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1952

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('51) A. I. R. (38) 1951 Pat. 12=30 Pat. 31=52 Cri. L. J. 309 (S.B.), In the matter of the Bharati Press — Reversed in A. I. R. 1952 S. C. 329.

COMPARATIVE TABLE

ILR 30 Patna = All India Reporter

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1	1951	P	450	240	1951	SC	14	431	1951	P	82	784	1951	P	602	1033	1952	P	106
4	"	"	402	247	"	"	6	438	"	"	612	799	"	"	165	1075	"	"	39
8	"	"	379	256	"	"	11	443	"	"	564	826	"	"	587	1085	"	"	166
13	"	"	187	264	"	P	56	447	"	"	565	847	"	"	181	1119	"	"	282
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31	"	"	12	287	1952	"	23	454	"	"	91	859	"	"	183	1130	"	"	257
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86	"	"	206	310	"	SC	155	606	"	"	583	871	1951	SC	247	1146	"	"	78
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115	"	"	497	344	"	"	55	673	"	"	177	960	"	P	625	1197	1952	P	61
126	"	"	462	351	"	"	123	681	"	"	201	964	1952	"	46	1210	1951	SC	477
131	"	"	486	357	1951	"	645	690	"	P	177	972	1951	"	201	1223	1952	"	1
137	"	"	463	366	"	"	529	703	"	"	621	985	1952	"	258	1248	"	P	142
152	"	"	60	377	"	"	595	716	"	"	134	991	1951	SC	316	1252	"	"	386
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												1018	1951	"	130	1274	"	"	450

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KASHMIR UNIVERSITY
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ACC. NO 177328
Dated 26.11.80

THE
ALL INDIA REPORTER
1952

Patna High Court

A. I. R. (39) 1952 PATNA 1 (C. N. 1)

SHEARER AND AHMAD JJ.

The State v. Ganesh Sahi and others, Accused.
Jury Ref. No. 1 of 1950, D/- 31-7-1951.

(a) *Criminal P. C. (1898), S. 307 (1) — Reference to High Court — Determining factor — Reasonableness of jury — "Ends of justice".*

If on the evidence two opinions are reasonably possible the jury is within its own powers to accept either of them. The opinion thus given by the Jury on facts is final and not susceptible to any challenge by the Judge. It is as a general rule only under one circumstance that the Judge can object to the finality of the opinion given by the jury and that is when opinion given by the jury is such as no reasonable body of men can hold it. In other words, this occasion will arise only when on the evidence one inference alone is reasonably possible and any other inference is beyond the realm of reason. If in such a case the jury does not adhere to that one opinion but reaches some other, the judge for the ends of justice has got power not to accept it as final and to submit the case to the High Court for being dealt with according to law. No doubt the ends of justice as laid down in the section itself is the determining factor in making a reference but the rule of "the ends of justice" is to be applied on the principle of reasonableness on the part of the jury. If the opinion given by the jury is not reasonable the law will take it as 'inconsistent' with ends of justice. But so long as the opinion is not unreasonable the question of the requirement of ends of justice giving the power to the Judge not to take the opinion as final does not arise. There is one exception to the general test of reasonableness on the part of the jury. That exception arises when some additional evidence is taken by the High Court. In that case even if the opinion of the jury is reasonable on the evidence presented to it, it may become unreasonable in the light of the additional evidence taken in the High Court though the same was not before the jury when it was called upon to give the opinion. A I R (33) 1946 P C 151, Rel. on. (Para 3)

Anno : Cr. P. C., S. 307, N. 3, 4.

(b) *Criminal Trial — Motive — If essential to prove guilt — Evidence Act (1872), S. 8.*

The motive, is not an element essential to prove the guilt in a criminal trial. It is a factor to be taken along with other circumstances. (Para 5)

Anno: Evidence Act, S. 8, N. 6.

Government Advocate and S. C. Chakraverty, for the Reference; Baidyanath Pd., Against the Reference.

Case referred to:
('46) 73 Ind App 174 : (A I R (33) 1946 P C 151 : 47 Cri L Jour 905) (Pr 3)

AHMAD, J. : This is a reference under S. 307, Criminal P. C., by the learned Assistant Sessions Judge of Muzaffarpur. He disagreed with the verdict of guilty of a majority of the jurors on the charge under S. 380, Indian Penal Code, framed against the accused, and has, therefore, submitted the case to this Court to be dealt with according to law. The grounds given for the reference are "that the verdict of the majority of the jury is against the weight of the evidence and circumstances and is perverse" and "that no reasonable body of men could return a verdict of guilty on the evidence and circumstances of the present case".

(2) The accused Dwarka Sahi is the son of the accused Ganesh Sahi and all the three accused are the residents of village Birpur situated within the jurisdiction of police station Kanti in the neighbourhood of another village Boaria situated within the jurisdiction of another police station Baruraj. The prosecution has alleged that on 25-10-1949 at about 10 or 11 a.m. accused Ganesh Sahi committed theft of a gramaphone, accused Dwarka Sahi of a harmonium and accused Pashupati Sahi of a trunk containing a gold 'hasuli' weighing seven tolas, a pair of silver 'bajoos' weighing 25 tolas, a wrist watch, some kurtas, one chadar and Rs. 722/- in cash from the outer room of one Rajdhari Singh of village Boaria. Before this occurrence on the same day the accused persons are also alleged to have committed offence under Ss. 144, 447, 379 and 436, Indian Penal Code, at the place of one Chengan Raut, about one fourth of a mile from the house of Rajdhari Singh. It is said that Rajdhari Singh and his neighbour one Benaras Singh had gone to extinguish the fire in the house of the said Chengan Raut, and while they were still there

they got information from one Munshi Raut that their houses too were being looted. So both of them ran at once along with Munshi Raut towards their houses and saw the alleged occurrence and thereafter a similar occurrence in the house of Benaras Singh. The matter was reported to the police at police station Baruraj and on an investigation one common charge-sheet was submitted in respect of all the three occurrences. A common preliminary enquiry under Chap. XVIII, Criminal P. C., was made in respect of all the three occurrences and in all 17 accused connected with the three occurrences were committed to the Court of Session to stand their trial for the offences charged against them. Thereafter the trial for each occurrence was held separately. It appears from the record that the case in relation to the occurrence at the house of Chengan Raut was tried by the Additional Sessions Judge, 2nd Court, and it ended in acquittal. The case connected with the occurrence at the house of Benares Singh and the present case in connection with the occurrence at the house of Rajdhari Singh were both sent to the Court of the learned Assistant Sessions Judge. The first has already been disposed of. In that the jury gave a verdict of not guilty and the learned Assistant Sessions Judge in agreement with it ordered acquittal. In the second, out of which this reference arises, the jury gave a verdict of guilty by 3 : 2, as stated above.

(3) The test laid down for referring the case to this Court under S. 307, Criminal P. C., by the learned Assistant Sessions Judge is, no doubt, sound and correct. But the test, I am afraid, does not apply to the facts of the present case. In the case of 'Ramanugraha Singh v. Emperor', 73 Ind App 174, their Lordships, while dealing with the duties and powers of a High Court Judge in India upon a reference under S. 307, Criminal P. C., have observed at p. 181 as follows :

"Under sub-s. (1) of S. 307 two conditions are required to justify a reference. The first, that the judge must disagree with the verdict of the jury, calls for no comment, since it is obviously the foundation for any reference. The second, that the judge must be 'clearly of opinion that it is necessary for the ends of justice to submit the case' is important, and in their Lordships' opinion provides a key to the interpretation of the section. The legislature no doubt realized that the introduction of trial by jury in the Mufussil would be experimental, and might lead to miscarriages of justice through jurors, in their ignorance and inexperience, returning erroneous verdicts. Their Lordships think that the section was intended to guard against this danger, and not to enable the Sessions Judge and the High Court to deprive jurors, acting properly within their powers, of the right to determine the facts conferred on them by the Code. If the jury have reached a conclusion on the evidence which a reasonable body of men might reach, it is not necessary for the ends of justice that the Sessions Judge should refer the case to the High Court merely because he himself would have reached a different conclusion on the facts, since he is not the tribunal to determine the facts. He must go futher than that and be of opinion that the verdict is one which no reasonable body of men could have reached on the evidence. The powers of the High Court in dealing with the reference are contained in subs. (3). It may exercise any of the powers which it might exercise on an appeal, and this includes the power to call fresh evidence conferred by S. 428. The Court must consider the whole case and give due weight to the opinions of the Sessions Judge and jury, and then acquit or convict the accused. In their Lordships' view the paramount consideration in the High Court must be whether the ends of justice require that the verdict of the jury should be set aside. In general, if the evidence is such that it can properly support a verdict either of guilty or not guilty, according to the view taken of it by the trial Court, and if the jury take one view of the evidence and the judge thinks that they should have taken the other, the view of the jury must prevail, since they are the judges of fact. In such a case a reference is not justified, and it is only by accepting their view that the High Court can give due weight to the opinion of the jury. If, however, the High Court considers that on the evidence no reasonable body of men would have reached the conclusion arrived at by the jury, then the reference was justified and the ends of justice require that the verdict be disregarded.

Their Lordships would, however, observe that the test of reasonableness on the part of the jury may not be conclusive in every case. It is possible to suppose a case in which the verdict was justified on the evidence placed before the jury, but in the light of further evidence placed before the High Court the verdict is shown to be wrong. In such a case the ends of justice would require the verdict to be set aside though the jury had not acted unreasonably."

It is, therefore, manifest that if on the evidence two opinions are reasonably possible the jury is within its own powers to accept either of them. The opinion thus given by the Jury on facts is final and not susceptible to any challenge by the Judge. It is as a general rule only under one circumstance that the Judge can object to the finality of the opinion given by the jury and that is when the opinion given by the jury is such as no reasonable body of men can hold it. In other words, this occasion will arise only when on the evidence one inference alone is reasonably possible and any other inference is beyond the realm of reason. If in such a case the jury does not adhere to that one opinion but reaches some other, the Judge for the ends of justice has got power not to accept it as final and to submit the case to the High Court for being dealt with according to law. No doubt the ends of justice as laid down in the section itself is the determining factor in making a reference but the rule of "the ends of justice" is to be applied on the principle of reasonableness on the part of the jury. If the opinion given by the jury is not reasonable in the sense as stated above, the law will take it as 'inconsistent' with ends of justice, and will take away the finality given under the section to the opinion of the jury leaving the Judge free to submit the case to the High Court to be dealt with according to law. But so long as the opinion is not unreasonable within the meaning, as stated above, the question of the requirement of ends of justice giving the power to the Judge not to take the opinion as final does not arise. Their Lordships, however, have laid

down one exception to the general test of reasonableness on the part of the jury. That exception arises when some additional evidence is taken by the High Court. In that case even if the opinion of the jury is reasonable on the evidence presented to it, it may become unreasonable in the light of the additional evidence taken in the High Court, though the same was not before the jury when it was called upon to give the opinion. Perhaps this exception is based on the consideration that if the additional evidence taken in the High Court were before the jury that would have negatived the reasonableness of the opinion given by the jury in the absence of that additional evidence and as such the opinion would be held as perverse and inconsistent with the ends of justice In this case there was no question of taking any additional evidence nor any additional evidence has been taken in the High Court. Therefore, the exception, referred to above, to the rule of the test of reasonableness does not come into play in this case. We are thus in this case concerned with general rule of the test of reasonableness alone and if the reference is consistent with the test, that is, if the opinion given by the jury is perverse, and that upon the evidence no reasonable body of men could have reached the conclusion arrived at by the jury, then alone the reference will be justified otherwise, due weight to the opinion of the jury should be given by accepting the same.

(4) The learned Assistant Sessions Judge has, in support of his conclusions as to the perversity of the opinion, relied on seven circumstances. The first is the discrepancies in the two statements made by the informant in the first information report and in the Court, or what may be called, the contradictions in the statement of the informant or the complainant as compared with his earlier statement made in the first information report. The second is the fact of enmity that has been found to exist between the accused persons and the witnesses appearing for the prosecution against the accused persons. The third circumstance is about the identification of interest of the prosecution witnesses among their ownselves and also with the complainant and as to the non-examination of the neighbours said to be residing near about the house of the complainant or of the female inmates of the house where theft is said to have been committed. The fourth is in relation to a few improbabilities noticed by the learned Assistant Sessions Judge in the evidence of the witnesses. The fifth is in relation to the fact whether the properties said to have been the subject-matter of theft could have been possessed by Rajdhari as the possession of the same by him has not been proved conclusively or that the best evidence has not been given in support of the claim of possession by him. The sixth is the contradiction in the statements of other prosecution witnesses as compared with their statements recorded earlier or 'inter se' between their own statements in the Court of sessions. The last circumstance referred to is about motive. The motive alleged by the prosecution in the case is that the complainants Rajdhari Singh and Benaras had gone to the place of Chengan Raut in order to extinguish the fire in his house and that act of assistance given by these two persons to Chengan Raut enraged and provoked the accused to commit theft in the house of the complainants. The learned Assistant Sessions Judge thinks that as the case of Chengan has ended in acquittal, the motive alleged by the prosecution in the present case disappears and, therefore, that is also a circumstance against the probabilities of the truth of the prosecution story.

(5) On analysis it is difficult to hold that any of the circumstances referred to above and relied upon by the learned Assistant Sessions Judge for arriving at the conclusion that the finding given by the jury in favour of the guilt of the accused persons is perverse, is such as would leave no room for any reasonable body of men to hold that the accused persons are not guilty. The first circumstance may affect the weight of the evidence given in Court on oath by the complainants. The second may equally shake their impartiality as against the accused persons in the matter of giving evidence and, in effect, this also may affect the weight of their evidence. The third is to the effect that the witnesses are persons connected with the complainants and therefore may be biassed. This likewise may affect the veracity of the witnesses or the weight of their statement. In the case already referred to above, their Lordships have observed :

> "The charge that witnesses are biassed always affords a legitimate ground of criticism of their evidence, and often for rejecting it in the absence of corroboration. It was essentially a matter for the jury to decide whether they would accept the evidence of interested witnesses."

The fourth circumstance is based on some improbabilities in the light of general experience. Those probabilities may weigh heavier in favour of the opinion held by the learned Assistant Sessions Judge but they are not of such a character as to make the opinion of the jury as one which can be held by no reasonable body of men. The jury considered those improbabilities and on their consideration came to the conclusion, which it could, that in spite of those improbabilities the facts alleged against the accused persons were true. The improbabilities in the circumstances of a case are after all questions of fact. It is for the jury to consider the case in the light of those improbabilities. Those improbabilities may no doubt in some cases assume a character which may not leave scope for the jury as reasonable body of persons to ignore them or to give an opinion in opposition to it. In those cases the opinion given by the jury in opposition to the improbability may be said to be perverse. In this case none of the improbabilities is of that character. The fifth circumstance is likewise based on the question of quantum of evidence given in the case in support of the possession of the articles said to have been stolen. If there was some evidence, though not sufficient to the satisfaction of the Judge but sufficient to the satisfaction of the jury, I think the jury was within its powers to accept or reject the same, in order to come to its own opinion. The sixth circumstance is as to the contradictions noticed by the learned Assistant Sessions Judge in the evidence of the witnesses either 'inter se' between their own statements or as against their statements recorded earlier. This again is a question of veracity and credibility of the witnesses. It was for the jury to weigh their evidence in order to accept or reject their statements. The seventh and the last circumstance, I am afraid,

of the Munsif. From time to time an extra Munsif is deputed to a District to try such suits as may be made over to him by the District Judge by general or special order. The Court of an additional Munsif who may happen to be sent to a District in a particular year is not necessarily the same Court as the Court of the additional Munsif deputed to the same area in other years. For the purpose of execution of the decree which the additional Munsif pronounced his Court was the Court of the first Munsif for he was then trying suits appertaining to the area which was comprised in the territorial jurisdiction of the latter Court."

Apparently Saunders J. proceeded on the assumption that the Court of Additional Munsif which was in existence at the time the previous application for execution was filed in the Court of the first Munsif was not the same Court of Additional Munsif which had passed the decree. In the present case, there is no suggestion that the third additional Court of Subordinate Judge, which was in existence when the application for execution was filed in the third Court of Subordinate Judge on the 8th October, 1947, was not the same Additional Court of Subordinate Judge which has passed the decree.

(14) In the second case '13 Pat 21', the decree under execution was passed on appeal arising out of a suit instituted in 1911 in the Court of the Subordinate Judge of Manbhum sitting at Purulia. In October, 1917, a Subordinate Judge's Court at Dhanbad in the District of Manbhum was established under S. 13 (1) of the Bengal, Agra and Assam Civil Courts Act (Act XII (12) of 1887), the local limits of the executive subdivision of Dhanbad being fixed as the local limits of his jurisdiction. By a simultaneous notification under S. 13 (1) of the same Act, the local limits of the executive subdivision of Dhanbad also ceased to be included in the local limits of the Subordinate Judge of Purulia. In February, 1931, the decree-holder applied for execution in the Court of the Subordinate Judge at Purulia, praying for attachment and sale of land situated in the subdivision of Purulia. The judgment-debtor resisted the execution on the ground that the proper Court in which to institute an execution case was that of the Additional Subordinate Judge of Dhanbad. This objection was overruled by the High Court. Courtney Terrell C. J. with whom Saunders J. agreed said:

"But the decree-holders had always and still have the right to apply as of course to the Court which passed the decree for its execution even if it be in respect of property outside the territorial jurisdiction of such Court and even if execution by such Court can be no more than execution by transmission to another Court. Such an application can be entertained by such a Court and if made within time would save limitation."

Thus, it appears that the application for execution was made in the Court which had passed the decree. The learned C. J., however, referred to the provisions of S. 3 of the Bengal, Agra and Assam Civil Courts Act, 1887, and observed that under that section "no such Court as that of the Additional Subordinate Judge of Dhanbad exists".

(15) Though the facts of the above cases are distinguishable from those of the present, Mr. Sinha on behalf of the decree-holder strongly relies on the interpretation put by their Lordships on S. 3 of the Bengal, Agra and Assam Civil Courts Act, 1887. Section 3 of the Act runs as follows:

"There shall be the following classes of Civil Courts under this Act, namely:

1. The Court of the District Judge;
2. The Court of the Additional Judge;
3. The Court of the Subordinate Judge; and
4. The Court of the Munsif."

Clearly this section divides civil Courts into four classes. In other words, there are only four classes of Civil Courts as specified therein. But when it refers to "the Court of the Subordinate Judge" as a class, it does not follow that at any particular place there can be only one Court of the Subordinate Judge.

(16) Section 4 provides:

"The Provincial Government may alter the number of District Judges, Subordinate Judges and Munsifs now fixed."

Section 13 (1) provides:

"The Provincial Government may, by notification in the Official Gazette, fix and alter the local limits of the jurisdiction of any Civil Court under this Act."

Section 13 (2) contemplates that "the same local jurisdiction" may be assigned to two or more Subordinate Judges. It is, therefore, clear that the Provincial Government may appoint two or more Subordinate Judges at any particular place and the Court of each of them will be a civil Court under class (3) of S. 3 and the Provincial Government may also fix the local limits of the jurisdiction of each of these Courts. It will be opposed to the very policy and scheme of the Act to hold that in one particular place there can be only one Court of the Subordinate Judge.

(17) The Act, no doubt, does not provide for Additional Subordinate Judges, but it was obviously unnecessary. At any particular place there may be two or more permanent Courts of the Subordinate Judge. At the same place there may also be two or more temporary Courts of the Subordinate Judge, usually presided over by officiating Subordinate Judges. These temporary Courts are called Courts of Additional Subordinate Judges, but truly speaking, they are Additional Courts of the Subordinate Judge. In ordinary parlance, we speak of first Subordinate Judge, Second Subordinate Judge and so forth, but really speaking by these expressions we mean the first Court of Subordinate Judge, the second Court of Subordinate Judge and so forth. Similarly, by the Additional Subordinate Judge is meant the Additional Court of Subordinate Judge. The Additional Court of Subordinate Judge is unquestionably a civil Court and it must come under class (3) of S. 3 of the said Civil Courts Act of 1887.

(18) The position with regard to "the Court of Additional Judge", referred to in class (2) of S. 3, is different. The appointment of Additional Judges is specifically provided for in S. 8 of the Act. They are to "discharge any of the functions of a District Judge which the District Judge may assign to them". By S. 9 of the Act

"the District Judge shall have administrative control over all the Civil Courts under this Act within the local limits of his jurisdiction."

According to the scheme of the Act, the District Judge is the administrative head of all the Civil Courts in his District. Necessarily, the Additional Judge is subject to his administra-

tive control. For obvious reasons, the Court of the District Judge and the Court of the Additional Judge could not be brought under the same class. Consequently the Court of the Additional Judge had to be put under class (2). As between the Court of the Subordinate Judge and the Court of the Additional Subordinate Judge, there is no such practical difference as would necessitate separate classification for these Courts. The Additional Subordinate Judge is neither subject to the administrative control of the Subordinate Judge, nor does he discharge any of the functions of a Subordinate Judge which the Subordinate Judge may assign to him. For all practical purposes, the position of the Additional Subordinate Judge is the same as that of the Subordinate Judge.

(19) With all respect to the learned Judges who decided both the aforesaid cases, I cannot help observing that the classification of civil Courts made in S. 3 of the said Act hardly seems relevant in considering the provisions of the Civil P. C. for the purpose of deciding the question as to which Court is the proper Court to entertain an application for execution.

(20) Now S. 38 of the Civil P. C. clearly lays down:

"A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution."

The words are clear enough and in view of this provision it is impossible to hold that any other Court is competent to execute the decree. Section 37 of the Civil P. C. defines the expression "Court which passed a decree" as follows:

"The expression 'Court which passed a decree' or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject of context, be deemed to include:

(a) Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) Where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit."

Order 21, R. 10 then provides:

"Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof."

In the face of these provisions, it is difficult to hold that the third Court of the Subordinate Judge was the proper Court to entertain the application for execution filed on 8th October, 1947.

(21) If, according to the decree-holder's contention, that Court was the proper Court to entertain the application for execution, then its order dated 19th January, 1948, returning the application for presentation to the proper Court was obviously wrong and the decree-holder should have, therefore, preferred an appeal or revision against that order. But not having done so, it is not open to them now to contend that that order was wrong.

(22) In my opinion, the application for execution filed on the 19th January, 1948, is time-barred.

(23) I would accordingly allow the appeal, set aside the decision of the learned Additional District Judge and dismiss the application for execution as time-barred. In the circumstances of the case, there will be no order for costs.

(24) LAKSHMIKANTA JHA, C. J.: I agree.

K.S. *Appeal allowed.*

A. I. R. (39) 1952 PATNA 7 (C. N. 3)

SHEARER J.

Jagdishpur Zamindari Co. Ltd. and others, Petitioners v. Sitaram and others — Opposite Parties.

Civil Revn. No. 346 of 1951 D/- 14-8-1951.

Tenancy Laws — Bihar Tenancy Act (VIII (8) of 1885) S. 170 (1) — Applicability — Land attached ceasing to constitute one occupancy holding — Application under O. 21, R. 58, Civil P. C. (1908) — Maintainability.

Section 170 is a bar to an application under O. 21, R. 58 only when it is admitted that the land which has been attached constitutes a holding and arrears of rent are due in respect of it.

Where land attached had ceased to constitute one occupancy holding, and, by reason of the provisions contained in S. 25A, Bihar Tenancy Act, constituted several holdings, and in so much of it as constituted a holding belonging exclusively to the objector the judgment-debtor had no interest whatever:

Held, that in the circumstances, the application by the objector under O. 21, R. 58 was maintainable: A I R (20) 1933 Pat 32, Ref.; A I R (37) 1950 Pat 565, Dist. (*Para 1*)

Kanhaiyaji, for Petitioners — N. N. Sen, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('32) 11 Pat 790 : (A I R (20) 1933 Pat 32 (Pr. 1)

('50) A I R (37) 1950 Pat 565 (Pr.1)

ORDER: The contention put forward by the objector was that the land which was attached had ceased to constitute one occupancy holding, and, by reason of the provisions contained in S. 25A of the Bihar Tenancy Act, now constituted several holdings, and that so much of it as constituted a holding belonging exclusively to himself and in which the judgment-debtor had no interest whatever, was not liable to be attached and sold. In the circumstances, the application under Order XXI Rule 58 was in my opinion, clearly maintainable. Section 170 of the Bihar Tenancy Act is a bar only when it is admitted that the land which has been attached constitutes a holding and arrears of rent are due in respect of it. In 'Deonandan Prasad v. Pirthi Narayan', 11 Pat 790, Dhavle, J., after a careful review of the decisions, observed: "The section presupposes a rent decree and it has been repeatedly held that a claim may be made under Order XXI, rule 58, on the ground that the decree is not a decree of the kind pre-supposed in the section. Claims have, for instance, been allowed where it was shown that the subject-matter of the suit was not a tenure or holding, or that the decree was not a rent decree because the landlord had brought his suit in respect of more than one tenure or

holding." The learned Advocate for the petitioner relied on Harihar Prasad v. Prasad Mahton' A I R (37) 1950 Pat 565. That decision is not, however, in point, and the reasoning of Dhavle, J. in 'Deonandan Prasad v. Prithi Narayan' 11 Pat 790, was approved and followed. The application must be dismissed with costs. The hearing fee is assessed at one gold mohur.

G.M.J. *Application dismissed.*

A. I. R. (39) 1952 PATNA 8 (C. N. 4)

B. P. SINHA AND C. P. SINHA JJ.

Rameshwar Prasad Gupta, Appellant v. Rajendra Prasad and others, Respondents.

A. F. O. O. No. 345 of 1948, D/- 6-2-1951.

Limitation Act (1908), Art. 182 (5) — "Final Order", meaning of — Objection to execution — Appeal — Property sold pending appeal — Appellate order is final order.

A decree was passed on 17-3-1939. Some properties were attached in execution of this decree. One of the judgment-debtors filed an objection to the attachment. The objection was allowed whereupon the decree-holder went up in appeal. The appellate Court remanded the case to the lower Court. But in the meanwhile some other properties of the judgment-debtor were sold and the executing Court passed an order on 28-1-1941 to the effect that the execution case be dismissed on part satisfaction.

After the case was remanded, the lower Court rejected the judgment-debtor's objection. The judgment-debtor went up in appeal against this order. The appellate Court dismissed the appeal for non-prosecution on 28-7-1944.

Pending the above appeal, (against the order rejecting the judgment-debtor's objection), some of the properties were sold. The sale was confirmed and on 18-11-1942, the executing Court passed an order to the effect that the execution case be dismissed on part satisfaction.

After the appellate order of 28-7-1944, the executing Court on 9-11-1944 passed an order "No steps taken. Case disposed of."

The decree-holder filed an application for execution on 18-7-1947. The lower Court held that the execution case having been dismissed on part satisfaction on 28-1-1941, the application was barred by limitation as more than three years had elapsed after that date.

Held: The application was not barred by limitation. The final order in the prior execution case was the appellate order of 28-7-1944 and time ran from that date. It was this order which finally determined the question whether the property was liable to attachment and sale. Although the property had in the meantime been brought to sale, and the sale was confirmed by the lower Court, the sale was all the time subject to the final decision of the appellate Court. Hence the order of the executing Court of 18-11-1942 was not the "final order" from which time would run. A I R (32) 1945 P C 176, Ref. to (Para 4)

Held also: Though the order of executing Court dated 9-11-1944 was 'last' order in the execution case it was not the 'final' order. (Para 3)

Anno: Limitation Act, Art. 182 N. 129.

Ray Parasnath, for Appellant; Ramanugrah Prasad, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('45) A I R (32) 1945 P C 176: (I L R (1946) Mad 142) (Pr 3)

('37) I L R (1937) All 272: (A I R (23) 1936 All 820 F B) (Pr 3)

Misc. Appeal No. 114 of 1940 (Pat) (Pr 2)

C. P. SINHA, J.: This is a decree-holder's appeal arising out of an order under S. 47 of the Code of Civil Procedure. The objection of the judgment-debtors has been upheld and the execution case has been dismissed as being barred by limitation.

(2) The facts briefly put are the following. A decree was passed against the judgment-debtors on the 17th of March, 1939. Execution of the decree was taken out in 1939 in Execution Case No. 124 of 1939. On the 12th of September, 1939, the properties sought to be sold were attached. One of the judgment-debtors filed an application on the 29th November, 1939, objecting to the attachment of some of the properties on the ground that those properties were not liable to attachment and sale. This objection was numbered as Miscellaneous Case No. 150 of 1939, and it was allowed on the 6th of January, 1940. Against this order, there was an appeal to this Court (Misc. Appeal No. 114 of 1940) by the decree-holder, and during the pendency of this appeal, the executing Court passed an order on the 28th of January, 1941, to the effect that the execution case be dismissed on part satisfaction, as it appears, some of the properties had been sold in the meantime. The Miscellaneous Appeal No. 114 of 1940 was allowed on the 2nd of September, 1941, and the case was remanded to the Court below for deciding the objection in accordance with law. On remand, the executing Court, by its order dated the 15th of January, 1942, rejected the objection to the attachment of some of the properties and asked the decree-holder to take steps. Against this order of the executing Court rejecting the objection, Miscellaneous Appeal No. 139 of 1942 was filed in this Court on the 23rd of April, 1942. But, it appears, the proceedings in execution were not stayed and property was sold at auction on the 18th of September, 1942, and on the 18th of November, 1942, the executing Court passed the following order:

"Sheristadar's report perused. Thirty days expired. Let the sale be confirmed and the execution case be dismissed on part satisfaction. Prepare sale certificate."

On the 27th November, 1942, the order-sheet shows, the sale certificate was prepared, sealed and signed. On the 16th of December, 1942, the High Court ordered stay of delivery of possession pending the disposal of the Miscellaneous Appeal No. 139 of 1942, and on the 28th of July, 1944, the Miscellaneous Appeal No. 139 of 1942 was dismissed for non-prosecution. The order-sheet of the 29th of August, 1944, in the execution case shows that the copy of the order of this Court in Miscellaneous Appeal 139 of 1942 was received by the executing Court, and the decree-holder was asked to take steps by the 11th September, 1944. No steps having been taken — and perhaps none was necessary to be taken — the Court ordered on the 9th of November, 1944: "No step taken. Case disposed of". The present application for execution has been filed on the 18th of July, 1947. The Court

below has held that the execution case having been dismissed on part satisfaction on the 28th of January, 1941, and the present execution having been filed more than three years after, it was barred by limitation.

(3) Mr. Rai Parasnath, learned counsel appearing on behalf of the appellant, has contended that the final order in the last execution case was passed either on the 9th of November, 1944, the last order in the previous execution case, or at the earliest on the 28th of July, 1944, when the High Court dismissed Miscellaneous Appeal No. 139 of 1942. So far as the last order dated the 9th of November, 1944, is concerned, there is no doubt that that cannot be the final order in the execution case. That was the last order in that execution case, but it, by no means, can be said to be the final order passed upon an application for execution. The question, therefore, turns upon the interpretation of the words "final order" as mentioned in Art. 182, sub-cl. (5) of the Indian Limitation Act. That clause runs as follows:

> "Where the application next hereinafter mentioned has been made, the date of the final order passed on an application made in accordance with law to the proper Court for execution..... ....."

There is no doubt in this case that the previous application for execution was in accordance with law. The only question is what is the final order which was passed in that execution case. Mr. Rai Parasnath has contended that, although the property had been sold on the 18th of September, 1942, and the sale was confirmed on the 18th of November, 1942, the matter had not become final between the parties as an appeal, at the instance of one of the judgment-debtors, was pending in the High Court and the question was whether the property which had been attached and ultimately sold was legally attached and sold. That matter cannot be said to have been finally decided by the executing Court having sold the property. The question was pending in the appellate Court as to whether or not the attachment was a valid attachment and whether the sale in execution was a valid sale. He argues that, if the High Court in appeal had decided that the property was not liable to attachment and sale, the sale, although held by the executing Court, would be of no effect. If, on the other hand, the appellate Court had decided that the property was liable to attachment and sale, the sale which was held by the executing Court during the pendency of the miscellaneous appeal in the High Court would stand as a good sale. Therefore, in either view of the matter, the final determination of the rights of the parties in respect of the property was subject to the decision of the appeal. In that view of the matter, the appellant contends that the order of this Court dated the 28th of July, 1944, was the order which could be said to be the final order in the execution case. In support of his contention he has relied upon a decision of the Privy Council in 'Annamalai Chettiar v. Villiammai Achi', A I R (32) 1945 P C 176. In this case the decree-holder had taken the order of the executing Court to the appellate Court, and it was held that the order of the appellate Court was the final order so far as the execution case was concerned. In the present case, however, the matter is slightly different inasmuch as it was one of the judgment-debtors who had appealed against the order of the executing Court. Mr. Ramanugrah Prasad, learned counsel appearing on behalf of respondent No. 1, contends that the order of the executing Court dated the 18th November, 1942, must be held to be the final order in the execution case, the executing Court having on that date passed the order to the effect that the execution case was dismissed on part satisfaction, and he says that, so far as the executing Court was concerned, that was the final order disposing of the execution case by selling the property which the decree-holder wanted to sell and that thereafter nothing remained to be done by the executing Court, and, in that view of the matter, the order of that date must be the only final order in the execution case He has relied upon a Full Bench case of the Allahabad High Court in 'Muhammad Taqi Khan v. Raja Ram', I L R (1937) All 272. In that case their Lordships were concerned with the interpretation of the words "final order" so far as the order of the executing Court itself was concerned. In that case the executing Court had passed the following order:

> "The decree-holders having received Rs. 300/- have granted two months time. Execution case struck off for partial satisfaction of the decree. Costs on judgment-debtors."

It was held by their Lordships that that order coupled with the order for payment of costs indicated that the executing Court intended to dispose of the matter finally and that it was a final order. In my judgment, that case is of no help in deciding the matter as to whether the order of the appellate Court in appeal arising out of an objection to execution regarding the sale of certain property was the final order as contemplated by Art. 182, sub-cl. (5) of the Limitation Act. In the Allahabad case there was no question of interpretation of any order of any appellate Court in execution proceedings.

(4) In my opinion, on the facts which have been mentioned above, it is clear that the question whether the property was liable to attachment and sale was finally disposed of, not by the executing Court, but by the appellate Court in Miscellaneous Appeal No. 139 of 1942. The order of the executing Court was subject to the final determination of the question raised before it by the decision of this Court. Although the property had, in the meantime, been brought to sale and the sale was confirmed by the executing Court, this sale was all the time subject to the final decision which might have been arrived at in the pending appeal in this Court . I would, therefore, hold that the final order in the execution was the order dated the 28th of July, 1944, passed by this Court In that view of the matter, the present application for execution cannot be said to be barred by time because it was filed within three years from that date.

(5) I would accordingly allow the appeal with costs.

(6) B. P. SINHA, J.: I agree.

K.S. *Appeal allowed.*

A. I. R. (39) 1952 PATNA 9 (C. N. 5)

RAMASWAMI AND RAI JJ.

Dirpal Singh and others, Appellants v. Karamchand Mahton, Respondent.

A. F. A. D., No. 1932 of 1948, D/- 12-1-1951.

(a) Civil P. C. (1908), Ss. 100, 101 — Finding of fact — Interference in second appeal.

Where there is no evidence to support a finding upon an issue of fact, it is open to the High Court to interefere with it in second appeal. (*Para 4*)

Anno: C. P. C., Ss. 100-101 N. 53.

† (b) *T. P. Act (1882), S. 52 — Rent suit — Nature of — Property conveyed after rent decree but before execution — Lis pendens doctrine of — Applicability — Tenancy Laws — Bihar Tenancy Act (8 of 1885) S. 65.*

A suit for rent is primarily a suit for money and is not a suit in which "any right to immovable property is directly and specifically in question." It is true that S. 65 of the Bihar Tenancy Act makes rent a first charge on the holding but no such charge is created until in any event before the decree is passed in the suit. It is of the essence of the rule of lis pendens that, in order to obtain the protection of the rule, the property must be directly and specifically in question in the suit. A suit for rent can hardly be regarded as a claim to charge some specific property. To make a lis pendens notice to a purchaser of an estate, the question in the suit must relate specifically to the estate and not merely to the money secured on it. (*Para 5*)

A rent decree is in no sense a mortgage decree and the charge referred to in S. 65 of the Bihar Tenancy Act is not such a 'charge as is defined by S. 100 of the T. P. Act. A I R (8) 1921 Pat 184, Rel. on. (*Para 6*)

After the landlord had obtained a rent decree in respect of a plot of land, the judgment-debtors, the registered tenants, sold the same to the defendants by a registered kebala. The landlord's fee was also duly paid at the time when the document was registered. Thereafter the landlord executed the rent decree and purchased the property himself, but failed to implead the defendants in the execution proceedings.

'Held' that the landlord did not obtain by purchase in the execution proceedings, a valid title to the plot in dispute which had been sold to the defendant before the commencement of execution.

(*Paras 7, 9*)

Anno: T. P. Act, S. 52 N. 14.

Guneshwar Prasad, for Appellants; S. N. Banerji and R. S. Chatterji, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('14) 41 Ind App 91: (A I R (1) 1914 P C 111) (Pr 7)
('28) 55 Cal 701: (A I R (15) 1928 Cal 441) (Pr 5)
('32) 59 Cal 1202: (A I R (19) 1932 Cal 321 S B) (Pr 7)
('21) 6 Pat L J 354: (A I R (8) 1921 Pat 184) (Pr 6)
('44) A I R (31) 1944 Pat 252: (23 Pat 356) (Pr 8)
(1867) 2 Ch 171: (36 L J Ch 190) (Pr 5)

RAMASWAMI, J.: The question to be determined in this appeal is whether the respondent is entitled to a decree declaring his title and for recovery of possession of plot No. 558, Khata No. 53, located in village Ghatway.

(2) The material facts are that in the year 1940 the landlord obtained a decree for rent with respect to plot No. 558 Khata No. 23 and plot No. 602, Khata No. 28, for which there was a joint jama. On the 16th June, 1943, the defendants purchased plot No. 558 by a registered kebala from the recorded tenants. On the 15th of November, 1943, the landlord applied for the execution of the rent decree but he failed to implead the defendants in the execution case. In April 1944 plots 558 and 602 were sold in execution of the decree and purchased by the plaintiff who obtained delivery of possession in due course. As the defendants forcibly harvested the paddy, the plaintiff brought the suit for declaration of his title and recovery of possession of plot No. 558 which the defendants alleged to have purchased. The main ground of defence was that the plaintiff was not entitled to a decree since the defendants had purchased the plot from the recorded tenants and since the defendants had not been impleaded in the execution case.

(3) Both the lower Courts granted the plaintiff's decree mainly on the grounds that the kebala executed in favour of the defendants was not genuine or operative.

(4) In support of this appeal Mr. Guneshwar Prasad argued in the first place, that the lower Courts have committed substantial error of procedure in holding that the kebala executed in favour of the defendants was not genuine since there was no allegation to this effect in the plaint and no issue was also framed. It is true that the finding is upon an issue of fact but since there is no evidence to support this finding, it is open to the High Court to interfere with it in second appeal. It may be mentioned at the outset that the vendor has not been made a party to the suit nor has he been examined as a witness to state that no consideration was paid. The lower Courts have remarked that since there was no proof that consideration was paid it must be held that the kebala was a sham transaction and not operative. As I have already remarked that there is no reliable evidence on the record to prove that consideration was not paid and in view of the fact that the defendants are at present in possession, it is difficult to hold that the kebala executed in favour of the defendants was not genuine or operative. It is impossible to accept the finding of the lower appellate Court on this point.

(5) On behalf of the respondent, Mr. R. S. Chatterji contended that even if the kebala was genuine and operative, the plaintiff would be entitled to a decree since the doctrine of lis pendens, as enacted in S. 52 of the T. P. Act, would apply. In my opinion, this argument is wholly untenable. S. 52 of the T. P. Act is to the following effect:

> "During the pendency in any Court having authority in British India, or established beyond the limits of British India by the Governor General in Council, of any suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or orders which may be made therein, except under the authority of the Court and on such terms as it may impose."

It is manifest that a suit for rent is primarily a suit for money and is not a suit in which "any right to immoveable property is directly and specifically in question". It is true that S. 65 of the Bihar Tenancy Act makes rent a first charge on the holding but no such charge is created until in any event before the decree is passed in the suit. It is of the essence of the rule of lis pendens that, in order to obtain the protection of the rule, the property must be directly and specifically in question in the suit. A suit for rent can hardly be regarded as a claim to charge some specific property. To make a lis pendens notice to a purchaser of an estate, the question in the suit must relate specifically to the estate and not merely to the money secured on it. In the case of In re Barned's Banking Co; Ex parte Thorton, (1867) 2 Ch 171 at p 178 Lord Justice Cairns said:

> "Then the lis pendens being a technical expression well known, it seems to me to be perfectly clear that it always implied a claim of right, or a claim to charge some specific property."

This view is also supported by 'Jaynal Abedin v. Hyderali Khan', 55 Cal 701 in which it was observ-

ed that the general doctrine of lis pendens did not apply to a case where property was conveyed to a third party pending a suit for rent in respect of that property, there being no dispute with regard to the title to the property as between the plaintiff and the defendants. The argument of the learned Counsel for the respondent on this part of the case must, therefore, fail.

(6) In this context it is important to remember that a rent decree is in no sense a mortgage decree and the charge referred to in S. 65 of the Bengal Tenancy Act is not such a 'Charge as is defined by S. 100 of the T. P. Act. In 'Kesho Prasad v. Paranjota Koer', 6 Pat L J 354 a landlord obtained two rent decrees against the tenant and first executed one decree by sale of the holding without notifying that the sale was subject to the other decrees and purchased the holding himself. It was held by the Division Bench that the rent decree was not a mortgage decree and did not compel the landlord to proceed against the holding and that the landlord was not debarred from executing the other decree against the remaining properties of the tenant.

(7) The problem to be examined in the present case is whether the plaintiff obtained a valid title to the plot in dispute by a purchase in proceedings of the execution of the rent decree in which the defendants were not impleaded. It is not controverted in the present case that the decree obtained by the landlord was a valid rent decree but it is argued on behalf of the appellants that under the Bengal Tenancy Act the right to bring the tenure or holding to sale in execution of a rent decree is dependent on the existence of relationship of landlord and tenant at the time. Applying this principle it is contended that at the date of the execution in the present case the original tenant had lost his interest with respect to plot No. 558, Khata No. 53, and since the defendants, who made the purchase, were not made a party to the execution case, there was no relationship of landlord and tenant between the parties and consequently the plot in dispute could not be validly sold at the execution sale. In my opinion, this argument is well founded and must succeed. In 'Arthur Henrey Forbes v. Bahadur Singh', 41 Ind App., 91 the question at issue was whether the person who had his interest as the landlord before the institution of the suit for rent could bring the tenure to sale in execution of the decree and Judicial Committee answered the question in the negative. The right to proceed to sale is conferred by S. 65 of the Bengal Tenancy Act; and Mr. Ameer Ali, who pronounced the opinion at the Judicial Committee, stated at page 101:

"To acquire the right which the section gives not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interest 'vested' in him. In other words, the right to bring the tenure or holding, as the case may be, to sale exists so long as the relationship of landlord and tenant exists."

In a latter case, 'Krishnapada Chatterji v. Manadasundari Ghosh', 59 Cal 1202, the landlord ceases to be landlord after obtaining a decree and before putting it into execution and a Special Bench of the Calcutta High Court held that the same principle will apply as the decree could not be enforced by sale of the holding in the execution case. Applying the ratio of these two cases it is obvious that the plaintiff had not obtained a valid title to plot No. 558, Khata No. 53, which had been sold to the defendants by the judgment-debtor before the commencement of the execution case.

(8) There is another aspect of the case which ought to be dealt with. Under the Bihar Tenancy Act a holding cannot be brought to sale in execution of a rent decree without the tenancy being represented by any one having an interest in it. It is true that S. 65 of the Act provides that the holding will be liable to sale in execution but that cannot be supposed to mean that the landlord may proceed against the holding irrespective of whether the holding is duly represented or not. In the present case the defendants have purchased plot No. 558 of holding No. 53 on the 16th June, 1943, and the endorsement on the kebalas further shows that the landlord's fee had been duly paid at the time when document was registered. S. 26(2) of the Bihar Tenancy Act enacts:

"Every transfer of an occupancy holding or a portion thereof, together with the right of occupancy therein, by sale, exchange or gift and every bequest of such holding or portion, together with the right of occupancy therein, shall be made in the same manner and subject to the same conditions as a permanent tenure in respect of registration and the payment of landlords' registration fee."

Under S. 12(1) of the Act of a transfer of a permanent tenure by sale.....can be made by a registered instrument; and under S. 12(2) a registering officer shall not register any instrument purporting or operating to transfer by sale, gift, exchange or usufructuary mortgage a permanent tenure unless there is paid to him — a process fee of the required amount and a fee (hereinafter called the landlord's registration fee) together with the costs necessary for the transmission of the landlord's registration fee to the landlord. In this context reference may be made to 'Prabhabati v. Lalji,' A I R (31) 1944 Pat 252 in which a Division Bench of this Court on construction of Ss. 12 and 13 of the Bihar Tenancy Act held that upon a voluntary sale being registered the transfer of the permanent tenure was complete and the title in the property transferred passed to the transferee, even though the landlord's fee was not paid as required by Ss. 12 and 13. The learned Judges of the Bench further held that any proceedings for rent after the completion of the transfer must be against the transferee and any decree for rent obtained against the transferor after the transfer cannot affect the interest of the transferee in the tenure.

(9) It is, therefore, manifest in the present case that after the kebala was registered and the landlord's fee was paid, the transfer was complete and the title in the property transferred passed to defendants. It follows that the defendants ought to have been made parties in the proceedings for execution of the decree. But since it is admitted that they were not represented in the execution proceedings, the plaintiff cannot obtain a decree declaring his title to the plot in suit.

(10) For these reasons I would set aside the decree of both the lower Courts and order that the suit brought by the plaintiff should be dismissed. The appeal is accordingly allowed with costs throughout.

(11) RAI, J.: I agree.

V.B.B.

Appeal allowed.

A. I. R. (39) 1952 PATNA 11 (C. N. 6)

LAKSHMIKANTA JHA C. J. AND REUBEN J.

Dhani Sahu and others, Appellants v. Jirjodhan Prasad Singh and others, Respondents.

A. F. O D., No. 114 of 1945, D/- 11-8-1950.

(a) Suit for partition — Parties — Proof — Civ. P. C. (1908) O. 1 R. 10.

Where the plaintiff has brought the suit for partition as a co-sharer by impleading all the co-sharers interested in the tauzi there is no defect of parties. In order to succeed in the suit the plff. has to prove unity of title and unity of possession. (Para 15)

Anno: C. P. C., O. 1 R. 10 N. 16.

(b) *Suit for partition — Proof of title.*

In a suit for partition the question of the plaintiff's title and possession cannot be left open to be determined at a later stage for the obvious reason that no decree for partition can be passed unless possession of the plaintiff based on some title is proved. (Para 18)

(c) *Tenancy Laws — Bihar Tenancy Act (VIII (8) of 1885) S. 22(2) — Applicability.*

Where the defts. acquired certain khatas as 12 annas co-sharer landlords representing the 4 annas interest in the hands of the plaintiff, the case does not fall within the mischief of S. 22(2) and the principle laid down in AIR (37) 1950 Pat 115 F. B. is not applicable. (Para 28)

(d) *Co-sharers — Exclusive possession — Compensation.*

The principle, on which the liability of a co-sharer to compensate his other co-sharers for his exclusive use of any common land is determined is based upon equitable considerations. If a co-sharer is in separate possession of any portion of the common land — whether or not in excess of the area to which he may be entitled on partition — without causing ouster or exclusion of any other co-sharers, or is in occupation of such land in a proper and husband-like manner without any objection on their part, it would not be in consonance with the rules of justice, equity and good conscience to allow them to claim a share in the fruits of the labour or capital of the co-sharer in possession. But if a co-sharer occupies a portion of the common land in denial of the right or title of other co-sharers in spite of their objection, or excludes or ousts them from possession, he should be held liable to pay to such co-sharers compensation for his exclusive user of the common land from the profits earned by him with the help of his labour, industry, skill or capital. 'Case law rel. on.' (Para 30)

(e) *Civil P. C. (1908), O. 14, R. 1 — Omission to frame issue.*

Where the question of title affected the maintainability of the suit, it cannot be said that in the absence of an express issue on the point the intention was to leave the point open. By giving up the point and not making any reservation in respect of it the defendant should be taken to have admitted the title of the plff. (Para 33)

Anno: C. P. C., O. 14 R. 1 N. 7.

K. N. Singh and Lakshmi Narain Sinha, for Appellants; Harinandan Singh, Nawal Kishore Prasad, Ugrah Singh, B. K. N. Singh and Satyanand Kumar, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('90) 17 Ind App 110: (18 Cal 10 P C) (Pr 30)
('92) 19 Cal 253: (19 Ind App 48 P C) (Pr 30)
('24) 51 Ind App 293: 51 Cal 631: (AIR (11) 1924 P C 144) (Pr 30)
('28) 55 Cal 393: (A I R (15) 1928 Cal 216) (Pr 30)
('29) A I R (16) 1929 Pat 185: (8 Pat 650) (Pr 28)
('33) A I R (20) 1933 Pat 616: (150 Ind Cas 251) (Pr 30)
('37) A I R (24) 1937 Pat 235: (168 Ind Cas 597) (Pr 30)
('38) F A No. 64 of 1938 (Pat) (Pr 7)
('41) 20 Pat 162: (A I R (28) 1941 Pat 90) (Pr 30)
('49) 27 Pat 610: (A I R (37) 1950 Pat 115 F B) (Pr 28)

JHA, C. J.: This is an appeal by defendants Nos. 1, 2 and 6 from a decree, dated the 29th March 1945, of the Additional Subordinate Judge, 2nd Court, Gaya.

(2) The suit is for partition of village Larua Lakhana, tauzi No. 2879, on the revenue-roll of the Collector of Gaya, and for other reliefs.

(3) It may be mentioned at the outset that, sometime before the institution of the partition suit, a suit for damages, being money suit No. 293 of 1942, had been instituted by defendants Nos. 1 to 6 of the partition suit in the Court of the Munsif at Aurangabad, impleading the plaintiff of the partition suit and several others as defendants, on the allegation that the plaintiff of the partition suit had appropriated the paddy and rabbi crops raised by them (plaintiffs of the money suit) on certain portion of the bakasht land in the tauzi under partition. This money suit was transferred to the Court of the Subordinate Judge, 1st Court, Gaya, where the partition suit had been instituted and was numbered as Money Suit No. 9 of 1944. Both the suits were heard together and are governed by the same judgment. The money suit was dismissed and an appeal from the decree in the money suit has been filed by defendants Nos. 1 to 6 in the Court of the District Judge, Gaya, and has not been disposed of yet. The circumstances under which the money suit was instituted will be referred to hereafter.

(4) In order to appreciate the argument at the bar it is necessary to give a short narration of the litigation leading to the institution of the present suit for partition.

(5) It appears from the records of the case that originally Basudeo, father of defendants Nos. 7 and 8, was owner of 8 annas interest Jagdeo was owner of 4 annas interest, and Sahodra Koer was the owner of the remaining 4 annas interest in the tauzi under partition. Basudeo died leaving behind his widow, Mt. Deomurat Koer, and two minor sons, Bishundeo (defendant No. 7) and Paraspat (defendant No. 8), and Deomurat Koer was appointed guardian of her two minor sons. Basudeo during his lifetime, executed simple mortgage bond on the 9th August, 1909, in favour of defendant No. 1, mortgaging four annas out of his eight annas interest in this tauzi. On the 1st August, 1918, Deomurat Koer as certified guardian of her two minor sons executed a sale-deed for Rs. 10,000/- (Ex. A2) in favour of defendant No. 1, conveying the 4 annas interest which had been mortgaged to him under the mortgage bond dated the 9th August 1909. The money under the sale deed was raised to pay off the dues under the mortgage bond and to meet other expenses of the family. It may be stated here that Jagadeo also sold to defendant No. 1 his own four annas interest under the kebala (Ex. A2). It further appears that defendants Nos. 1 to 6 acquired the 4 annas interest of Sahodra Koer in this tauzi under a sale-deed dated the 3rd May, 1925 (Ex. A 1). Thus defendants Nos. 1 to 6 acquired 12 annas interest in this tauzi and Bishundeo (defendant No. 7) and Paraspat (defendant No. 8) were left with 4 annas interest therein. Out of this 4 annas interest of defendants Nos. 7 and 8, 2 annas interest passed to defendants Nos. 17 and 18 at Court sale with an encumbrance under a usufructuary mortgage bond executed by Basudeo in favour of defendants Nos. 19 to 23 who are still in possession, and the remaining 2 annas interest passed to defendant No. 9 who sold it to defendants Nos. 10 to 16.

(6) On attaining majority Bishundeo (defendant No. 7), for self and as guardian of his minor brother, Paraspat (defendant No. 8), instituted title suit No. 23 of 1928 in the Court of the Subordinate Judge, Gaya, to get the sale deed dated the 1st August, 1918 (Ex. A 2) declared void and inoperative and for recovery of possession with mesne profits This suit was decreed on the 24th May, 1930. with mesne profits, and the decree of the trial Court was affirmed on appeal by the High Court by its judgment dated the 28th November, 1934 Thereafter defendants Nos. 6 and 7 applied for execution of the decree in title suit No. 23 of 1928. During the pendency of the execution proceedings they sold to the plaintiff, under a sale-deed dated the

7th September, 1937 (Ex. 4), along with other properties, their 4 annas interest in tauzi No. 2879, in respect of which they had obtained a decree in title suit No. 23 of 1928, for a consideration of Rs. 4,000/- to satisfy their debts and to pay off certain decrees which had been obtained against them by their creditors, and in respect of which executions were pending. After execution of the sale-deed (Ex. 4) the plaintiff obtained delivery of possession of the 4 annas interest purchased by him on the 21st September, 1938.

(7) After the sale-deed dated the 1st August, 1918, referred to above, was declared inoperative by the Court, a suit was instituted on the 16th June, 1936, by defendant No. 1 and other members of his family on the basis of the mortgage bond dated the 9th August, 1909, in the Court of the Subordinate Judge, Gaya, being mortgage suit No. 37 of 1936; the transfer in favour of the plaintiff being 'pendente lite', he was added on the 12th November, 1937, as defendant No. 23 in the suit. This suit, however, was dismissed by the trial Court on the 5th August, 1938. There was an appeal by defendant No. 1 of the present suit (who was the plaintiff in the said suit) to the High Court (First Appeal No. 64 of 1938), and during the pendency of the appeal a compromise was entered into by defendant No. 1 and other members of the family on the one hand and defendants Nos. 7 and 8 on the other. Accordingly a compromise petition was filed in the appeal and a consent decree for Rs. 7200/- was passed by the High Court by its order dated the 24th August, 1943. The present plaintiff, who was defendant No. 23 in the Court below, was not a party to this compromise. As the plaintiff had become a purchaser during the pendency of the suit, defendant No. 1 and other members of his family alleged that the present plaintiff was only benamidar for defendants Nos. 7 and 8, and a prayer was made on their behalf that an issue be framed to that effect and sent down for trial in the Court below, but their Lordships observed:

"As the decree which is being passed by the Court is a money decree it appears to us that no such issue arises in the present litigation. It will, however, be open to the plaintiff to raise the question, if necessary, in the execution proceedings."

(8) From the narration of the facts as stated above it would appear that the defendants Nos. 1 to 6 were left with 8 annas interest in the tauzi, the plaintiff claims 4 annas interest therein under the sale-deed (Ex. 4), defendants Nos. 19 to 23 claim to be in possession of 2 annas interest belonging to defendants Nos. 17 and 18, and defendants Nos. 10 to 16 of the remaining 2 annas interest in the tauzi. Thus it is clear that defendants Nos. 7, 8 and 9 have no interest left in the tauzi. The specification of shares of the defendants as stated above is given in schedule A to the plaint.

(9) According to the plaintiff's case, there are tenancy, bakasht and basgit lands in the tauzi under partition. 61.33 acres are alleged to be the total area of the bakasht land as specified in schedule B to the plaint. Out of this area 28.33 acres have been recorded as bakasht in the record of rights; 17.58 acres were recorded in the names of tenants and were abandoned by them — both during and after the survey — and are alleged to be in the possession of landlords; and 15.22 acres are said to be tenancy lands purchased by defendants Nos. 1 to 6 in execution of decrees for rent.

(10) The plaintiff's allegation is that for the sake of convenience of cultivation there was a private arrangement under which defendants Nos. 1 to 6 were in cultivating possession over 48 acres and odd and defendants Nos. 7 to 9 used to cultivate 12 acres and odd of the bakasht land, and they paid compensation to other landlords in proportion of their shares. The case, as set out in the plaint, is that although the plaintiff got delivery of possession over 4 annas interest in the tauzi on the 21st September, 1938, corresponding to the 12th Asin 1346 Fasli, he could not get direct possession over any portion of the bakasht land. In 1347 Fasli, however, by a private arrangement he was put in possession over 20 bighas and odd out of the bakasht lands fully described in Sch. C to the plaint; he grew paddy and rabbi crop over the land specified in Sch. C to the plaint, but as a sequel to proceedings under Ss. 144 and 145, Criminal P. C. the paddy and rabbi crops raised by him were appropriated by defendants Nos. 1 to 6, and the plaintiff lost possession over the land specified in Schedule C to the plaint. It is alleged that defendants Nos. 1 to 6 in order to forestall the plaintiff brought money suit No. 293 of 1942 in the Court of the Munsif at Aurangabad as stated above, claiming compensation from the plaintiff in respect of Sch. C land on a false allegation that the paddy and the rabbi crops had been raised by them but appropriated by the plaintiff. The plaintiff has accordingly brought the present suit for partition and prays for allotment of a separate takhta in lieu of the 4 annas share in Basti, Baharai, Sairat, Bakasht and other kinds of lands. There is also a prayer for a decree of Rs. 1499/2/6 as compensation for the years 1346 to 1349 Fasli against the defendants or such of them as may be adjudged liable therefor, together with interest 'pendente lite' and future interest.

(11) Five sets of written statements have been filed in the present suit. As the appeal is by defendants Nos. 1, 2 and 6 only, it is not necessary to state in detail the defence of other defendants. It may be stated that defendants Nos. 10 to 16 in their written statement have alleged that bakasht (excepting Basti lands of all descriptions were divided among the landlords according to their shares but they have no objection to the partition being effected. They, however, deny any liability for compensation, inasmuch as, according to them, they are not in possession of any baksht land in excess of their proportionate 2 annas share. According to them, defendant No. 9 (their predecessor in interest) settled a portion of the bakasht land in his possession with one Bigan Gope, who is in possession of the same, and it is alleged that in the absence of Bigan the suit is bad for defect of parties. Similarly, defendants Nos. 19 to 23 deny having held any bakasht land in excess of their proportionate share or to have deprived the plaintiff of his share in the bakasht land in collusion with any of the defendants. They have no objection to partition and their case is that for convenience of cultivation each party cultivated a portion of bakasht land by mutual adjustment, although there was no partition (written statement 4).

(12) Defendants Nos. 3 to 5 are minor members of the family of defendants Nos. 1, 2 and 6. They have appeared through their pleader guardian-ad-litem and have adopted the written statement of defendant Nos. 1, 2 and 6.

(13) Defendants Nos. 1, 2 and 6 deny the story of the plaintiff that he was allowed to cultivate 20 bighas and odd of land specified in Sch. C to the plaint; they also deny the plaintiff's story of the removal by them of the paddy and rabbi crops as alleged in the plaint. Their case, in short, is that the plaintiff is a farzidar for defendants Nos. 7 and 8. According to them, some of the lands alleged to be bakasht in the plaint were acquired by them at Court sales in execution of decrees for rent obtained by them against certain tenants, while some other lands, out of Sch. B to the plaint, were recovered by them after costly litigation from persons set up as tenants by defendants Nos. 7 and 8. Therefore, according to them, the plaintiff is not entitled to claim any share in the bakasht lands so acquired by them. They also allege that

some lands mentioned in Sch. B are not bakasht and are in actual possession of tenants, and, therefore, not liable to partition. They allege, however, that they paid the compensation for the excess of bakasht lands in their possession to defendants Nos. 7 and 8. They further pleaded that about 17 bighas of the land in Sch. B were allowed to remain in possession of defendants Nos. 7 to 9 under a compromise and about 8 bighas out of the same were settled with one Bigan Gope and as such these lands are not liable to partition. Their case is that, if the plaintiff in any event be held entitled to any share in the bakasht land, they are entitled to be reimbursed for the expenses incurred by them in the litigation for the recovery of these disputed lands.

(14) On the allegations stated above several issues were framed and the suit came up for hearing before the learned Subordinate Judge, who decreed the suit for partition on the 15th June, 1944. At the hearing defendants Nos. 1 to 6 did not appear to contest the suit. Therefore, the suit was heard in the presence of defendants Nos. 10 to 16 and 19 to 23 and 'ex parte against defendants Nos. 1 to 6. This decree was, however, set aside on an application under O. 9, R. 13, filed by defendants Nos. 1 to 6, and the suit was set down for hearing afresh in the presence of defendants Nos. 1 to 6. At the second hearing issues were remodelled in the presence of all the parties and defendants Nos. 1 to 6 did not raise any issue regarding the title of the plaintiff although the Court at the first hearing had recorded a finding of title in favour of the plaintiff. The learned Subordinate Judge, on a consideration of the evidence, has found that the suit is not bad for non-joinder of parties or misjoinder of causes of action, that the plaintiff has proved his title and possession in respect of his 4 annas interest in the tauzi; that the lands given in the schedules to the plaint are bakasht lands and liable to partition and that the plaintiff is entitled to compensation for the years 1346 to 1349 for having been kept out of possession of his share of the bakasht land. Accordingly a decree for partition and compensation as claimed in the plaint has been passed by the learned Subordinate Judge.

(15) The first question that arises for consideration in this appeal is whether the plaintiff is entitled to claim partition by metes and bounds and allotment of a separate takhta in lieu of his 4 annas share in the tauzi under partition. The plaintiff has brought this suit for partition as a co-sharer by impleading all the co-sharers interested in the tauzi and there is no defect of parties. Therefore, in order to succeed in the suit the plaintiff has to prove unity of title and unity of possession. In support of his title the plaintiff relies upon the registered sale-deed, dated the 7th September, 1937 (exhibit 4), under which he purchased the 4 annas interest in the tauzi for Rs. 4,000/-. To prove the passing of consideration under exhibit 4 the plaintiff relies upon two satisfaction petitions. (Exs. 5 and 5A) under which he paid the dues of Pandit Ramballav Missir and others in satisfaction of decree obtained by them against defendants Nos. 7 and 8 in respect of which execution proceedings were pending. The plaintiff has further adduced oral evidence in this behalf. P. W. 1, who is one of the creditors of defendants Nos. 7 and 8, states that out of the consideration money of Rs. 4,000/-, Rs. 1.300/- went towards the satisfaction of the decrees of Ramballav Missir and others and the remaining sum, namely, Rs. 2,700/-, was paid to him (the witness) in satisfaction of the debts due to him from defendants Nos. 7 and 8. His statement is corroborated by the evidence of P. W. 2. Thus, in my opinion, the plaintiff has proved his title which he acquired under the sale-deed (Ex. 4) and passing of consideration thereunder.

(16) The plaintiff has relied both on documentary and oral evidence in support of his joint possession. He relies upon certain decrees which he obtained against tenants for arrears of rent. Exs. 10 and 10(a) are rent decrees obtained by the plaintiff against tenants for arrears of rent. Exhibit 10(b) is a decree showing that the plaintiff was impleaded as a co-sharer in a suit for rent brought by another co-sharer against certain tenants. Ex. 7 is a certified copy of register D showing that the plaintiff stands recorded in the revenue register of the Collectorate of Gaya. Exs. 11 series are challans showing payment of revenue by the plaintiff. Thus, the documents referred to above clearly show that the plaintiff was in joint possession of his share in the tauzi and was also treated as a co-sharer malik by other co-sharers of the tauzi. Besides the oral and documentary evidence referred to above there is a clear admission of the plaintiff's title and possession by some of the witnesses examined by some of the defendants. D.W. 1 for defendants Nos 11 and 16, who is defendant No. 13, says that it is not true that the plaintiff is the farzidar of Bishun Babu (defendant No. 7.) Besides, D.W. 1 for the defendants Nos. 1, 2 and 6, who is defendant No. 11, states in his deposition that "Durjodhan Babu" has 4 annas share in the tauzi and is in possession. This is evidently a mistake for Jirjodhan Singh, and the next sentence of his deposition shows that he is referring to the plaintiff. I cite it below:

> "Ram Pukar Babu and Raja Babu go there for the Plaintiff." Ram Pukar has been examined as P.W. 1 and refers to Raja Singh as being gumashta of the plaintiff. When in the argument this passage in the deposition of the witness was cited, there was no suggestion on behalf of the appellants that be meant some one other than the plaintiff. It is, therefore, not safe to rely on the interested testimony of D.W. 5 for defendants Nos. 1, 2 and 6, who is one of the defendant-appellants, and his other witnesses who deny the title and possession of the plaintiff and allege that he is only a benamidar for defendants Nos. 7 and 8. Therefore, on a consideration of the entire evidence on the record I see no reason to differ from the finding of the learned Subordinate Judge on the point."

(17) It has been argued at the bar that the appellants had alleged in their written statement that the plaintiff is a benamidar for defendants Nos. 7 and 8, but there was no issue raised on the point and as such the defendants have been prejudiced as they had no opportunity to place before the Court full evidence to prove the 'benami' character of the sale-deed under which the plaintiff claims title. It is contended that an issue be framed regarding the question of title and a finding from the trial Court on further evidence be called for, or, at any rate, the question of title of the plaintiff be left open.

(18) In my opinion, issue No. 2, which runs as follows:

> "Are the lands given in the schedule bakasht? Are they liable for partition as such?"

clearly covers the question of title. As already observed, the suit was at first heard 'ex parte' against defendants Nos. 1 to 6, and at that stage a large number of issues had been framed. The decree was, however, set aside at the instance of the appellants on an application under Order 9, Rule 13, of the Code of Civil Procedure and after the suit was restored for hearing the issues were remodelled with the consent of the parties (Vide order No. 46, dated 20-2-1945.) The defendants did not insist on any specific issue being framed regarding the title. If the appellants wanted to raise any specific issue on the question of title they should have asked the Court to frame such an issue. In my

opinion, it was clearly understood that the question of title and possession was covered by issue No. 2. In fact evidence was led on the point and the Court below has recorded its finding thereon. Therefore, it is not open now to the appellants to question the title or possession of the plaintiff. The question of the plaintiff's title and possession cannot be left open to be determined at a later stage for the obvious reason that no decree for partition can be passed unless possession of the plaintiff based on some title is proved. It is true that the appellants took out execution of the compromise money decree which they had obtained against defendants Nos. 7 and 8, and in execution of the decree attached the 4 annas interest which is claimed by the plaintiff in the partition suit. There was a claim case preferred by the plaintiff under Order 21, Rule 58, of the Code of Civil Procedure. This claim case was allowed, but when the matter came to the High Court there was a remand and the objection filed under Order 21, Rule 58, was ordered to be treated as one under Section 47 of the Code of Civil Procedure. It is stated at the bar that the matter is still pending. In my opinion, it will not be proper to leave the question of title and possession open to be investigated in the proceeding under Section 47 of the Code of Civil Procedure which is still pending. The appellants had full opportunity to prove the 'benami' character of the sale-deed in favour of the plaintiff. I do not think that ends of justice require that the partition suit should be stayed and the question of the plaintiff's title investigated in miscellaneous proceedings.

(19) Thus the plaintiff having proved his title and joint possession in respect of the tauzi under partition to the extent of his 4 annas interest therein and no case of any previous partition having been set up by the appellants, the plaintiff is clearly entitled to have a separate 'patti' of his 4 annas interest in the tauzi.

(20) Now the question for decision is whether the land set out in Schedule B to the plaint is bakasht as alleged and whether there is any bar to the plaintiff getting the right to khas cultivating possession after partition in respect of any portion of the bakasht land by reason of Section 22, Clause (2) of the Bihar Tenancy Act.

(21) According to the plaintiff's case as set out in the plaint, the total area of the bakasht land is 61.33 acres out of which 48.80 acres are alleged to be in the possession of defendants Nos. 7 to 9. I have already stated that out of the 4 annas interest in the tauzi belonging to defendants Nos. 7 and 8, 2 annas interest was purchased by defendant No. 9, from whom it has passed to defendants Nos. 10 to 16, and the remaining 2 annas interest has passed to defendants Nos. 17 and 18 and is at present in possession of defendants Nos. 19 to 23 as usufructuary mortgagees. The plaintiff's case in the plaint is that he did not get actual possession of any portion of the bakasht land set out in Schedule B to the plaint at the time of the delivery of possession, but by subsequent arrangement he was given by defendants Nos. 1 to 6, 20 bighas out of the bakasht land for khas cultivation in lieu of his share of the bakasht land, the specification of which is set out in Schedule 6 to the plaint. This story of the plaintiff was not accepted by the trial Court and the finding of the Court below on this point has not been challenged before us. Therefore, according to the case of the appellants, the plaintiff was not in actual possession of any portion of the bakasht land in the tauzi, though he got the formal delivery of possession in respect of his 4 annas share through Court on the 21st S ptember 1938. It may be mentioned that it appears from Exhibit O that Lachhmi Prasad, defendant No. 9, instituted Title Suit No. 169 of 1929 against the appellants and others for recovery of khas possession in respect of certain khatas mentioned in the schedule to the plaint of the present suit on the ground of abandonment of the holdings by the tenants recorded in the record of rights. This suit was compromised, and under the compromise 17 bighas, 3 kathas 1 dhur out of Khatas Nos. 3 and 9 were put in the direct cultivating possession of defendant No. 9 representing 4 annas interest in the tauzi and the remaining area was allowed to remain in possession of the appellants representing 12 annas interest in the tauzi, which includes the 4 annas interest which has now passed into the hands of the plaintiff. Thus it is clear that all the bakasht land in the village excepting the 17 bighas 3 kathas 1 dhur land is in the possession of the appellants. Therefore, the plaintiff would be entitled to direct cultivating possession in the bakasht land after the partition if there be no legal bar in his way.

(22) In Schedule B to the plaint the bakasht land has been classified under the following three categories:

(1) 28.33 acres recorded as bakasht in the record of rights under Khata No. 3;

(2) 17.58 acres said to have been abandoned by the original tenants before the final publication of the record of rights and thereafter recorded under Khatas Nos. 9, 21, 25, 28, 29, 32 and 33;

(3) 15.22 acres purchased by defendants Nos. 1 to 6, the appellants, at Court sales and also by private treaty.

(23) It may be mentioned that according to the appellants khata No. 29 is not an abandoned holding. His case is that it was held by the original tenant Sheocharan Teli, and the appellants as 12 annas co-sharer landlords purchased this khata in execution of a decree for rent, in execution case No. 675 of 1937, and in support of his case the sale certificate (Ex. P-1) has been filed. With regard to khata No. 32 the appellants' case is that this holding was not abandoned by the original tenant. According to them it was the service jagir of one Jageswar Dusadh and that they recovered possession of this khata by a suit after terminating the service tenure. They admit however, that the land of this khata is in their possession as bakasht.

(24) Khata No. 28 comprises plots Nos. 100, 104 and 112, whereas khata No. 24, comprises several plots including plots Nos. 101, 105, and 107. With regard to the three plots of khata No. 28 the appellants' case is that they are not bakasht but homestead and khand lands of one Mohan Kumhar. Similarly, with regard to plots Nos. 101, 105 and 107 appertaining to khata No. 24, their case is that they are the homestead and khand lands of Ali Jolaha and Dukhi Jolaha (written statement 18.) Their case is that these plots of the two khatas are not bakasht and, therefore, not liable to partition as such. D.W. 5, however, who is one of the appellants, states in evidence "the lands of khata No. 28 of Seocharan Teli are parti and in my possession." With regard to the three plots appertaining to khata No. 24 mentioned above, his evidence is:

"Ali Jolaha and Dukhi Jolaha have their houses. I cannot give their plot numbers. They live in their raiyati lands which are their homestead."

I may state here that there were previous disputes in respect of khata No. 24 (vide Exhibits D and D (1)) but the specific case as alleged here was never set up. Therefore, I am of opinion that the appellants have failed to prove that the plots mentioned above appertaining to khatas Nos. 24 and 28 are not bakasht land having been abandoned by the original tenants.

(25) With regard to khatas Nos. 9, 21, 24, 25 and 33, the appellants do not dispute the plaintiff's case of abandonment of these khatas but their case is

that these khatas along with plots Nos. 17, 20 and 140 appertaining to khata No. 3 were settled under a 'sada hukumnama' granted by Deokishan Koer, mother of defendants Nos. 7 and 8, and Jagdeo with Nasrat, Nannak, Sulaiman, Turawan and Imaman, and a case under Section 145 of the Code of Criminal Procedure cropped up between the appellants and those Muhammadan tenants, which, as it appears from the judgment of the Magistrate (Ex. L1), terminated in favour of the Johanas. The appellants had, therefore, to institute a title suit against them, being Title Suit No. 26 of 1927, which was decided in their favour. Exhibit L is the judgment of the Subordinate Judge in Title Suit No. 26 of 1927 and Exhibit O1 is the decree therein. Therefore, it is argued on behalf of the appellants that the plaintiff is not entitled to claim any share in these khatas. Alternatively their case is that, if in any event the plaintiff is entitled to khas possession over these khatas on partition, the appellants must be reimbursed to the extent of Rs. 3,051/-, the amount which they had spent as the cost of litigation. I may state at once that the judgment of the trial Court in Title Suit No. 26 of 1927 (Ex. L) shows that the tenants failed to prove settlement and there was no independent evidence to show that the defendant tenants were set up by Deokichan and Jagdeo. Thus there is no manner of doubt in my mind that khatas Nos. 9, 21, 24, 25 and 33 were in possession of the appellants as abandoned holdings and they recovered possession of these khatas from Nasarat and others who were found to be mere trespassers.

(26) The lands of khata No. 3 are admittedly recorded as bakasht in the record of rights (Ex. 12.) The case of settlement as set up by Nasarat and others with respect to plots Nos. 17, 20 and 140 appertaining to khata No. 3 failed. Therefore, the entire khata was in possession of the appellants and other defendants as bakasht.

(27) With regard to the lands described in the plaint as bakasht under the third category, the appellant's case is that khata No. 8 belonged to one Jageshwar Dusadh, and the appellants as 12 annas landlord purchased the entire holding in execution of a rent decree obtained against the tenants, in execution Case No. 1494 of 1927, and the sale certificate (Ex. P-1) has been filed in support of the case. With regard to the remaining khatas of the third category, namely, khatas Nos. 12, 13, 14 and 16, it appears from Exhibits 10 (c), 10 (d) and 10 (e), which are decrees in rent suits, that khatas Nos. 12, 13 and 14 belonged to one Nanhku Barhi and Khata No. 16 belonged to one Deva Charan Barhi and that decrees for rents were obtained against them. Nothing has been placed before us to show that these khatas came into possession of the appellants by virtue of any Court sale in execution of decrees for rent. On the other hand, the case set up by the appellants in respect of these khatas is that they were purchased by one Raghu Sahu under a kebala, dated the 6th January 1927, and after his death these khatas came into possession of his sons Dargahi and Hazari. A sale-deed dated the 1st July 1941, (Ex. A) executed by these two sons of Raghu Sahu has been filed to show that they had title and possession over them. So far as these khatas are concerned, it may be stated that the judgment of the High Court (Ex. 9), shows that Raghu Sahu, the purchaser under the sale-deed dated the 6th January, 1927, was held to be a 'benamidar' for the appellants and it has been admitted by D.W. 5, who is one of the appellants, that he is in possession of these khatas. In fact, the contention of Mr. G. P. Das, who argued the case before us on behalf of the appellants, was that the appellants have acquired title by Court sales held in execution of decrees for rent in respect of only two khatas, viz., khata No. 29 and khata No. 8. Thus the plaintiffs' case that khatas Nos. 8, 12, 13, 14 and 16 were acquired by the appellants by purchase is admitted. It has also been proved by them that khata No. 29 was purchased by them at Court sales.

(28) In view of the discussions already made I am of opinion that the plaintiff has established the bakasht character of all the lands mentioned in Schedule B to the plaint, and therefore he is entitled to khas possession on partition of the lands mentioned in Schedule B to the plaint in proportion to his 4 annas interest in the tauzi. I may mention here that it was conceded in the Court below that the plaintiff is entitled to his share in the lands:

> "that are recorded as bakasht in the survey because of their initial nature as such or on account of abandonment."

The argument in the Court below was confined only to the land falling under the third category, that is, land acquired by the appellants by purchase, and it was contended there that the lands falling under the third category cannot be partitioned as bakasht by reason of Section 22, Clause (2) B. T. Act. It has been argued before us by Mr. G. P. Das, appearing on behalf of the appellants that the plaintiff is not entitled to khas possession only in respect of khatas Nos. 29 and 8 which were purchased by the appellants at Court sale in execution of decrees for rent in respect thereof, and reliance has been placed on the recent decision of the full bench in the case of 'Upendra Pratap v. Iswarwati Kuer', 27 Pat 610, in support of his argument that the appellants are entitled to hold the land of these two khatas subject to the payment of rent to the other co-proprietors as contemplated by Section 22, Clause (2) B. T. Act, even if on partition the lands of these two khatas fall into the 'patti' of the plaintiff or other co-proprietor. It has been further argued that the plaintiff is not entitled to claim partition as bakasht land of khata No. 32 and of khatas Nos. 3, 9, 21, 24, 25 and 33, without reimbursing the appellants for the costs incurred by them for recovery of possession. Their case is that they spent about Rs. 200/- for the recovery of khata No. 32 and Rs. 3,051/- for the recovery of khatas Nos. 3, 9, 21, 24, 25 and 33 as costs of litigation and they are entitled to be re-imbursed before the plaintiff can claim any relief. It may be observed here that the learned Subordinate Judge rejected the argument regarding the applicability of the provisions of Section 22, Clause (2) B. T. Act on the ground that it was not proved that the holdings were transferable, and, therefore, relying upon the decision of 'Lachhmi Narain v. Ram Saran', AIR (16) 1929 Pat 185, the learned Subordinate Judge held that the appellants could be treated as trespassers in respect of lands purchased by them whether privately or by Court-sale, and the land would be partitioned as bakasht. But in my opinion, the point does not arise and neither of the two points raised by Mr. Das is sustainable. The appellants are in possession of the bakasht lands specified in Schedlue B to the plaint as 12 annas co-sharers. They acquired the two khatas namely, khatas Nos. 29 and 8, as 12 annas co-sharer landlords representing the 4 annas interest which is now in the hands of the plaintiff under the kebala dated the 1st August 1918 (Ex. A-2.) The plaintiff purchased from defendants Nos. 7 and 8 their 4 annas interest in the tauzi, which was in possession of the appellants, by a kebala dated the 7th September, 1937 (Ex. 4), and the plaintiff got delivery of possession on the 21st September 1938. Therefore when the appellants purchased two khatas in 1927 and 1938, they purchased as the representative of the plaintiff as well. In my opinion, the case does not fall within the mischief of Section 22, Clause (2) B. T. Act, and the principle laid down in the

Full Bench case in 'Upendra Pratap v. Iswarwati Kuer', 27 Pat 610 is not applicable.

(29) It is no doubt true that the appellants had to incur some expenses to recover either the service tenure of Jageshwar Dusadh or from the Jolaha trespassers. But I think the appellants are not entitled to be reimbursed. There is no satisfactory evidence on behalf of the appellants to prove the actual expenditure. Exhibit G is a bahi for the year 1924 filed by the appellants to show the expenses incurred by them over the litigations. This bahi does not seem to have been kept in the ordinary course of business. The entries show that certain sums were paid to lawyers who are still alive, but they have not been examined, nor has any receipt been filed in Court granted by any of the lawyers who worked in those cases. In the absence of any independent evidence on the point I do not feel inclined to rely upon the evidence of D.W. 5 for the appellants or upon the bahi (Ex. G.). The learned Subordinate Judge has doubted the genuineness of this bahi (Ex. G) and I entirely agree with the reasons given by the learned Subordinate Judge and see no reason to differ from the view taken by him. Therefore, even if it be assumed that the appellants are entitled to be reimbursed, I am of opinion that they have failed to prove the actual expenses incurred by them over the litigations for the recovery of the lands claimed as bakasht in the suit. As a result of the findings arrived at above, in my opinion the plaintiff is entitled to claim partition of the entire lands as given in the plaint as bakasht as well as the proprietary interest to the extent of his 4 annas interest. It may be observed, as has already been stated, that by a compromise (Ex. O) certain specific plots appertaining to khatas Nos. 3 and 9 were given to defendant No. 9 representing the 4 annas interest which at present is held by defendants Nos. 10 to 16 and 19 to 23 (representing the interest of defendants Nos. 17 and 18) and it is an admitted position that some lands were settled by defendant No. 9, the predecessor in interest of defendants Nos. 10 to 16, with one Bigan Gope, who is not a party in the present suit. Therefore, in my opinion, at the final partition lands settled with Bigan Gope should be allotted to the share of defendants Nos. 10 to 23 as their bakasht land.

(30) The next question for consideration is whether the plaintiff is entitled to claim compensation for his share of the produce for the years 1346 to 1349 Fasli. It has been contended before us by Mr. Nawal Kishore Prasad, on behalf of the appellants, that there is no averment in the plaint of any ouster or exclusion of the plaintiff by the appellants and that, therefore, in the absence of such averment the plaintiff is not entitled as a co-sharer landlord to claim any compensation from the appellants, and in support of his contention he has relied upon 'Robert Watson & Co. v. Ram Chand Dutt', 17 Ind App 110 and 'Shyam Sunder v. Mt. Sheorachan Kuer', AIR (24) 1937 Pat 235. In both these cases, however, a decree for compensation was made in favour of the plaintiff. In my opinion, the appellants, on their own case, cannot escape liability to compensate the plaintiff in respect of their exclusive use of the bakasht land. The principle, on which the liability of a co-sharer to compensate his other co-sharers for his exclusive use of any common land is determined is based upon equitable considerations. It is now well-settled that if a co-sharer is in separate possession of any portion of the common land — whether or not in excess of the area to which he may be entitled on partition — without causing ouster or exclusion of any other co-sharers, or is in occupation of such land in a proper and husband like manner without any objection on their part, it would not be in consonance with the rules of justice, equity and good conscience to allow them to claim a share in the fruits of the labour or capital of the co-sharer in possession. But if a co-sharer occupies a portion of the common land in denial of the right or title of other co-sharers in spite of their objection, or excludes or ousts them from possession, he should be held liable to pay to such co-sharers compensation for his exclusive user of the common land from the profits earned by him with the help of his labour, industry, skill or capital. This rule was laid down as early as the year 1890 in the case of 'Robert Watson & Co. v. Ram Chand Dutt', 17 Ind App 110, on which Mr. Nawal Kishore Prasad has relied. In this case the plaintiffs and defendants (Watsons) were co-sharers in possession as tenants in common. The Watsons were in possession of the common land in excess of their proportionate share, and they resisted the endeavours of the plaintiff to take possession of the lands in their exclusive occupation. Such resistence on their part was not in denial of the title of the plaintiff but simply with the object of protecting themselves in the profitable enjoyment of the land. The suit was by the plaintiffs for joint possession, injunction and compensation. The Courts in India decreed the suit for joint possession, granted injunction and allowed compensation. Their Lordships of the Judicial Committee set aside the decree for joint possession and for injunction but allowed compensation to the plaintiffs at the rate of 7 annas per bigha. While setting aside the decree of the High Court regarding injunction their Lordships are reported to have said:

> "In India a large proportion of the lands, including many very large estates, is held in undivided shares, and if one share-holder can restrain another from cultivating a portion of the estate in a proper and husband like manner, the whole estate may, by means of cross-injunction, have to remain altogether without cultivation until all the share-holders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected — a work which, in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the Courts of Justice, in according to justice, equity, and good conscience, cases where no specific rule exists, are to act and if, in a case of share-holders holding lands in common, it should be found that one share-holder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other share-holder to appropriate to himself the fruits of the other's labour or capital."

In the principle enunciated above their Lordships ordered that:

> "the plaintiffs do recover from the defendants No. 1 a sum of money calculated at the rate of two-thirds of 7 annas per bigha a year for 4128 bighas, as compensation in respect of the exclusive use and benefit by the defendants No. 1 of 4128 bighas, from the beginning of the year 1291 Amli to the 4th of January 1886, the date of the said decree."

It may be observed that the Watsons were in possession of the 14 annas interests in the mahal which belonged to the plaintiffs' family as lessee, and their lease expired on the last date of the year 1290 Amli. Therefore, their Lordships ordered compensation to be allowed to the plaintiffs from the date of the expiry of the leases in favour of the Watsons.

The principle laid down in this case was again reaffirmed by their Lordships of the Judicial Committee in 'Midnapur Zamindary Co. v. Naresh Narayan Roy', 51 Ind App 293, in which Sir John Edge said:

"Where lands in India are so held in common by co-sherers, each co-sharer is entitled to cultivate in his own interests in a proper husband like manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary right as co-sharers in the lands."

I may observe that in this case the suit was for partition in which compensation was claimed by the plaintiffs. The Subordinate Judge had decreed mesne profits, but their Lordships of the Judicial Committee varied the decree of the Subordinate Judge

"by substituting for his order as to mesne profits an order that the Midnapur Zamindary Company is to pay compensation to the plaintiff for the exclusive use by the Midnapur Zamindary Company themselves or by their tenants of the land in suit."

This case came to be considered by Division Bench of the Calcutta High Court in the case of 'Chandra Kishore v. Biseswar Pal', 55 Cal 396, and after a review of all the decisions relevant to the point, Page, J., says:

"Where co-sharers are entitled to joint possession of immoveable property as tenants-in-common each of such co-sharers is entitled to be in possession of each and every part of the common land. But for the purpose of the profitable occupation of the joint property it usually happens that some of the co-sharers are found to be in occupation of some portions of the land, and other co-sharers of other portions; and it is I think clearly established that where one co-sharer is in separate possession of the common land (whether or not the portion of the land which he is occupying is in excess of the area that would fall to him upon partition) without objection from, or ouster or exclusion of, the other co-sharers, he is under no obligation either to account or to pay compensation to such co-sharers in respect of the profits which have accrued to him by reason of the skill or industry which he has employed in making good use of the property while he was in possession."

Again he says:

"On the other hand, if a co-sharer, notwithstanding an objection from the other co-sharers, claims an exclusive right to occupy a portion of the land of which they have a common right of possession, or excludes or ousts from possession the other co-sharers, it is equally clear, in my opinion, that he will have to pay compensation to the other co-sharers for any profits that they may be held to have lost by reason of his exclusive occupation of the common land."

The principle laid down in this case was followed by James, J., in 'Shiva Narain v. Chandra Sekhar', AIR (20) 1933 Pat 616 and by Noor, J., in 'Mt. Shyam Sunder Koer v. Mt. Sheorachan Kuer', AIR (24) 1937 Pat 235. Again the question came up for consideration before a Division Bench of this Court in 'Raj Ranjan Prasad v. Khobari Lal', 20 Pat 162 and Dhavle, J., following the view taken by Page, J., in the case of 'Chandra Kishore v. Biseswar Pal', 55 Cal 396, observed as follows:

"It seems to me impossible, after the Privy Council decision in 'Lachmeswar Singh v. Monowar Hussain', 19 Cal 253, to take the passage from 'Midnapur Zamindary Company's case', 51 Cal 631 apart from the facts of the case and to hold that our plaintiffs would have been entitled to compensation even if they had never objected to the defendants' exclusive use and occupation of these bakasht lands."

(31) An examination of the plaint and the written statement of the appellants clearly shows that the plaintiff demanded joint possession and his share of the produce of the land in the exclusive possession of the appellants, but the latter denied the title of the plaintiff and claimed to remain in separate occupation in defiance of the plaintiff's right to joint possession. Therefore, in view of the clear denial of the plaintiff's right, the appellants are, in my opinion, on the principle enunciated in the case which I have noticed, liable to pay him compensation for the loss of the profits to which he was put by reason of his exclusion or ouster by the appellants from the bakasht lands in suit for the years 1346 to 1349 Fasli.

(32) So far as the claim of compensation for the year 1346 is concerned, the appellants' case is that they paid the compensation to defendants Nos. 7 and 8. No receipt has been filed to prove any such payment. Any payment to defendants Nos. 7 and 8, even if made, would not exonerate the appellants from their liability to the plaintiff because defendants Nos. 7 and 8 had no interest in respect of the 4 annas share claimed by the plaintiff at a time when they are alleged to have been paid, for they had already parted with their interest on the 7th September 1937, under Exhibit 4. The case of the plaintiff for compensation for the year 1347 Fasli stands on a different footing. His case was that he grew paddy and rabbi crop over land mentioned in Schedule C to the plaint. But that story has been rejected by the Court below and the finding has not been challenged before us, whereas the appellants' case was that the plaintiff was never in possession. Therefore, on apellants' own case the plaintiff is entitled to be compensated for the year 1347 Fasli. Similarly, he is entitled to be compensated for the years 1348 and 1349. Certain papers were relied upon by the appellants to show that they had incurred certain 'galandazi' expenses. But the Court below has rejected the papers. In the absence of any satisfactory evidence the Court below has decreed compensation at the rate claimed in the plaint for the obvious reason that the rate at which the appellants have claimed damages from the plaintiff in money suit No. 293/9 of 1942/1944 is higher than the rate claimed by the plaintiff in the present suit. Therefore, the Court below has taken this as the safe guide for fixing compensation. It has been urged that the comparison between the two plaints is erroneous, that in the money suit the defendants 1 to 6 claiming compensation on account of crops said to have been grown by them did not need to make any allowance on account of the cost of cultivation, whereas in the partition suit the plaintiff had to make such an allowance. Making an allowance of 25 per cent for the cost of cultivation, which appears reasonable, the claim in the money suit would be reduced to 3/4th x Rs. 451-10=Rs. 340/-. In comparing this with the corresponding figure in the plaint in the partition suit Rs. 434/-, we have to remember that the former covers only the paddy crop while the latter includes the rabbi crop. Hence, there is no sufficient discrepancy to invalidate the reasoning of the learned Subordinate Judge. Our attention has not been drawn to any positive evidence to show that the finding of the learned Subordinate Judge is incorrect. Hence I think the plaintiff's claim is not exaggerated and he ought to get compensation at the rate decreed by the trial Court.

Therefore, the appeal is dismissed and the decree of the trial Court according partition is affirmed. The Court below will now appoint a Commissioner for effecting partition of the lands according to the shares, following the direction given above with regard to the lands settled with Bigan Gope.

(33) REUBEN, J.: I agree.

(34) As regards the question of title, it has been argued that in the absence of an express issue on the point it must be taken that the intention was to leave the point open. To me it appears that the proper inference is just the contrary. The question of title affected the maintainability of the suit. By giving up the point and not making any reservation in respect of it, the defendants should be taken to have admitted the title of the plaintiff. Besides, evidence was adduced on the point in the presence of the appellants without any objection on their part, and there is nothing to suggest that they were taken by surprise.

D.H. *Appeal dismissed.*

A. I. R. (39) 1952 PATNA 19 (C. N. 7)

LAKSHMIKANTA JHA, C.J. AND REUBEN, J.

Amir Alam, Appellant v. Mt. Bibi Salma and another; Respondents.

A.F.O.D. No. 337 of 1946, D/- 15-5-1951.

Contract Act (1872), S. 16 — Paradanashin lady — Deed transferring almost all her property — Validity — Burden of proof — What must be estabished by decree — Proof of intelligent execution — Sufficiency.

In the case of a pardanashin lady, denuding herself of a large proportion of her property, an independent legal advice is not in itself essential.

After all, advice, if given, might have been bad advice, or the settlor might have insisted on disregarding it. The real point is, that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it. If the lady really understands and means to make the transfer, it is not required that some one should have tried to persuade her to the contrary.

The party who sets up and relies on the document must satisfy the Court that the deed has been explained to and was really understood by the lady, that she intended to execute it as such, that the execution was not merely a physical act but that the executant's mind went with it and she intended to give effect to the transaction represented by the deed. Case law referred.

Whether the proof of intelligent execution i. e., the knowledge of the executant of the nature of deed she was executing is sufficient or not depends upon the circumstances of each particular case. Ordinarily where there is no special connection between the 'pardanashin' lady on one side and the beneficiary under the deed or the persons concerned in bringing about the execution of the deed, it may be sufficient to prove that the lady knew the nature of the documents she was executing. The inference would, however, not follow so readily where there is relationship of a fiduciary character.

Where the relations between the parties at the time of the transactions are such as to raise a presumption that the donee had influence over the donor, the Court must be satisfied that the gift was the spontaneous act of the donor acting under circumstances which enabled her to exercise an independent will. In such a case it it not sufficient that the executant knows the nature of the document , she must also realise what its effect on her will be. AIR (16) 1929 P C 3, Relied on. (Paras 6, 7)

Held that, in the circumstances of the case, the donee had failed to establish intelligent execution of the impugned documents and the donor's intention to execute them as effective documents. (Para 13)

Anno: Contract Act S. 16, N. 16.

Mahabir Prasad, S. S. Asghar Hussain and Girish Nandan Sahay Sinha; for Appellant; B. C. De, A. H. Fakhruddin, S. Hasan and S. Anwar Ahmad, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('82) 8 Ind App 39: (7 Cal 245 P C) (Pr 6)
('91) 18 Ind App 144: (18 Cal 545 P C) (Pr 6)
('02) 29 Ind App 127: (29 Cal 749 P C) (Pr 6)
('12) 39 Ind App 156: (34 All 455 P C) (Pr 6)
('14) 41 Ind App 23: (36 All 81 P C) (Prs 5, 6)
('19) 46 Ind App 272: (AIR (6) 1919 P C 24) (Pr 6)
('25) 52 Ind App 342: (A I R (12) 1925 P C 204) (Pr 6)
('29) A I R (16) 1929 P C 3: (115 Ind Cas 733) (Pr 7)
('38) A I R (25) 1938 P C 38: (172 Ind Cas 720) (Pr 6)
(1887) 36 Ch D 145: (56 L J Ch 1052) (Pr 7)

REUBEN, J: This appeal by the defendant is directed against a decree of the Subordinate Judge, Patna, declaring certain documents inoperative and granting consequential relief.

(2) The impugned documents purport to have been executed by one Mt. Bibi Ayesha in favour of the defendant-appellant. The defendant-appellant Amir Alam is the son of Ayesha's brother Akram. Plaintiff no. 1 Salma is the sister of Ayesha. Plaintiff no. 2 Afzal is the son of Ali Aslam, another brother of Ayesha. Ayesha died in September, 1943, leaving these three persons as her only heirs. The defendant became an orphan when he was aged about four years and was taken charge of by Ayesha, who had no children of her own. Ayesha's husband died about the year 1928 and since then the defendant has lived with her and has looked after her affairs. The impugned documents were executed by her when she was about sixty years of age and by then she parted with all her immovable property. Two of the documents are deeds of Hiba-bil-ewaz for a nominal consideration. The third is a sale-deed the consideration for which is stated to be Rs. 5,000/-. The case of the plaintiff is that Ayesha was induced to execute these deeds through fraud and undue influence, that she had no independent advice and did not understand what she was doing, that at best the documents represent fictitious transactions and no consideration passed. Also it was suggested that the documents are forged. The defence taken was that the documents are genuine, executed in due course and for consideration, and that the executant knew what she was doing and intended them to be effective documents.

(3) There does not appear to have been serious attempt before the Subordinate Judge to establish the plea of forgery and the Subordinate Judge has not come to any clear finding thereon. In consideration of the relationship between the defendant and Mt. Ayesha, the Subordinate Judge placed on the defendant the onus of proof and formulated it to be to satisfy the Court."

"First that the deed was actually executed by her or by some person duly authorised by her with a full understanding of what she was about to do; secondly, that she had full knowledge of the

nature and effect of the transaction into which she is said to have entered and thirdly, that she had independent and disinterested advice in the matter."

On a consideration of the evidence he came to the conclusion that the defendant has failed to prove that the documents were executed by Ayesha with a knowledge and understanding of their contents. He also held that the consideration alleged had not passed and that effect was not given to the documents.

(4) Ayesha was a widow aged about sixty years when she executed the documents in question. She was admittedly a 'purdanashin' woman and was living alone with the defendant, who has been looking after her property for a very long time. The defendant is the sole beneficiary under the impugned documents and by these documents Ayesha purports to strip herself of all her immovable property. In these circumstances, Counsel for the appellant concedes that the onus was heavy on the appellant to prove intelligent execution by Ayesha. He contends that on the evidence adduced the Subordinate Judge should have held this onus to have been discharged. He urges that the Subordinate Judge misdirected himself by regarding independent advice as essential and that, once the defendant succeeds in proving that Ayesha understood the nature of the documents which she was executing, the onus lies on the plaintiffs to prove that the documents represent fictitious and not real transactions. In view of these contentions, the arguments before us have been confined to the evidence adduced by the defendant.

(5) In 'Kali Bakhsh Singh v. Ram Gopal Singh', 41 Ind App 23 Lord Shaw of Dunfermline observed:

"The possession of independent advice or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction."

In that case evidence as to the executant's strength of will and business capacity and that the lady thoroughly understood this form of transaction and the fact that the disposition of her property was not an unnatural one were taken along with the other evidence and circumstances to prove due execution. Although the Subordinate Judge in stating the burden of proof at the commencement of his judgment emphasised the necessity of independent advice, he was not unaware of the correct view, for his attention was drawn to this decision of the Judicial Committee, and, treating the absence of independent evidence as a fact to be weighed along with the other evidence, he came to the conclusion that there was

"no satisfactory evidence on the defendant's side to show that Bibi Ayesha executed the documents in question of her own free will after knowing and thoroughly understanding the transactions."

(6) The extent of the onus of proof in such cases is well defined by Lord Sumner in 'Farid-un-nisa v. Mukhtar Ahmad', 52 Ind App. 342 at p. 350:

"The case of an illiterate pardanashin lady, denuding herself of a large proportion of her property without professional or independent advice, is one on which there is much authority. Independent legal advice is not in itself essential: 'Kali Buksh Singh's case', 41 Ind App 23. After all, advice, if given, might have been bad advice, or the settlor might have insisted on disregarding it. The real point is, that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it: 'Wajid Khan v. Ewaz Ali Khan', 18 Ind App 144; 'Sunitabala Debi v. Dharasundari Debi', 46 Ind App 272. The appellant clearly had no such advice, nor it is contended that she had. If, however, the settlor's freedom and comprehension can be otherwise established, or if, as is the respondents' case here, the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor, and were then substantially embodied in the deed, there would be nothing further to be gained by independent advice. If the settlor really understands and means to make the transfer, it is not required that some one should have tried to persuade her to the contrary. Again, the question arises how the state of the settlor's mind is to be proved. That the parties to prove it are the parties who set up and rely on the deed is clear. They must satisfy the Court that the deed has been expained to and understood by the party thus under disability, either before execution, or after it under circumstances which establish adoption of it with full knowledge and comprehension: 'Sudisht Lal v. Mt. Sheobarat Koer', 8 Ind App 39; 'Shambati Koeri v. Jagobibi', 29 Ind App 127; 'Sajjad Hussain v. Amid Hussain', 39 Ind App 156."

What the party claiming under such a deed has to establish is that the executant really understood the deed and intended to execute it as such 'Sikandar Begam v. Zulfikar Wali Khan', AIR (25) 1938 P C 38; that the execution is not merely a physical act but that the executant's mind went with it and she intended to give effect to the transaction represented by the deed.

(7) It has been contended before us that it is sufficient that the party claiming under the deed proves intelligent execution, that is to say, that the executant knew the nature of the deed which she was executing. Whether this will be sufficient or not depends on the circumstances of each particular case. Ordinarily where there is no special connection between the 'pardanashin' lady on one side and the beneficiary under the deed or the persons concerned in bringing about the execution of the deed, it may be sufficient to prove that the lady knew the nature of the document she was executing. The inference would, however, not follow so readily where there is relationship of a fiduciary character and the Court must be satisfied that the executant understood the effect of the transaction into which she was entering and really intended it. A case in point is 'Inche Noriah v. Shaik Allie', AIR (16) 1929 P C 3, in which the Judicial Committee followed the rule in 'Allcard v. Skinner', (1887) 36 Ch D 145 where the relations between the parties at the time of the transaction were such as to raise a presumption that the donee had influence over the donor, the Court must be satisfied that the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will. In the case before their Lordships there was proof of independent advice given by a lawyer who deposed that he prepared the deed of gift on instructions received from the lady herself and that he explained it to her before its execution, telling her that it was irrevocable and gave the property absolutely to the donee. Their Lordships, while not doubting the good faith of the lawyer, did not consider his advice sufficient to rebut the presumption as, 'inter alia', he has not made aware that the property which was being given away constituted practically the whole estate of the donor, and he did not seem to have brought home to the donor's mind the consequences to herself of

what she was doing. Thus, it is not sufficient that the executant knows the nature of the document, she must also realise what its effect on her will be.

(8) The first impugned document (Exhibit A) is dated the 19th September, 1938. It is a Hiba-bil-ewaz deed purporting to transfer to the defendant a house in Dariapur Sher of Patna town which is valued in the deed at Rs. 2,000/-. The motive for the deed is stated to be the executant's affection for the appellant whom she has maintained from his childhood and her anxiety that he should have residence of his own. There are two remarkable features about this document. The first is the number of times in which it is mentioned that the document has been read out and explained to Ayesha. Ayesha herself makes the statement three times, in the body of the document, in her endorsement of execution and in an endorsement said to have been made by her before the Sub-Registrar at the time of registration. In the nature of things, a bare statement of this sort has little value for the present purpose, as it begs the very question which is to be investigated. There must be proof that she had the capacity to understand it, or of something done or said by her which shows that she understood it. Then there is a note to this effect by the scribe. This is a feature which the document has in common with the other two impugned documents. None of the scribes has been examined as a witness and the Court is not in a position to assess the value to be attached to this explanation. Finally, there is an endorsement by Syed Muhammad (D.W. 4), whose evidence I shall discuss presently. Evidently, somebody, connected with the execution of this document realised that it was important that Ayesha should know, or at least should appear to have known, what she was doing. It is significant in these circumstances that no near relative of Ayesha other than the defendant himself was present. The only relatives present are said to have been Anwarul Haque (D.W. 3) and one Abdus Salam, both attesting witnesses, who have been found by the Subordinate Judge to be at most distant relatives of Ayesha and nearly related to the defendant. The second peculiar feature is that though there were as many as five attesting witnesses, they all attested on "the admission of the executant." Apparently, in spite of the alleged relationship Mt. Ayesha did not appear before any of the attesting witnesses. The second document is another Hiba-bil-ewaz., exhibit A (1), dated the 11th October, 1939, by which Ayesha purported to part with milkiat property in Semhari and Kohbara villages assessed to a total revenue of about Rs. 700/- per year together with eight kathas of Brahmotter land in village Kohbara. The approximate value of this property is stated to to be Rs. 2,000/- but this would appear to be a palpable understatement, an opinion which is confirmed by the third impugned document, which relates to the remaining milkiat interest of Ayesha in village Kohbara. The motive of the deed is again stated to be the affection which Ayesha bears to the defendant and her desire "to make such an arrangement so that he might live in full comfort." The defendant recites that it has been executed after obtaining "independent and legal advice" but no attempt has been made to show that she was advised by any independent person. The sale-deed, Exhibit B, is dated the 12th January 1943, and relates to milkiat property in Kohbara assessed to Government revenue of about Rs. 67/-. The consideration is stated to be Rs. 5,000/- partly adjusted in satisfaction of a loan of Rs. 3,925/- given by the defendant to Ayesha, partly left with the vendee for paying Government dues and partly left in cash before the Sub-Registrar. It may be accepted that the cash actually changed hands in the presence of the Sub-Registrar but it does not follow that this represents a real payment, for Ayesha was then behind the 'purdah'. By that time Ayesha is said to have lost the use of her eyes and the sale-deed purports to have been signed on her behalf by Mukhtar Ahmad (D. W. 2), who is also an attesting witness. There are as many as ten other attesting witnesses. Evidently the importance of making it appear that every thing was regular in the execution of this document was realised, but again no near relative was present other than the defendant. The Subordinate Judge has held that there was no passing of consideration and that Ayesha was not in need of money. This finding is based on substantial evidence and its correctness has not been challenged before us.

(9) In proof of the due execution of these three deeds, three witnesses have been examined. Anwarul Haque (D.W. 3) is a probationary Munsif-Magistrate in the State of Hyderabad and much stress has been laid upon him as a respectable and reliable witness. He figures as an attesting witness to both the documents of Hiba-bil-ewaz and it is he who identified Ayesha before the Sub-Registrar when the Second Hiba-bil-ewaz was registered. At the time when these two deeds were executed, the witness happened to be in Patna because he was a student in the local Law College. His home is in the Hyderabad State and his relationship with Ayesha is at most a distant one of which he was unable to give any particulars. The witness states that when the Sub-Registrar was registering the second document, he, the witness, read and explained the 'hibanama' to Ayesha and there is an endorsement to this effect on the document. Mokhtar Ahmad (D.W. 2), an attesting witness to the impugned sale-deed, was also a student when he attested the document. He too is at best very distantly connected with Bibi Ayesha. By that time Bibi Ayesha must have been in helpless state having lost the use of her eyes. Yet, here again, we find no near relative present and before the Sub-Registrar it is this student who identified Ayesha and who is said to have read and explained the document to her. More weight would, at the first sight, appear to attach to the evidence of Syed Muhammad (D.W. 4) an elderly lawyer practising at Patna. He is an attesting witness to the sale-deed and the second Hiba-bil-ewaz and is said to have identified Ayesha at the time of the registration of the first Hiba-bil-ewaz and to have read and explained the document to her. Unfortunately the weight of this gentleman's evidence is affected by a peculiar circumstance appearing in connection with the registration of the first Hiba-bil-ewaz. There are two endorsements on this document purporting to have been made in the presence of the Sub-Registrar by the lady whom he identified as the executant. Exhibit I (4):

"I got the contents of this deed read over and explained to me."

Exhibit I (5):

"I received one bound volume of Quaran Sharif and one gold ring in presence of the Sub-Registrar." The writing in which these two endorsements appear is markedly different both in firmness and in style from the endorsements of execution said to have been made by Ayesha on the two deeds of Hiba-bil-ewaz and the Subordinate Judge rightly expressed a doubt as to whether these endorsements were written by the same person who made the endorsement of execution.

(10) As regards Ayesha's capacity to understand the nature and effect of the documents which she was executing, there is only general evidence. We know that she was literate to the extent of being

able to sign her name and to make the necessary endorsements of execution and the like. Anwarul Haque (D. W. 3) and Syed Muhammad (D. W. 4) say that she was intelligent and understood business, but neither of them speaks of having actually seen her transacting business. The former deposes that he never had any connection with the management of her property and has never had any transaction with her. The latter admitted in cross-examination that he had no occasion to judge of her capacity to understand business. Reference has been made before us to the statement of Sheocharan Lal (P. W. 4) that Ayesha used to dictate letters. But even illiterate persons, who have no special capacity for understanding business, are quite capable of dictating letters. Stress has also been laid on a statement of Afzal (plaintiff No. 2), who was examined as P. W. 8, as showing a knowledge of the nature of these transactions. The witness made two contradictory statements. The one relied on is:

"It is Bibi Ayesha who told me that the two hibanamas and the kebala in suit had been executed by her as farzi documents and she also told me why she had executed these documents as farzi documents."

Accepting this statement for what it is worth, it does not help the defendant. The statement must have been made after the documents had been executed, whereas we are concerned with her knowledge and her intention at the time of the execution of these documents. Further, the statement shows, at most, a knowledge of the nature of the documents. It does not show that she was aware of the extent of the property covered by the documents and how her own position was likely to be affected by those documents. Also the statement does not show an intention on her part to execute those documents as genuine and effective documents. The case of the plaintiffs as regards the motive for the execution of farzi, that is to say, fictitious, documents of transfer, is that Ayesha was given to understand that the documents were necessary for the purpose of litigation with one Ramratan Babu, Mukhtar; the first Hiba as evidence of possession, the second Hiba in order to make herself out to be a pauper and the sale-deed to avoid the realisation of court-fee. We know that there was such a suit brought by Mt. Ayesha as a pauper and that the suit ultimately ended in a compromise. The suggestion as to the fictitious nature of these documents is, therefore, not without any basis. The evidence relied upon does not, in my opinion, prove that Ayesha knowingly executed these documents intending that they could be operative deeds.

[11] My inference is supported by the circumstances accompanying the reading and the explaining of the documents to Ayesha. On none of these occasions was any near relation of Ayesha present with the exception of the defendant alone. On these occasions the reading and explaining was done by the scribes of the particular documents—persons who have not been examined as witnesses and therefore persons whose acquaintance with the affairs of Mt. Ayesha and whose capacity to make Ayesha understand the purport and the effect of the documents in question, the Court is unable to judge. It is not usual to select scribes with particular regard to their intelligence and their conscientiousness. Ordinarily, any person who has acquired a certain amount of facility in drawing up formal documents and who happens to be available at the the time when the occasion for drawing up such a document arises, is engaged for the purpose. On two other occasions the reading and the explaining was done by mere students. On the only occasion the reading and the explaining was done by a person of such a standing that it might be premised that he was capable of advising the executant as well as of explaining the document. It is doubtful whether the person to whom the explaining was made was really Mt. Ayesha. Another circumstance consistent with the suggestion of farzi is the statement of Aklu Dhobi (D. W. 8), a tenant in the house in Dariapur, that upto the date of Ayesha's death he was paying the rent to Ayesha. Had Ayesha really intended the first Hiba executed by her to be an effective document and had she really intended, out of affection for the defendant, to transfer the house to the defendant, she would have told the witness that the house no longer belonged to her and that the rent was due not to her but to the defendant. Some papers were adduced in evidence to show that the defendant got his name mutated in respect of the property covered by the impugned deeds. As the defendant was looking after Mt. Ayesha's property, not much weight attaches to these papers and they have not been referred to before us. Nor has any reference been made to the account papers of the defendant himself which were rejected by the Subordinate Judge as unreliable.

[12] In the circumstances, which I have set out above, it appears to me that the physical act of Ayesha in executing the documents and her acknowedgment of execution before the Sub-Registrar at the time of registration is no proof that the mental element necessary for valid execution was present. Nor is it of any avail that, after Afzal spoke to her, Ayesha took no steps to disclaim the three transactions.

[13] For these reasons I agree with the Subordinate Judge that the defendant has failed to prove intelligent execution of the impugned documents and an intention to execute them as effective documents. Therefore, the appeal fails and I would dismiss it with costs.

[14] **Lakshmikanta Jha C. J.**—I agree.

D.R.R. *Appeal dismissed.*

A. I. R. (39) 1952 Patna 23 *[C. N. 8.]*

LAKSHMIKANTA JHA C. J. AND REUBEN J.

The Bukhtiarpur-Bihar Light Railway Co. Ltd.—Petitioner v. *The District Board, Patna, and another—Opposite Party.*

S. C. A. No. 57 and Misc. Judicial Case No. 216 of 1950, D/- 29-9-1950.

(a) Constitution of India, Arts. 132, 133 (1) (c), 134 (1) (c)—Certificate of fitness—Substantial question of law.

Under an agreement between the promoters of the Light Railway Company and the District Board of Patna the latter had a right of purchasing the Light Railway, subject to certain conditions, in accordance with the provisions of S. 41, Bengal Tramways Act. The District Board on 16-12-1949, gave six months' notice in writing to the Company, according to the provision of S. 41 of the Act, declaring its intention to exercise its right of purchasing the Light Railway with effect from 25-6-1950. On 17-5-1950, the petitioner company moved the High Court and prayed for a writ of mandamus restraining the District Board from taking possession of the Light Railway "except in due course of law". A rule was issued by the High Court on 23-6-1950, and a consent order was passed. One of the terms of the agreement between the parties was thus:

"The District Board will take possession of the undertaking, viz. the Bihar Bukhtiarpur Light Railway (including the Rajgir Extension) only after the purchase, to which the District Board claims to be entitled, has been legally completed." The petitioner's case was that the opposite party disturbed its possession by a forcible entry at midnight of 24-6-1950, in violation of the consent order, and a petition was moved in the High Court on 28-6-1950, praying for a writ of mandamus against opposite parties Nos. 1 and 2 and others, directing them to forbear from interfering with the possession of the petitioner over the Light Railway and also for a rule committing the opposite parties Nos. 1 and 2 for contempt of Court. On 19-7-1950, the petitioner filed a supplementary petition on the ground of complete dispossession and obtained a further rule calling upon the opposite parties Nos. 1 and 2 to show cause why a mandatory injunction should not issue against them directing them to restore possession of the Light Railway to the petitioner. In view of the admission that dispossession was complete, the rule relating to the issue of a writ to restrain the opposite party from disturbing the petitioner's possession was discharged by the High Court. It had been found that the opposite party had not, by its action complained of, committed any contempt of Court, nor had the petitioner made out a case for the issue of a writ of mandamus asked for:

Held (1) that a contempt of Court may be committed either when a person's action or inaction is in disobedience of an order of a Court or when his action or conduct is in disregard of an undertaking given to the Court. The order of the High Court incorporating the agreement was divisible into two parts, namely, (1) the agreement between the parties, and (2) the command of the Court superadded to it. It was open to two constructions. According to one view a consent order remains in the domain of contract and no undertaking to the Court can be implied simply by reason of the fact that a command of the Court is superadded to the agreement. According to the other view as soon as the sanction of the Court is superadded to an agreement, undertaking by the party to the Court is implied. The point raised was of great public as well as private importance, and the principle when finally decided by the Supreme Court would be of benefit not only to the parties who were directly involved in the present litigation but to a considerable body of other people also. Therefore it was a fit case for appeal to the Supreme Court and leave should be granted under Art. 133 (1) (c). Even treating the proceeding in the High Court as a criminal proceeding, in view of the fact that the principle involved was of wide public as well as private importance, the High Court would be justified in granting a certificate of fitness under Art. 134 (1) (c);

(2) the writ of mandamus can issue to a person, (or corporation) requiring him to do some particular thing which appertains to his office and is in the nature of a public duty. It could, however, be said that taking possession of the Light Railway by the District Board or its Chairman was in breach of duty appertaining to the office of the Chairman or the Corporation, for their duties are defined in the Local Self-Government Act. If there was an infringement of a fundamental right, it is a substantial point for consideration whether or not the power under Art. 226 is coupled with a duty. In deciding whether a decision of the High Court could be supported it would be necessary to consider one or both of two questions: (1) is the right alleged to have been infringed a fundamental right? and (2) If it is a fundamental right, does Art. 226 impose a duty in addition to conferring a power? Both of these were questions as to the interpretation of the Constitution of India and were substantial questions of law. The questions raised were matters of wide public importance; and in the absence of any authoritative decision of the Supreme Court directly on the point, the High Court ought to grant a certificate under Art. 132 : A. I. R. (35) 1948 Cal. 294 and 42 Cal. W. N. 203, *Ref.* [Paras 10, 11, 12, 21, 24]

(b) Contempt of Court — Proceedings—Nature of—Constitution of India, Art. 133.

Proceedings in contempt are regarded as anomalous in their nature, possessed of characteristics which render them more or less difficult of ready or definite classification in the realm of judicial power. Hence, such proceedings have sometimes been styled *sui generis*. But the proceeding for the purpose of leave to appeal to the Supreme Court is a civil proceeding, because the remedy to the petitioner can be given only by way of a civil execution: A.I.R. (16) 1929 Pat. 72 and A. I. R. (25) 1938 P. C. 295, *Rel. on.* [Para 12]

(c) Constitution of India, Arts. 32, 226—Distinction.

Per *Lakshmikanta Jha. C. J.* — A comparison of the provisions of Art. 32 with those of Art. 226 of the Constitution clearly shows that though the right to move the Supreme Court under Art. 32 for the enforcement of the fundamental rights is guaranteed to a citizen, such a right is not guaranteed under the provision of Art. 226, although the High Court has a wider field assigned to it in that it can issue writ for the enforcement of any of the fundamental rights conferred by Part III as well as for "any other purpose". No provision corresponding to the provision of Art. 32, Cl. (1), finds place in Art. 226. Therefore, even if there is an invasion of any fundamental right of a citizen, his right to move the High Court is not guaranteed. [Para 14]

(d) Constitution of India, Art. 226—Writs when can be issued.

Per *Lakshmikanta Jha, C. J.* — Writs of mandamus and other writs "of like nature" can issue for the protection of legal rights to a corporation or to a person holding a public office who is required by reason of such office to do some particular thing which appertains to his office; it is within the discretion of the Court issuing the writ to decline to interfere by a writ of mandamus or by any other writ "of like nature" if it considers that there is another legal remedy available to the aggrieved person. *Case law discussed.* [Para 15]

P. R. Das, Balbhadra Prasad Singh and S. M. Siddique (in No. 57); Dr. Sultan Ahmed, Abdus Salam Ismailee, Balbhadra Prasad Singh and S. M. Siddique (in No. 216) — for Petitioner ; The Advocate-General, and K. Dayal (in No. 57) ; K. K. Varma and K. Dayal (in No. 216) — for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('29) 56 Ind. App. 93 : (A. I. R. (16) 1929 P. C. 69). [Pr. 16]
('38) 17 Pat. 770: (A. I. R. (25) 1938 P. C. 295). [Pr. 12]
('50) A. I. R. (37) 1950 S. C. 124 : (51 Cri. L. Jour 1514). [Pr. 21]
('38) 42 Cal. W. N. 203. [Pr. 11]
('48) A. I. R. (35) 1948 Cal. 294 : (49 Cri. L. Jour 567). [Pr. 11]
('29) 8 Pat. 323 : (A. I. R. (16) 1929 Pat. 72: 30 Cri. L. Jour 741 F. B). [Pr. 12]
(1880) 5 A. C. 214: (49 L. J. Q. B. 577). [Pr. 21]
(1870) 2 Dougl. 524: 99 E. R. 334. [Pr. 20]
(1862) 30 L J. Q B. 271: (5 L. T. 289). [Pr. 20]
(1883) 12 Q. B. D. 471. [Pr. 17]
(1888) 21 Q. B D. 131: (57 L. J. Q. B. 433). [Pr 21]

Lakshmikanta Jha C. J.—There are two applications before us; one of them is under Art. 133, and the other under Art. 132 of the Constitution. Both of them arise out of the same order, and we are asked to certify that the case involves a substantial question of law as to the interpretation of the Constitution, or, at any rate, it is a fit case for appeal to the Supreme Court within the meaning of Art. 133, Cl. (1) (c).

[2] The petitioner is a public limited liability company and owns an undertaking known as the Bukhtiarpur-Bihar Light Railway, hereinafter to be referred to as the "Light Railway". The opposite party No. 1 is the District Board of Patna and the opposite party No. 2 is the Chairman of the District Board.

[3] The facts giving rise to the present applications are shortly these; The Light Railway was established about the year 1901 under the provisions of the Bengal Tramways Act, 1883 (Act III [3] of 1883) and under an agreement dated 21-8-1901 between the promoters of the Company and the District Board of Patna the latter had a right of purchasing the Light Railway, subject to certain conditions, in accordance with the provisions of S. 41 of the Act. It is alleged that the District Board on 16-12-1949, gave six months' notice in writing to the Company, according to the provision of S. 41 of the Act, declaring its intention to exercise its right of purchasing the Light Railway with effect from 25-6-1950. On 17-5-1950, the petitioner moved this Court and prayed for a writ of mandamus restraining opposite parties Nos. 1 and 2 from taking possession of the Light Railway "except in due course of law." A rule was issued by this Court, giving rise to miscellaneous judicial case No. 120 of 1950, and an *ad interim* order of injunction was also made. This case came up for hearing before a Division Bench of this Court, and on 23-6-1950, a consent order was passed. One of the terms of the agreement between the parties, runs thus:

"2. The District Board will take possession of the undertaking, viz, the Bihar Bukhtiarpur Light Railway (including the Rajgir extension) only after the purchase, to which the District Board claims to be entitled, has been legally completed". After the consent order was recorded the *ad interim* order of injunction was vacated."

[4] The petitioner's case is that the opposite party disturbed its possession by a forcible entry at midnight of 24-6-1950, in violation of the consent order, and a petition was moved in this Court on 28-6-1950, praying for a writ of mandamus against opposite parties Nos. 1 and 2 and others, directing them to forbear from interfering with the possession of the petitioner over the Light Railway and also for a rule committing the opposite parties Nos. 1 and 2 for contempt of Court. A rule was thereupon issued giving rise to miscellaneous judicial case No. 139 of 1950.

[5] On 19-7-1950, the petitioner filed a supplementary petition on the ground of complete dispossession and obtained a further rule calling upon the opposite parties Nos. 1 and 2 to show cause why a mandatory injunction should not issue against them directing them to restore possession of the Light Railway to the petitioner. These applications came up for hearing before a Division Bench of this Court, presided over by Reuben and Das JJ., who by their order dated 8-9-1950, discharged the rules.

[6] The case of the petitioner is that the conduct of the Chairman, District Board, was not straightforward and he entered into the agreement merely as a dodge by which he induced the Court to refrain from issuing an injunction against the District Board.

[7] At the hearing it was admitted that the District Board is in possession of the Light Railway. According to the allegation of the petitioner, dispossession took place since the passing of this Court's order dated 28-6-1950, whereas according to the opposite party, the taking of possession was peacefully effected at midnight of 24th/25th June. My learned brother has observed that an *ad interim* injunction was granted on 28-6-1950, on misrepresentation of facts by the petitioner. In view of the admission that dispossession is complete, the rule relating to the issue of a writ to restrain the opposite party from disturbing the petitioner's possession was discharged and there is no longer any controversy regarding this matter.

[8] It has been found that the opposite party has not by its action complained of committed any contempt of Court, nor has the petitioner made out a case for the issue of a writ of mandamus asked for.

[9] On the judgment of this Court the following two questions arise for decision by the Supreme Court: (1) Whether the opposite party has committed contempt of Court; (2) whether it is a case in which mandamus should issue directing the District Board and the Chairman of the District Board to restore possession to the petitioner it being admitted that dispossession is complete.

The decision of both these points depends upon the construction of the second clause of the agreement dated the 23rd June 1950, which I have already quoted.

[10] With regard to the first point, it may be observed that a contempt of Court may be committed either when a person's action or inaction is in disobedience of an order of a Court or when his action or conduct is in disregard of an undertaking given to the Court. In the case before us the petitioner contends that the action of the opposite party in taking possession of the undertaking before the sale "has been legally completed" is a breach of an undertaking to the Court and, therefore, they are punishable by committal. Alternatively, he contends that the agreement together with the Court's order thereon amounts to an injunction to the District Board not to take possession till the title is complete and its injunction has been disobeyed. In order to appreciate the argument I consider it necessary to state the position arising on the consent order.

[11] The order of this Court incorporating the agreement is divisible into two parts, namely, (1) the agreement between the parties, and (2) the command of the Court superadded to it. It is open to two constructions. According to the view of the Calcutta High Court in the case of *Nisha Kanto* v. *Saroj Bashini*, A.I.R. (35) 1948 Cal. 294, as well as the view taken .by the learned Judges in this case, a consent order remains in the domain of contract and no undertaking to the Court can be implied simply by reason of the fact that a command of the Court is superadded to the agreement. It has been found as a matter of construction that no undertaking was given by the opposite party to the Court. According to the decision in this case, taking of possession by the opposite party is in breach of an undertaking to the petitioner and not in breach of any undertaking to the Court. The other view is that as soon as the sanction of the Court is superadded to an agreement, undertaking by the party to the Court is implied. The case of *Hari Charan Day* v. *Ranjit Kumar*, 42 Cal. W. N. 203, is in support of this view. The argument of the Advocate General on behalf of the opposite party is that, as no undertaking whatsoever was given to the Court by the District Board or the Chairman, there was no contempt, and the leave should be refused. The argument, of Mr. P. R. Das, on behalf of the petitioner, on the other hand, is that the agreement between the parties embodied in clause (2) of the consent order, though in form affirmative, connotes in substance a negative as well as an affirmative undertaking. According to Mr. Das, affirmatively there is an undertaking by the District Board to the Company that it will take possession of the undertaking only after the purchase "has been legally completed"; and negatively there is an undertaking or promise to the Court that it will not take possession until the purchase "has been legally completed." He submits further that the order of the Court, read as a whole, is in the nature of a prohibitory injunction by the Court commanding the opposite party to refrain from doing anything in breach of the undertaking. He urges, therefore, that the opposite party is guilty of contempt of Court in taking possession of the Light Railway in violation of the injunction and breach of the implied promise to the Court. The point raised seems to be of great public as well as private importance, and the principle when finally decided by the Supreme Court will be of benefit not only to the parties who are directly involved in the present litigation but to a considerable body of other people also. Therefore, in my opinion, it is a fit case for appeal to the Supreme Court and leave should be granted. The Advocate General, on behalf of the District Board, opposed the grant of a certificate on the ground that the proceeding in this Court was a criminal proceeding and therefore, leave can be granted only under Article 134, Clause (1) (c) of the Constitution. Even treating the proceeding in this Court as a criminal proceeding, I think that, in view of the fact that the principle involved is of wide public as well as private importance, we would be justified in granting a certificate of fitness under Article 134, Clause (1) (c).

[12] It may be observed that proceedings in contempt are regarded as anomalous in their nature, possessed of characteristics which render them more or less difficult of ready or definite classification in the realm of judicial power. Hence, such proceedings have sometimes been styled *sui generis* (*In re Murli Mahohar Prasad*, 8 Pat. 323 at p. 337). We are, however, of the opinion that the proceeding for the purpose of leave to appeal to the Supreme Court is a civil proceeding, because the remedy to the petitioner can be given only by way of a civil execution. Our opinion gets support from the following passage of Halsbury's Laws of England, volume 7, S. 638 (Hailsham's Edition, volume 7, Art. 37, p. 24). :

"In circumstances involving misconduct, contempt in procedure partakes to some extent of a criminal nature, and then bears a twofold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the State, a penal or disciplinary jurisdiction, to be exercised by the Court in the public interest."

The recent decision of the Privy Council in the case of *S. N. Bannerjee* v. *Kuchwar Lime and Stone Co., Ltd.*, 17 Pat. 770 is directly in point. It related to an alleged disobedience of an injunction, and the Judicial Committee treated as civil proceedings, the proceedings in contempt taken against parties inhibited by the injunction. The injuncton in that case was granted in a civil suit but, on principle, there appears to be no difference where, as here, the injunction said to have been disobeyed is civil in its nature.

[13] With regard to the second point raised by the petitioner, the question is whether it involves a substantial question of law within the meaning of Article 132 of the Constitution.

[14] The argument of Mr. P. R. Das is that the District Board as a public body and the Chairman as its head have, by illegally taking possession of the Light Railway in breach of their undertaking, deprived the petitioner of its right to hold property ; their action, according to him is an invasion of its fundamental right to hold property within the meaning of Art. 19, cl. (1) (f) of the Constitution. Therefore, he contends, the petitioner has a right to move this Court to issue a writ of mandamus to the opposite party for the enforcement of its guaranteed fundamental right. He concedes, however, that a right of mandamus cannot issue to a private individual or (sic) an invasion by him of a fundamental right. According to him if a person holding a public office, or a corporation, interferes with the proprietary right of a citizen, it is the duty of the High Court under Art. 226 to give adequate relief by issuing a writ of mandamus to the wrong-doer. This argument, in my opinion, is not well founded. A comparison of the provisions of Art. 32 with those of Art. 226 of the Constitution clearly shows that though the right to move the Supreme Court under Art. 32 for the enforcement of the fundamental rights is guaranteed to a citizen, such a right is not guaranteed under the provision of Art. 226, although the High Court has a wider field assigned to it in that it can issue writ for the enforcement of any of the fundamental rights conferred by Part III as well as for "any other purpose." No provision corresponding to the provision of Art. 32, cl. (1), finds place in Art. 226. Therefore, even if there is an invasion of any fundamental right of a citizen, his right to move the High Court is not guaranteed.

[15] An examination of the authorities giving the origin and the history of mandamus and other writs "of like nature" will show that, in order to attract the provision of Art. 226, the aggrieved person must satisfy the Court that the person to whom the writ is to issue is a person holding a public office who is required by reason of such office to do some particular thing which appertains to his office. In my opinion, two propositions are well settled in law by a long course of decisions : (1) writs of mandamus and other writs "of like nature" can issue for the protection of legal rights to a corporation or to a person holding a public office who is required by reason of such office to do some particular thing which appertains to his office ; (2) it is within the discretion of the Court issuing the writ to decline to interfere by a writ of mandamus or by any other writ "of like nature" if it considers that there is another legal remedy available to the aggrieved person.

[16] It may be observed that the writs mentioned in Art. 226, including mandamus, have not been defined in the Constitution of India ; but it must be presumed that, when the constituent assembly has delibrately used a term which has a known legal significance in law, it has attached to that term that known legal significance *L. P. E. Pugh* v. *Ashutosh Sen*, 56 Ind. App. 93 at p. 101. In order, therefore, to understand the known legal significance of the word "mandamus" we have to look to its history under the common law of England. Mr. Das contends that, whatever may be the law as to the granting of writ of mandamus under the common law of England, in India the history of writs begins with the Constitution. He concedes, however, that, as the word "mandamus" has not been defined by the Constitution, its historical origin under the common law of England can be of aid only to ascertain the nature of the writ of mandamus which the High Court is empowered to issue under Art. 226 of the Constitution, because, he contends, the writs which the High Court has power to issue are not identical with the common law writs of England but they are "in the nature of" such writs.

[17] The historical origin of writs shows that according to the common law of England a writ of mandamus issued from the King's Bench, and was a command directing any person, corporation, or inferior Court of Judicature in the King's dominions to do *some particular thing* therein specified appertaining to its office or duty, which the Court of King's Bench supposed to be consonant to right and justice, where the performance of the duty sought to be enforced could not be compelled by action. In the case of the *Queen* v. *Commissioners of Inland Revenue*, (1883) 12 Q. B. D. 471 at p. 478, the law as to the granting of writs is thus summarised by Bowen L. J. :

> "A writ of mandamus, as everybody knows is a high prerogative writ, invented for the purpose of supplying defects of justice. By Manga Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done."

In Halsbury's Laws of England the law relating to a writ of mandamus is thus summarised :

> "The writ of mandamus is a high prerogative writ of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior Court, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty." Hailsham's edition, Vol. 9, S. 1269, p. 744).

And Stephen in his Commentaries on the Laws of England (vol. III, p. 668) has summarised the law as follows :

> "The power of issuing this (mandamus) writ belongs, by virtue of the Judicature Act, 1873, S. 34, primarily to the King's Bench Division. In its form, it is a command issuing in the King's name, and directed to any person, corporation, or inferior Court, within the King's domi-

nions, requiring him or them to do some particular thing therein specified which appertains to his or their office and duty."

[18] Thus it is quite clear that the writs of mandamus can issue to a person, (or corporation) requiring him to do some particular thing which appertains to his office and is in the nature of a public duty. It cannot, however, be said that taking possession of the Light Railway by the District Board or the Chairman is in breach of duty appertaining to the office of the Chairman or the corporation, for their duties are defined in the Local Self-Government Act.

[19] It is equally a well established rule of practice in England that the power of the King's Bench to grant writs, including writs of mandamus, is discretionary. But the contention of Mr. Das is that if the other remedy be not equally convenient, beneficial and effectual, the High Court has no power to decline to issue a writ of mandamus to give adequate relief. I may state that an examination of the decisions of the English Courts shows that no one can claim the grant of a prerogative writ as a matter of right.

[20] In the case of the *King* v. *The Governor and Company of the Bank of England*, (1870) 2 Dougl. 524 at p. 526 : 99 E. R. 334, Lord Mansfield stated the law thus :

"When there is no specific remedy, the Court will grant a mandamus that justice may be done. But where an action will lie for complete satisfaction equivalent to a specific relief, and the right of the party applying is not clear, the Court will not interpose the extraordinary remedy of a mandamus."

In re Barlow, (1862) 30 L. J. Q. B. 271, it was held by Hill J:—

"It is well settled that where there is a remedy equally convenient, beneficial and effectual, a mandamus will not be granted. This is not a rule of law, but a rule regulating the discretion of the Court in granting writs of mandamus; and unless the Court can see clearly, that there is another remedy equally convenient, beneficial and effectual, the writ of mandamus will be granted, provided the circumstances are such in other respects as to warrant the granting of the writ."

[21] In the case of the *Queen* v. *The Registrar of Joint Stock Companies*, (1888) 21 Q. B. D. 131 at p. 136 the law was thus stated by Wills J. :

"It is a well established rule of practice, as to which there can be no doubt, that, a mandamus ought not to be granted where there is another appropriate remedy. I do not wish to put it so high as to say that the other remedy must be as convenient, for I think that if no reasonable objection can be taken to the alternative remedy a mandamus ought not to be granted."

Mr. Das, however, contends that whatever may be the governing principle laid down by the Judges of foreign Courts in issuing writs, in India this principle ought not to be extended to cases coming under the Indian Constitution. He submits on the authority of *Frederic Guilder Julius* v. *The Lord Biship of Oxford*, (1880) 5 A. C. 214 at p. 223 that even if another remedy be open to a person there may be something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the donee of the power to exercise it for the benefit of those who have that right when required on their behalf. His submission is that under the consent order certain duties were cast upon the District Board and the Chairman of the District Board, and on their acting contrary to the duty it was obligatory on the High Court, as the donee of the power under Art. 226 of the Constitution, to enforce such duty by issue of a writ of the nature of mandamus. According to him, the expression "shall have power" used in Art. 226, cl. (1) of the Constitution, even though in form it is discretionary, becomes obligatory and the High Court is bound to issue a writ if it is satisfied that there has been an invasion of the legal right. It is contended that the High Court can exercise such power under Art. 226, not only when there is invasion of fundamental rights, but also in other appropriate cases, even though another remedy is open to the complainant. In this respect, it is contended, the field of the High Court is wider than the field assigned to the Supreme Court. In my opinion, the principles laid down in the case of *Frederic Guilder Julius* v. *The Lord Bishop of Oxford*, (1880) 5 A. C. 214 at p. 223 can apply only when a public officer is required by reason of his office to do some particular thing which appertains to his office and he acts in breach of such duty. This principle, I think, cannot be extended to a case where a person holding a public office acts in breach of a duty imposed upon him under a contract. It is not for the Supreme Court to decide whether it was the intention of the framers of the Constitution to guarantee a right to move the High Court for a remedy in every case in which a citizen feels aggrieved, although he may have a remedy by way of a regular suit or otherwise. The Supreme Court has recently observed in the case of *Romesh Thappar* v. *State of Madras*, A. I. R. (37) 1950 S. C. 124 at p. 126 as follows :

"That Article (Art. 32) does not merely confer power on this Court, as Art. 226 does on the High Courts, to issue certain writs for the enforcement of the rights conferred by Part III or for any other purpose, as part of its general jurisdiction. In that case it would have been more appropriately placed among Arts. 131 to 139 which define that jurisdiction. Article 32 provides a 'guaranteed' remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. This Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights."

I would not have felt inclined to grant a certificate but for the fact that a large number of petitions have been filed in this Court and the questions raised before us are matters of wide public importance; and in the absence of any authoritative

decision of the Supreme Court directly on the point, I think we ought to grant a certificate under Art. 132 of the Constitution in view of the Constitutional questions raised before us.

(22) In the circumstances stated above, I would grant a certificate to the applicant for leave to appeal to the Supreme Court under Arts. 132, Cl. (1), and 133 (i) (c) of the Constitution.

(23) REUBEN, .: I agree with my Lord the Chief Justice, and wish to add a few observations.

(24) I disposed of the prayer for a writ of mandamus on the basis that the petitioner Company had come to the Court with a false statement and did not deserve a writ. Das, J., held that the right of the petitioner Company had been encroached on but refused to interfere because another remedy was available. Both of us proceeded on the basis that the power under Art. 226 is discretionary. It is conceded by the learned Advocate-General that, if there is an infringement of a fundamental right, it is a substantial point for consideration whether or not the power under Art. 226 is coupled with a duty. If a duty attaches, the case could not have been disposed of in the manner described above. Das J. would have had to consider whether the right infringed is a fundamental right. If he held it is, he would have had to hold that a writ of mandamus should issue. In the same way I would have had to consider whether any right was infringed and, if so, whether it was a fundamental right. Therefore, in deciding whether our decision can be supported it will be necessary to consider one or both of two questions: (1) Is the right alleged to have been infringed a fundamental right? and (2) If it is a fundamental right, does Art. 226 impose a duty in addition to conferring a power? Both of these are questions as to the interpretation of the Constitution of India. That the second of these questions is a substantial question is conceded by the learned Advocate-General. As regards the first question, I am inclined 'prima facie' to answer it in the negative. I would distinguish between the right of a citizen "to hold property" and his title to hold a particular property. In the present case the District Board challenges the title of the petitioner Company to the disputed property but there is no challenge to the right of the Company to hold property. It is not possible, however, to give a definite answer to this question without an investigation which would be inappropriate in a proceeding, the object of which is merely to ascertain whether there is a substantial question of law as to the interpretation of the Constitution. I have no doubt that there is such a question.

(25) Some mention should be made of an objection of a preliminary nature which was raised, namely, that an order under S. 162, Indian Companies Act, has been passed by the Calcutta High Court winding up the petitioner Company, and only the Official Liquidator is entitled to prosecute the present petition. The answer is that an appeal has been filed against the winding up order and the appellate Court has stayed "the operation of the (winding up) order" until the disposal of the appeal. The intention of the appellate Court to restore the 'status quo ante' the winding up order is clear from its direction to the Official Liquidator to give up to the petitioner Company all the assets of the petitioner Company. Under Ss. 171-A and 178, Indian Companies Act the Official Receiver, who is here the Official Liquidator, is bound to take into his custody all the assets of the Company. This is a statutory duty which has to be performed by the Official Liquidator if he exists as such. The operation of the winding up order having been stayed, however, there is no Official Liquidator and the direction of the Court to which I have referred above is not contrary to law. Much reliance has been placed in opposition to this view on the direction of the Court that

> "the said Official Liquidator shall hold until the further order of this Court rupees ten lakhs to the credit of the said appellants lying in the Imperial Bank of India, Patna, which sum will remain in the said Bank and would be deemed to be in the possession of the Official Liquidator."

This is merely the condition imposed by the Court when granting the stay. All it requires is that the deposit of rupees ten lakhs made by the District Board in favour of the petitioner Company in the Imperial Bank of India at Patna will remain at the credit of the Official Receiver. By an inadvertence he has been described as the "Official Liquidator." This is a mistake of the office of the High Court in drawing up the formal order of stay, and does not indicate an intention to keep the Official Liquidator in existence — an intention which is quite inconsistent with the direction for staying the operation of the winding up order.

D.H. *Applications allowed.*

A. I. R. (39) 1952 PATNA 28 (C. N. 9)

AHMAD, J.

Kedar Nath, Petitioner v. The State of Bihar

Criminal Revn. No. 445 of 1951, D/- 19-7-1951.

Bihar Cotton Cloth and Yarn (Control) Order, 1948, Cl. 2 — Register of Daily transactions — Transactions when to be entered — Prosecution under S. 7, Essential Supplies (Temporary Powers) Act (1946) for contravening condition of licence — Held no contravention.

Clause 2 means that the transaction of each day is to be entered in a register. From the point of view of convenience and correctness this register showing the transaction of the day can be filled up only at the close of the transaction for that day. Neither the terms of the clause require that the register should be filled up from minute to minute and hour to hour or as soon as a new stock is brought into the shop, nor does the general practice or rule of convenience prevalent in the business world support the idea that it should be filled up from minute to minute or hour to hour, or as soon as the stock is brought into the shop. AIR (35) 1948 Pat 356 Rel. on. 27 Cal 118 (PC) Ref. (Para 4)

The accused held licence for dealing in cloth. The stock in his shop was checked and verified with reference to the Stock Register. On checking twenty-five pairs of saris were found to be in excess in the shop of the accused and were not found entered in the Stock Register. The accused was prosecuted under S. 7 of the Essential Supplies (Temporary Powers) Act, 1946 for having no proper account of the cloths in his stock and thereby contravening the conditions of the licence issued to him under the Bihar Cotton Cloth and Yarn (Control) Order, 1948. The defence of the petitioner was that the said twenty-five pairs of saris were purchased by his Munib that very day from a certain firm, but no sooner than the Munib had brought the saris from the said firm, he received news of the sudden illness of his son and so he left the petitioner's shop without entering the twenty-five pairs of saris in the Stock Register. The cash memo in respect of the said saris was also with the petitioner's Munib and as such it could not be produced at the time of the checking. He also contended that there could be no contravention of the conditions of the licence for mere non-entry in the Stock Register of the stock re-

ceived soon after its receipt until the entries for the day had closed.

'Held' that there may be a presumption that these twenty-five pairs of saris found in the shop must be a part of the stock which was in the shop from before. The presumption was, however, rebuttable.

'Held further' that the explanation given by the accused was sufficient to discharge the onus laid on him under S. 106, Evidence Act, and to account for the excess of twenty-five pairs of saris found in the shop on the day of checking. The mere non-entry of this purchase in the Stock Register during the business hours before the close of the day did not amount to any contravention of the terms of the licence. AIR (24) 1937 Rang 83 (FB) Rel. on. (*Para 5*)

Balbhadra Prasad Singh, for Petitioner. Govt. Advocate and S. C. Chakravarty, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('99) 26 Ind App 254: (27 Cal 118 P C) (Pr 4)
('79) 4 Bom 576 (Pr 4)
('48) A I R (35) 1948 Pat 356: (49 Cri L Jour 576) (Pr 4)
('37) A I R (24) 1937 Rang 83: (38 Cri L Jour 524 FB) (Pr 5)
(1935) A C 462: (104 L J K B 433) (Pr 5)

JUDGMENT: This application in revision is against an order passed by Mr. Uma Shankar Prasad, Sessions Judge of Saran, upholding the order of Mr. Shree Krishna Prasad, Munsif Magistrate, Chapra, convicting the petitioner under S. 7 of the Essential Supplies Act, 1946 for having no proper account of the cloths in his stock and thereby contravening the conditions of the licence issued to him under the Bihar Cotton Cloth and Yarn (Control) Order, 1948. He has been sentenced to rigorous imprisonment for one month and to a fine of Rs. 200/-, in default rigorous imprisonment for one month more.

(2) The prosecution story, briefly stated, is that the petitioner held licence for dealing in cloths and had his shop in the town of Chapra. On 4-10-1950 in the afternoon, Mr. S. K. Ghatak, a Magistrate, along with Akhouri Himachal Prasad Singh, Deputy Superintendent of Police, checked the stock in the petitioner's shop and verified the same with reference to the Stock Register. On checking, twenty-five pairs of saris were found to be in excess in the shop of the petitioner and were not found entered in the Stock Register. The defence of the petitioner has been that the said twenty-five pairs of saris were purchased by the Munib of the petitioner that very day from the firm of Tansuk Rai Baijnath, but no sooner than the Munib had brought the saris from the said firm, he received news of the sudden illness of his son and so he left the petitioner's shop without entering the twenty-five pairs of saris in the Stock Register. The cash memo. in respect of the said sari was also with the petitioner's Munib and as such it could not be produced at the time of the checking. His case further has been that there could be no contravention of the conditions of the licence for mere non-entry in the Stock Register of the stock received soon after its receipt until the entries for the day had closed. And, in fact, the entries could not be closed till the close of the business for the day. So if the twenty-five pairs of saris purchased on that very day from the firm of Tansukh Rai Baijnath had not been entered in the Stock Register till the afternoon on that day, when the checking was made, it did not in law, constitute any contravention of the terms of the licence. The petitioner, in support of his defence, has examined his own Munib as aslo the Munib of the firm of Tansukh Rai Baijnath and has produced the cash memo issued to the petitioner and its counterpart retained in the firm of Tansukh Rai Baijnath. The charge framed against the petitioner at the trial was as follows:

"That you, on or about 4-10-1950, at Chapra being a licensee under Bihar Cotton Cloth Control Order, 1948 contravened the provisions of the licence issued to you under the said Order, to wit, did not maintain your stock register correctly & thereby committed an offence punishable under S. 7 of the Act 24 of 1946 as amended by Act 52 of 1950 and within my cognizance, and I hereby direct that you be tried by the said Court on the said charge."

The prosecution examined two witnesses in support of the charge, P.W. 1 is Mr. S. K. Ghatak, the Magistrate who checked the stock in the petitioner's shop. P. W. 2 is Akhouri, H. P. Singh, Deputy Superintendent of Police, who accompanied Mr. Ghatak at the time of checking. The petitioner has examined two witnesses in support of his defence. D.W. 1 is Basdeo Narayan, who is the Munib of the firm of Tansukh Rai Baijnath. D.W. 2 is the Munib of the petitioner in his cloth shop.

(3) Mr. Balbhadra Prasad Singh, learned advocate appearing for the petitioner, has raised the following points. Firstly, that the prosecution having failed to prove that the balance struck on the previous day was wrong, and that the excess of twenty-five pairs of saris found in the shop was in stock from sometime before the day of checking, the defence set up by the petitioner should have been accepted, as there is nothing impossible in it, and more so for the reason that the best evidence that could have been secured by the petitioner in support of his defence had been placed before the Court. Secondly, that the terms of licence issued to the petitioner do not contemplate that every purchase of a new stock, brought to the shop should be entered in the Stock Register the moment it is received there. Under the terms, the new stock can be entered and should be entered in the Stock Register till the time of the close of the business when the Stock Register is generally written and the balance is struck.

(4) Clause 2 of the Bihar Cotton Cloth and Yarn (Control), Order, 1948 reads:

"A register of daily transaction in the form below shall be correctly maintained by wholesale and retail dealers separately for (a) dhoties and saris by numbers, (b) cloth normally sold by yardage in yards and that by weight in pounds, (c) other materials sold, chaddars, towels, etc., by numbers for each kind and (d) yarn by counts in weight."

There is a proviso also attached to the clause, but we are, however, not concerned with that proviso in this case. This clause speaks of a register of daily transactions. According to the ordinary meaning, it means that the transaction of each day shall be entered in it and, naturally, from the point of view of convenience and correctness this register showing the transaction of the day can be filled up only at the close of the transaction for that day. Neither the terms of the clause require that the register should be filled up from minute to minute and hour to hour, or as soon as a new stock is brought into the shop, nor does the general practice or rule of convenience prevalent in the business world support the idea that it should be filled up from minute to minute or hour to hour, or as soon as the stock is brought into the shop. The two registers exhibited in the

case and containing the entries for a number of months also prove that the practice in the shop had always been to make one total entry of all the purchases of one class of cloth made during a particular day and not to enter different entries in the column of that day for the different purchases made during that day. It implies, therefore, that the different lots of cloth of one class brought into the shop on a particular day were lumped together and entered as one purchase and this must have been done at the close of the transactions for the particular day. The learned Advocate for the petitioner has, in support of the general practice prevalent in the business world regarding the entry of purchase and sale in the Stock Register, relied on two cases. The first case is that of 'Deputy Commissioner of Bara Banki v. Ram Parshad', 26 Ind App 254. The relevant passage relied upon is 'at page 260', where their Lordships, dealing with the provisions of Section 34 of the Indian Evidence Act, have observed:

"But on the authority of a decision of the Bombay High Court in 'Munchershaw Bezonji v. New Dhurumsly S. and W. Co.', 4 Bom 576, it held that the entries were not relevant under S. 34 of the Indian Evidence Act, the book not being regularly kept in the course of business within the meaning of that section. In the case referred to the learned Judge held that the words in S. 34 'books of account regularly kept in the course of business' mean books entered up from day to day, or from hour to hour, as transactions take place. Their Lordships are unable to approve of this decision. It gives a much too limited meaning to S. 34. If it were correct, merchants' bankers' books regularly kept would in many cases be excluded from being used as corroborative evidence. The time of making the entries may affect the value of them. but should not, if not made from day to day or from hour to hour, make them entirely irrelevant."

Mr. Balbhadra Prasad Singh, relying on this passage, contends that this authority is strongly in support of his contention that in the business world the entries are made in the books not necessarily from hour to hour, as transactions take place, or even from day to day. But as in this case Cl. 2 requires that it must be done from day to day, at best, it can mean that the entry should be made in Stock Register at the close of the day and not necessarily from hour to hour. Therefore, if the defence version is accepted that the twenty-five pairs of saris had been purchased on the day when the checking was made, the mere fact that the purchase had not been entered in the Stock Register till the time of checking, that is, sometime in the afternoon, it cannot, in law, create any liability for contravening the terms of Cl. 2 of the said Order. From the language of the clause, as well as on the ground of general practice prevalent in the business world, as proved in this case by the entries in the Stock Register itself, the implication of Cl. 2 is that the Stock Register should be filled up from day to day and not from hour to hour. Meredith, J., in the case of Rameshwar Lal v. Emperor', AIR (35) 1948 Pat 356 observed:

"The shop-keeper is not expected to keep his books entered up to the minute. The ordinary course of business will be to write up the books once daily. In the circumstances it does not appear to me that any non-compliance with the terms of the licence was established."

(5) The next point contended on behalf of the defence is that the twenty-five pairs of saris had been purchased on that very day and they were not a part of the stock coming in the shop from before. There is no evidence on the side of the prosecution that this extra stock of twenty-five pairs of saris was present even on the previous day. From the mere presence of these extra saris, the prosecution has inferred that it must have been present there from before. There is nothing on the record to prove that the balance struck in the Stock Register on the previous day was not true and consistent with the stock present in the shop. No doubt, there may be a presumption that these twenty-five pairs of saris found in the shop must be a part of the stock which was in the shop from before. The presumption is, however, rebuttable. In this case, I think, the defence has sufficiently explained the presence of these extra twenty-five pairs of saris in the shop on that day. The explanation given by the defence is not in any way improbable and much less impossible. The defence witnesses examined on behalf of the petitioner state on oath in support of the purchase. The voucher given to the Munib of the petitioner and its counterpart from the firm of Tansukh Rai Baijnath have been produced in corroboration of their oral evidence. I think, the best that could be done by the petitioner to prove his explanation has been done in this case, and he has discharged the onus put upon him under S. 106, Evidence Act. The learned Sessions Judge has discarded the counterfoil on the ground that the three leaves of the counterfoil were found torn. In fact, on inspection, I found that only one leaf is missing. The two which are said to be missing are counterfoils issued to customers. This fact may be a ground for suspicion against the genuineness of the counterfoil. But the prosecution would have been well advised to give a chance to the Munib of the Firm of Tansukh Rai Baijnath to explain this fact. It woud be rather unfair to draw an inference from certain irregularity found in the counterfoil, without giving a chance to the person who maintains it, to explain the same. Even if it is taken as a ground of suspicion and for that reason it is said that the petitioner has failed to prove his defence, I think that the matter does not rest there. The rule of law:

"that whilst the prosecution must prove the guilt of the accused there is no such burden laid on the accused to prove his innocence and it is sufficient for him to raise a doubt to his guilt; he is not bound to satisfy the jury of his innocence" (as laid down in the case of 'Woolmington v. Director of Public Prosecutions', (1935) AC 462) is in no way inconsistent with the law in British India,"

as held in the case of 'Emperor v. U. Damapala', AIR (24) 1937 Ran 83, Roberts, C. J., has further observed therein,

"By S. 106, Evidence Act, when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. the burden of proof referred to here is that of introducing evidence merely and the phrase is used in the same sense as in S. 105. S. 106 does not cast any burden on an accused person to prove that no crime was committed by proving facts specially within his knowledge, nor does it warrant the conclusion that if anything is unexplained which the Court thinks the accused could explain he ought therefore to be found guilty."

Dunkley, J., in that very case observed:

"The burden is on the prosecution to establish the guilt of the accused beyond reasonable doubt, and if upon a review of all the materials on the record there appears a reasonable doubt as to whether the case falls within any exception, the prosecution has failed to discharge that burden, and the accused must be acquitted, or convicted only of the minor offence, as the case may be."

I think, in this case the prosecution has not at least proved that the explanation given by the defence regarding the purchase of the twenty-five pairs of saris on the day of checking was false, or that the excess stock of tweney-five pairs of saris was not purchased on that day. In such circumstance, the accused is entitled to the benefit of doubt and the explanation cannot be thrown out as not even worth consideration. I hold the explanation given by the petitioner is sufficient to discharge the onus laid on him under Section 106, Evidence Act, and to account for the excess of twenty-five pairs of saris found in his shop on the day of checking. The mere non-entry of this purchase in the Stock-Register during the business hours before the close of the day, as already held by me, does not amount to any contravention of the terms of the licence.

(6) Therefore, the charge against the petitioner has not been proved beyond reasonable doubt. The application is accordingly allowed and the conviction and sentence passed against him are set aside and the rule is made absoute.

V.S.B. *Conviction set aside.*

A. I. R. (39) 1952 PATNA 31 (C. N. 10)

SPECIAL BENCH

REUBEN, RAMASWAMI AND C. P. SINHA, JJ.

In the matter of Shyam Chandra Prasad.

Civil Ref. No. 2 of 1950, D/- 17-9-1951.

Legal Practitioners' Act (1879), Ss. 13 and 14 — Misconduct — Negligent identification by mukhtear — Suspension from practice for one year ordered.

'S', a mukhtear figured as a witness on a bond executed by 'K' in respect of a loan taken by him under the Agriculturists' Loans Act, his endorsement being "I know 'K' personally who has signed in my presence". It transpired ultimately that there was no person of the name and description as identified by the mukhtear. In a proceeding against the Mukhtear under the Legal Practitioners Act the Mukhtear admitted that he did not know 'K' personally but that he had been deceived by J. who was known to him, and on whose request he made the endorsement of identification.

'Held' that it was at least a case of negligent identification and the appropriate penalty in the circumstances would be suspension from practice for a period of one year. A I R (16) 1929 Pat 339 (S.B.) and AIR (17) 1930 Pat 495 (1) (F.B) Ref. (*Para 5*)

Anno: Legal Practitioners' Act, S. 13 N. 8, 13.

Gupteshwar Prasad, for Reference — Standing Counsel — Against Reference.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('29) A I R (16) 1929 Pat 339: (115 Ind Cas 679 S B) (Pr 5)

('30) A I R (17) 1930 Pat 495 (1): (31 Cri L J 1130 *F B*) (*Para 5*)

REUBEN, J.: This is a reference under S. 14 of the Legal Practitioners' Act against Shayam Chandra Prasad, Mukhtear, practising at Muzaffarpore.

(2) On 22nd of February 1946 an application for a loan of Rs. 1200/- under the Argiculturists Loans Act, 1884, was filed before the District Magistrate of Muzaffarpore by a person who signed himself as Kantu Jha son of Phula Jha, resident of village Dhamuli Ramnath, Madhuban, District Muzaffarpore The application was enquired into by a Sub Deputy Magistrate Mr. S. M. Panjiar who reported the security offered to be sufficient for a loan of Rs. 500, which amount he recommended accordingly subject to a further enquiry as to whether the property was free from encumbrances. A ministerial officer thereupon enquired into the existence or otherwise of encumbrances and he having reported in the negative a loan of Rs. 500 was advanced to the applicant on a bond executed by him on 29th of March 1946. Upon this bond the Mukhtear figures as a witness, his endorsement being "I know Kantu Jha personally who has signed in my presence". Later in the year 1948 when a certificate was filed for the recovery of the amount advanced it was reported by the peon sent to serve the notice in the certificate proceedings that there was no person of the name of Kantu Jha in this village. As a result of further enquiries proceedings were drawn up against the Mukhtear and have resulted in the present reference.

(3) It has been urged before us on behalf of the Mukhtear that there was in fact no wrong identification. The correctness of the report that there is in that particular village no one of the name of Kantu Jha is not contested but it is urged that one Rameshwar Jha of village Basant, police station Katra, who is said to be the nephew of one Jagdish Jha, resident of Dhamauli Ramnath, was in fact the applicant for the loan and is also known as Kantu. There is no suggestion that this Rameshwar Jha has any interest in the property which was given in security for the loan and that Government has not been defrauded. In support of the suggestion reference is made to a statement made by the village Choukidar Garbhu Chamar in cross-examination that the said Rameshwar Jha is also known as Kantu Jha. The witness did not appear to know much about Rameshwar Jha, for he could not name his father. I am unable to accept the suggestion because it does not find place in the written explanation submitted by the Mukhtear in answer to the notice calling upon him to show cause in the proceeding. He admitted clearly in that written explanation that he had been deceived by Jagdish Jha and that the identification was not a true one. The suggestion that Rameshwar Jha is also known as Kantu Jha was denied by Mathura Ojha, resident of Dhamauli Ramanath, who was examined as P. W. 5. It was not put to Rudal Jha (P. W. 6) another resident of Dhamauli Ramnath and a 'gotia' of Jagdish Jha. Besides, identity is not a mere matter of the name. The person who took the money represented himself in the bond as son of Phula Jha and a resident of Dhamauli Ramnath. When the Mukhtear professed to know him personally he vouched for the correctness of these details, and it was because of his identification that the Sub Divisional Officer (P. W. 10) accepted the bond.

(4) On the evidence as it stands I have no doubt that the person who took the money was not Kantu Jha and that he was wrongly identified as Kantu Jha. The only question which arises to my mind is whether this is a case of fraud on the part of the Mukhtear or of negligence. The Mukhtear admits that previously to this he had no acquaintance with the person whom he identified as Kantu Jha. His only reason for identifying him as such was according to him, that Jagdish Jha who is his client was sometime previous to the identification accompanied on one or two occasions by this person and addressed him as Kantu Jha, and that at the time when the bond was executed Jagdish Jha requested the Mukhtear to identify this person as Kantu Jha. There is evidence of two witnesses who have been examined on behalf of the Mukhtear to the effect that the Mukhtear has on occasion worked for this Jagdish Jha. We get it, however, from the evidence of D. W. 1 Gopalji Prasad Mukhtear, Secretary of the Mukhtear Association, Muzaffar-

pore, that Jagdish Jha is a tout-hardly the sort of person on whose mere request the mukhtear would be justified in regarding the identity of this person as proved. There is therefore no doubt that this is at least a case of negligence on the part of the Mukhtear. There is no positive evidence on which it is possible to come to a finding that the Mukhtear was a party to the fraud.

(5) In these circumstances I hold that negligent identification has been satisfactorily established and the only point which arises for consideration is the proper punishment to be imposed. On two separate occasions this Court has warned members of the legal profession as regards their responsibility in the matter of identifying persons coming to public offices in order to receive money 'In the matter of I, a Mukhtar', A I R (16) 1929 Pat 339 and 'In the matter of the District Judge, Gaya V. D. A. Mukhtar', AIR (17) 1930 Pat 495 (1). In the circumstances of those particular cases nominal punishment was given. In the present case I am unable to take a light view and consider that the appropriate penalty will be suspension from practice for the period of one year from today and would pass an order accordingly.

(6) RAMASWAMI, J.: I agree.

(7) SINHA, J.: I agree.

K.S. *Order accordingly.*

A. I. R. (39) 1952 PATNA 32 (C. N. 11)

SPECIAL BENCH

REUBEN, RAMASWAMI AND C. P. SINHA JJ.

Dr. Vishun Shankar and others v. The State of Bihar.

Civil Ref. Case No. 1 of 1950, D/- 17-9-1951.

Stamp Act (1899), Sch. 1 Art. 33 — Partition deed reciting fact of surrender by Hindu Widow — Additional duty under Sch. 1 Art. 33 held not payable — Stamp Act (1899) Ss. 2 (15), 5, and Sch. I Art. 55.

A deed of partition executed by the five sons of B, their mother, and attested by B and J, their grandmother, contained the following clause. 'J surrendered her limited interest she had in the property left by her husband in favour of B, her daughter. Subsequently, the said daughter having for sometime remained in possession of the property left by her father surrendered her rights in respect thereof in favour of us the executants, her sons and put them into possession thereof." The attestation of the deed by B and J included a statement that they got the contents of the deed read over to them and understood by them. The question was whether the deed of partition was chargeable with additional stamp duty as a deed of gift under Sch. 1 Art. 33.

'Held' that the deed was a pure and simple partition deed and no stamp duty was payable under Sch. 1 Art. 33. The statement in the deed in the past tense that the widows B and J, had surrendered their interest did not purport to operate to terminate their interest. It might be that the intention was to bind B and J and to prevent them in future from asserting an interest in the property but the question was not relevant for the purpose of determination of the duty. Even assuming that the deed operated as a surrender it was doubtful whether it was chargeable with duty under Sch. I, Art. 33. The principle on which a surrender operates is that the limited owner by her act of surrender extinguishes her own existence and thus accelerates succession. The property would, therefore, appear to pass by succession and not by conveyance. AIR (5) 1918 P C 196, A I R (21) 1934 P C 105 and A I R (28) 1941 Mad 430 Ref., AIR (25) 1938 Pat 33 (S B) doubted and distinguished. (Paras 3, 5)

'Held', further that it was not necessary that the registration authorities should enter into any enquiry as to whether there had been actually a 'previous' surrender by the widows as recited in the partition deed. (Pr 4)

Anno: Stamp Act Sch. 1 Art. 33 N. 2 .

Standing Counsel, for Reference — B. B. Saran and J. N. Sahai, Against Reference.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('19) 46 Ind App 72: (A I R (5) 1918 P C 196) (Pr 5)

('34) 61 Ind App 200: (A I R (21) 1934 P C 105) (Pr 5)

('36) A I R (23) 1936 Cal 106: (161 Ind Cas 450) (Pr 4)

('41) I L R (1941) Mad 551: (A I R (28) 1941 Mad 430) (Pr 5)

('38) 17 Pat 95: (A I R (25) 1938 Pat 33 S B) (Pr 5)

JUDGMENT: This is a reference under S. 57 sub-s. (1) of the Indian Stamp Act. The deed in question purports to be a deed of partition. The question which has been referred is whether it is a deed of gift as well and whether in consequence additional stamp duty under Art. 33 of Sch. 1 to the Indian Stamp Act is payable.

(2) The property covered by the deed formerly belonged to one Durga Prasad who died about 43 years ago leaving him surviving a widow Janak Dulari and a daughter Bachan Devi. The deed is a deed of partition executed by the five sons of Bachan Devi. The reason for making the reference is that Janak Dulari and Bachan Devi are attesting witnesses to the deed which contains the following passage among the recitations:

> "Srimati Janak Dulari Kuar surrendered her limited interest she had in the property left by her husband in favour of Srimati Bachan Devi her daughter. Subsequently the said daughter having for sometime remained in possession and occupation of the property left by her father surrendered her rights in respect thereof in favour of us the executants, her sons, that is the grandsons of Babu Durga Prasad and put them into possession thereof."

It is pointed out that the attestation of these two ladies is not in the usual form but includes a statement that they got the contents of the deed read over to them and understood the contents, the obvious intention being to bind them with knowledge of the statement contained in the above cited passage that they have surrendered their interest in the property.

(3) It appears to us clear that this reference must be answered in the negative. The deed as it stands is a pure and simple partition deed. In the passage on which reliance has been placed on behalf of the State there is merely a statement in the past tense that the ladies "surrendered" their interest, that is to say, the deed does not purport to operate to terminate their interest. It may be that the intention is to bind these ladies and to prevent them in future from asserting an interest in the property. If the question should arise in future, it will be for the Courts to consider whether the document has that effect but the question is not relevant at this stage. The executant of this document have executed the deed as a deed of partition and want to get it registered as such. If by reason of any omission it appears later that their title in the property is incomplete, that is their concern and they run the risk with open eyes. We do not see any reason why the registration autho-

rities should compel them to treat this deed as a deed of gift and to stamp it and register it accordingly.

(4) Reference has been made in the course of argument to the fact that there is no evidence of a previous surrender, and it is suggested that the registration authorities are entitled to make an investigation on the point. We do not think such an investigation is necessary or even within the power of the registration authorities. The transaction alleged is a surrender by a limited owner of her interest in the property. Such a surrender it has been held does not require a document 'Nirmal Chandra v. Mohitosh Das', A I R (23) 1936 Cal 106. Having regard to the ordinary duties of the registration authorities, it is difficult to imagine that they can be required to enter upon an enquiry as to the existence or non-existence of a transaction which may be oral.

(5) Our attention has been drawn to a decision of a Special Bench in 'In re. Khetramoni Debya', 17 Pat. 95 in which it was held that a document in which a Hindu widow in possession of property as a limited owner renounces her interest in the property in favour of the next reversioner requires to be stamped under Art. 33 of Sch. 1 to the Indian Stamp Act. The facts of that case are distinguishable as the document there expressly operated to extinguish the interest of the widow. In passing we would observe with respect that the correctness of that decision may require re-examination on a proper occasion. The principle on which a surrender operates is that the limited owner by her act of surrender extinguishes her own existence and thus accelerates the succession 'Rangasami v. Nachiappa 46 Ind App 72 and 'Sitanna v. Viranna', 61 Ind App. 200. The property would therefore appear to pass by succession, not by conveyance (vide 'Venkatarayudu v. Narayana', I L R (1941) Mad 551.

(6) We answer the reference in the negative. The deed is a partition deed and stamp duty is not realisable on it under Art. 33 of Sch. I to the Indian Stamp Act.

K.S. *Answer in the negative.*

A. I. R. (39) 1952 PATNA 33 (C. N. 12)

SARJOO PROSAD AND JAMUAR, JJ.

Manilal Bacharlal Sanghvi and another, Appellants v. Keshabji Pitamber, Respondent.

Appeals from Original Decree Nos. 61, 94 and 342 of 1949. D/- 19-7-1951.

(a) Partnership Act (1932), S. 44 (g) — Dissolution of partnership — Subsequent events — Consideration of.

Under Section 44 (g), it may be open to a Court of law even to take into consideration the events subsequent to the date of the suit for dissolution of partnership for the purpose of giving its decision. The words "just and equitable" are wide in their amplitude and do not prevent the Court from taking into consideration subsequent factors. It would, be however, too much to assume that the suit of the plaintiff although it has failed on the ground substantially alleged in the plaint should succeed upon this new ground alone. It would be unjust and inequitable to direct dissolution of the partnership on that ground alone. (*Para 8*)

Anno: Part. Act. S. 44, N. 5.

(b) Deed — Construction — Partnership deed in respect of colliery business — Provision as to payment of all public demands, taxes and cesses due and payable 'in respect of colliery' — Whether covers income-tax payable in respect of profits of business — Evidence Act (1872), S. 92 — Partnership Act (1932), S. 9.

Where the partnership deed in respect of a colliery, provided that the defendants who were placed in sole charge of the management should duly and regularly pay to the landlords rents, royalties and commissions and other dues payable to them, and that they should also punctually and regularly pay all the public demands, taxes and cesses due and payable "in respect of the colliery" and all such payments would be debited to the partnership accounts.

'Held' that the taxes referred to were the taxes payable in respect of the colliery, that is, taxes in the nature of water-board tax, Chaukidari tax and such other taxes which were payable on account of the Colliery itself and which had nothing to do with the profits of the business. They, therefore, did not refer to income-tax payable in respect of the profits of the business: AIR (9) 1922 Pat 75; AIR (25) 1938 P C 243, Rel. on. (*Para 10*)

Even if the agreement of partnership were silent on the point of the liability to pay the income-tax due, Section 92 of the Evidence Act did not prevent the defendants from proving that the intention was that the tax should be paid on the individual profits of the partners and not on the profits of the business: AIR (7) 1920 P C 61, Rel. on. (*Para 11*)

The fact that the document provides for the adjustment of accounts at least every 6 months and that the plaintiff himself had been realizing the share of the profits irrespective of the payment of the income-tax, pointed to the conclusion that the liability to pay the income-tax was upon the partners individually and not upon the business as such. (*Para 11*)

Such an inference was also in consonance with the provisions of Section 9, Partnership Act, where the common advantage of the partners required that the income-tax should be payable upon the profits of the individual partners and not upon the profits of the business as a whole. (*Para 11*)

(c) Partnership Act (1932), Section 44 (d) — Dissolution of partnership — Suit by party himself guilty of misconduct.

Where a partnership was for a term of years under which by the agreement of the parties the defendants had been placed in the sole charge of the management of the business and the evidence showed that the defendants had been running the business on appropriate lines and had made it a profitable concern, the mere fact that the plaintiff had been trying to resile from the agreement and was creating obstructions in the way of the defendants in managing the colliery cannot be any ground for dissolution of partnership. The Court will not interfere at the suit of a partner who is himself guilty of misconduct: (1856) 21 Beav 482, Rel. on. (*Para 13*)

Anno: Part. Act, S. 44, N. 2.

R. S. Chatterji; A. K. Chatterji and S. K. Mazumdar, for Appellants; S. N. Dutta and N. N. Roy, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('20) 47 Ind App 17: (AIR (7) 1920 P C 61) (Pr 11)

('38) 65 Ind App 354: AIR (25) 1938 P C 243 (Pr 10)

('22) AIR (9) 1922 Pat 75 (Pr 10)

(1856) 21 Beav 482: (111 R R 175) (Pr 13)

SARJOO PROSAD, J.: These three appeals have been heard together because they arise substantially out of the same judgment of Mr. S. M. Karim, Subordinate Judge of Dhanbad. They arise out of a suit for dissolution of partnership and

accounts and also for the appointment of a receiver to wind up the partnership business. First Appeal 61 of 1949 is by the defendants against that part of the judgment which directed accounts to be taken from them, whereas First Appeal 94 of 1949 is by the plaintiff against the portion of the judgment refusing his prayer for dissolution of the partnership, and Miscellaneous Appeal 342 of 1949 is also by the plaintiff against the order dated 13-9-1949 refusing to appoint a receiver.

(2) The plaintiff under a registered lease got a settlement from the Kashipur Wards Estate for a term of 30 years of coal and coal mining rights with incidental surface rights in respect of a plot of land measuring about 92 bighas in mauza Kujama Pergana Jharia. Under the lease in question the plaintiff carried on colliery business in the name and style of Keshavji Pitamber Kujama Colliery. It appears, however, that his circumstances became involved and suits for rent and royalty in respect of the colliery as also for realisation of other dues were instituted against the plaintiff. The plaintiff being in pressing need of money to save the colliery from sale in execution of the landlord's decree in Title Suit No. 17 of 1943 and for obtaining a renewal of the lease entered into a partnership with the defendants. This partnership-deed is dated the 2nd of September 1944, and is Ex. 2 in the case. The terms of this deed play an important part in the decision of the disputes involved in these appeals and will have to be dealt with in some detail later. Suffice it to say that under the deed in question the defendants agreed to advance to the plaintiff a capital sum of Rs. 1,36,000 under the terms and conditions embodied in the agreement and they were to be in sole charge of the management of the colliery. The period of the agreement was to last for 7½ years commencing from the 1st of June 1944, because the defendants had been already put in possession of the colliery business by virtue of a prior agreement between the parties on the 31st of May 1944, and this period of 7½ years could be extended in case the defendants were not able to realise meanwhile the capital sum advanced from the income of the colliery business. It may be also stated that the plaintiff was entitled to a half share in the profits of the partnership business, whereas the defendants, who were the other two partners, were entitled to one-fourth each, and the further agreement was that out of the plaintiff's share of the profits the defendants would be entitled to appropriate 75 per cent thereof towards the satisfaction of the amount advanced by them and to pay the rest of the 25 per cent to the plaintiff.

(3) The plaintiff's case is that the entire sum advanced by the defendants had been fully repaid and satisfied out of the three-fourth of the plaintiff's half share of the profits. He claimed that the actual profit earned from the colliery business was much more than what had been shown by the defendants and there were false and fraudulent entries in the account books. He, therefore, alleged various irregularities in the keeping of the accounts and in the conduct of the business. Numerous such details have been given in the plaint but fortunately most of these have not been seriously pressed either before this Court or before the Court below. The most important allegation, however, is that the defendants have failed to pay the income-tax due in respect of the business on account of which there is an apprehension of the plaintiff being harassed. The plaintiff further averred that in the circumstances he had lost confidence in the defendants and that it was not possible for him to carry on the business in partnership with them. He has, therefore, claimed dissolution of partnership and accounts as stated above.

(4) It may be observed that this suit was filed on the 8th of October 1947, when in fact the period of 7½ years for which the partnership agreement was to last in any event had not run out. In fact the period has not yet run out commencing as it did on the 1st of June 1944. The plaintiff, therefore, must make out a very strong case for dissolution of the partnership before any relief could be granted in violation of the terms of the agreement at least in respect of this period for which the defendants were entitled to remain in charge of the management of the colliery and the business according to the terms of the deed. The original plaintiff Keshavji Pitamber died after the institution of the suit and in his place his son and heir has been substituted.

(5) The defendants have filed a joint written statement. Their defence in substance is that having regard to the terms of the partnership deed dated the 2nd of September 1944, the suit is wholly premature and is fit to be dismissed. They pleaded that but for their help to the plaintiff in taking over the business and in advancing the capital amount the plaintiff would have been completely ruined, and the said advance is secured over the partnership assets and the defendants are entitled to continue in charge of the management until the capital advanced by them had been completely satisfied and which, according to them was still outstanding. They stated that the plaintiff was at first keen and willing to register the agreement in question but later having received the advance he refused to do so until the defendants adopted the procedure for compulsory registration. They have further averred that by their hard labour and capital they effected various improvements and development in the colliery and made the coal business a lucrative and profitable concern, and it is on that account that the business had been yielding a good profit, and the plaintiff while pocketing his share of the profits of the business has been creating various obstructions in the management of the same in order to force the defendants to give up the partnership. They deny the charges levelled by the plaintiff against the defendants and they state that the account books and all the records of the business have been regularly and correctly maintained in ordinary course and even inspected and scrutinised by the plaintiff. The profits of the business are calculated and distributed amongst the partners and their accounts are adjusted after each Diwali and the adjustments are not only entered in the account books but signed by the plaintiff and the defendants. They, therefore, deny that there has been any case of misfeasance or mismanagement on their part as stated by the plaintiff. They, therefore, urge that in view of the terms of partnership and in consideration of all the circumstances the partnership could not be legally and equitably dissolved in any case earlier than the expiry of the period given in the lease and no grounds whatsoever have been made out for claiming dissolution.

(6) it would thus appear from the above pleadings that the case for dissolution of partnership rests upon the alleged prejudicial conduct of the defendants and also upon the general ground that it would be just and equitable having regard to the circumstances of the case to direct dissolution of the partnership. The learned Subordinate Judge, as I have already observed, refused the plaintiff's prayer for dissolution of the partnership and for appointment of a receiver. He has, however, put the defendants to certain terms in regard to the payment of income-tax due in respect of the business and has also directed accounting to be made by the appointment of a Commissioner. It is this

direction as to payment of income-tax which has been the most serious bone of contention in these appeals before us; otherwise Mr. S. N. Dutt, appearing on behalf of the plaintiff has fairly conceded that there is really no other substantial ground of misfeasance or malfeasance on the part of the defendants. In other words, there is no other ground of prejudicial conduct. Indeed there could not be apparently any such ground because as it will appear later the business was being run by the defendants on sound lines and it has been earning huge profits to the advantage of both parties to the partnership agreement.

(7) The main points, therefore, which have been canvassed before us are (1) whether the defendants were under the terms of the agreement liable to pay the income-tax due; (2) whether the defendants did make any deliberate default in such payment; and (3) whether in the circumstances it would be just and equitable to order dissolution on account of this alleged non-payment of income-tax. On a review of the materials placed before us I have no doubt that the decision of the learned Subordinate Judge refusing the prayer for dissolution of partnership and the appointment of a receiver is perfectly justified, and, in my opinion, the directions given by him are more than adequate for the protection of the plaintiff's interest in the partnership even assuming that his interest was under any apprehension of jeopardy.

(8) As the whole question turns upon this alleged non-payment of income-tax or the liability to pay the same, the relevant facts bearing on the point may be stated at this stage. Before the date of the institution of the suit it is the common case of the parties that the amount of income-tax had been paid by the partners themselves, and there was no other income-tax assessed till after the date of the institution of the suit. Therefore, this could not be any ground for dissolution of partnership on the date when the suit was filed. Mr. S. N. Dutt on behalf of the plaintiff has, however, contended that it was open to the Court to take into consideration subsequent events in order to mould its decree in the light of those events to do complete and substantial justice between the parties. On behalf of the defendants Mr. R. S. Chatterji urges that the question of dissolution should be considered in the light of the facts and circumstances prevailing at the date of the institution of the suit, and if the plaintiff was unable to make out any ground in support of his claim for dissolution of partnership at the date of his filing the suit, the Court should refuse the prayer. Section 44 of the Partnership Act lays down the grounds for dissolution of partnership. Clause (g) of the section states that a partnership could be dissolved when the Court considers it just and equitable to do so. That being so, it may be open to a Court of law even to take into consideration the events subsequent to the date of the suit for the purpose of giving its decision. The words "just and equitable" are wide in their amplitude and do not prevent the Court from taking into consideration subsequent factors. It would be however too much to assume that the suit of the plaintiff although it has failed on the ground substantially alleged in the plaint should now succeed upon this new ground alone, namely, the ground of non-payment of income-tax after the date of the suit. In my opinion, it would be unjust and inequitable to direct dissolution of the partnership on this ground which again is of an ephemeral character as I shall hereafter show. This would be sufficient to dispose of the appeals of the plaintiff in regard to his claim for dissolution of partnership. The defendants' appeal however raises the question of the liability to pay the income-tax due and I will proceed to examine the materials bearing on the question in so far as they are germane to the points under consideration.

(9) The plaintiff's case is that the liability to pay the income-tax due was upon the firm as such and not upon the partners, and, therefore, it was the duty of the defendants to have the firm assessed as a partnership firm and pay the income-tax so assessed out of the profits thereof. The defendants, on the other hand, contend that the income-tax was not to be paid by the firm but it was to be paid by the partners and the assessment of income-tax had to be made upon the profits of the partners and not upon the profits of the firm as such. There was nothing to show in the agreement that the income-tax was payable by the partnership itself; on the contrary, they contend that the conduct of the parties both before and after the agreement showed that the income-tax was to be paid by the partners individually. They point out that during the assessment year 1945-46 the partnership had been registered and the partners of the firm, namely, the plaintiff and the defendants had been assessed to income-tax on their individual incomes both from the partnership as also from other sources, and it was the plaintiff who subsequently resiled from that position and refused to apply for the registration of the firm. The result was that there was a tremendous difference in the amount of the income-tax assessed. The assessment of the income-tax upon the profits of the firm as such was far in excess of the assessment which would otherwise have been made if the partners were assessed on their individual income, and it would be opposed to the objects of the partnership to throw such a burden upon the partnership business to the entire detriment of the defendants. They accordingly contend that it was due to the conduct of the plaintiff in refusing to apply for registration of the partnership that the firm was heavily assessed and the income-tax fell due during the pendency of the suit, and the plaintiff, could not take advantage of his own wrong in asking for dissolution of partnership on that account.

(10) It has been noticed that the defendants came in possession of the colliery and the partnership business on the 1st of June 1944, under a prior agreement between the parties. This agreement is Ex. 1 and is dated the 31st of May 1944. The plaintiff was the first party and the defendants were the second party to the agreement. It recited that for the better interest of the property and that of the parties concerned the management of the colliery with its coal business was to be absolutely conducted and carried on by the second party for the first two years in consultation with the first party and thereafter by rotation the management would be in the hands of the first party and it would thus go on changing hands between the two. It further provided that in the interest of the parties and for the safety of the property the parties should pay respectively all such royalty, commissions together with all other public rates and public taxes, etc. In pursuance of this agreement the defendants came in possession of the business. This was soon followed by the registered partnership deed, dated the 2nd of September 1944, and the period in the deed was to run from the 1st of June 1944, the defendants being already in possesion of the business. The firm was duly registered under the Income-tax Act and assessment was made on the profits of the business for the period 1945-46 on the income of the partners and not upon the income of the business itself. For the assessment year 1946-47 and for other subsequent years, namely, 1947-48 and 1948-49 the partners were not assessed but the firm

was itself assessed as such because it appears that Keshavji Pitamber, the plaintiff, refused to sign the application under Section 26 (A) of the Income-tax Act on account of certain differences with the other partners. The assessment order for 1946-47 is dated the 30th of April 1948, which is after the institution of the suit and so are the other orders of assessment in the subsequent years (vide Exs. 4, 4-a and 4-b.) The result of the plaintiff's refusal to get the firm registered has been a marked difference in the assessment. This fact is not disputed by the plaintiff but he says that he was not bound to have the firm registered and to mitigate the burden of the partnership firm to his own detriment. On behalf of the parties reliance has been placed on paragraph 11 of the partnership deed which provides that the second party, namely the defendants shall duly and regularly pay to the landlords rents, royalties and commissions and other dues payable to them, and that they shall also punctually and regularly pay all the public demands, taxes and cesses due and payable "in respect of the colliery" and all such payments will be debited to the partnership accounts. The plaintiff says that the word 'tax' also refers to income-tax which is payable in respect of the profits of the business where as the defendants contend that the taxes referred to in paragraph 11 are the taxes payable in respect of the colliery, that is, taxes in the nature of water-board tax, chaukidari tax and such other taxes which are payable on account of the colliery itself and which have nothing to do with the profits of the business. In my opinion, this contention of the defendants appears to be correct. I am strengthened in this view by a decision of this Court in 'Nilkantha Narain Singh v. Niharan Chandra', AIR (9) 1922 Pat 75 and that of the Privy Council in 'Bengal Coal Co. v. Sri Janardan Kishore Lal Singh', 65 Ind App 354: AIR (25) 1938 P C 243, where the word "taxes" with reference to mines has been similarly construed.

(11) But were it held that there was any ambiguity in the document, this ambiguity is clarified by the conduct of the parties themselves. The further provisions of the agreement indicate that the partnership accounts were to be adjusted and settled at the end of every six months. It also shows that at the time of adjustment the monthly amount paid to the plaintiff was to be debited towards his share of the profits and the profits were to be divided according to their respective shares. It is well contended that this could be done only on the principle that the profits were to be calculated independently of the income-tax payable. Income-tax is never a part of the profits. Besides, it was evidently to the advantage of all the partners of the business that the income-tax should not be assessed upon the partnership as such. It has been already shown that the income-tax for the assessment year 1945-46 was assessed on the individual income of the partners and not upon the partnership business. In April 1946, there was an adjustment of accounts from October 1944 to October 1945. This adjustment has been signed by all the parties and it shows a profit of about Rs. 91,000 and add, without any deduction for income-tax. Besides, the defendants have produced a number of receipts to show that the plaintiff had been taking his share of the profits almost from month to month without any question of deduction of the income-tax. The defendants further submit that they had gone on sending the accounts to the plaintiff but the plaintiff himself refused to sign the accounts on one pretext or another without any fault of the defendants. This is borne out by some of the letters of the plaintiff himself: Ex. 3 (b), dated 3-6-1946 and Ex. A-23, dated 17-5-1947 Ex. 3 (b) indicates that the defendants sent a statement of accounts on 12-5-1946, regarding the profits and loss of the period 5-11-1945 to 30-4-1946. This related to a period subsequent to the one for which there had been already an adjustment of accounts signed by the parties. The son of the plaintiff tried to explain that the adjustment had not been signed by the plaintiff after due consideration of the accounts; but that explanation has been rightly disbelieved by the learned Subordinate Judge. Ex. 3 (b). further shows that the plaintiff claimed the share of the profits, Rs. 7,500 out of the total profits of Rs. 60,000, without any reference to the income-tax payable in respect of the said profits. All these factors very clearly indicate that the intention of the parties was that the income-tax could not be paid on the profits of the business as such but on the individual profits of the partners. This conclusion inevitably follows from the conduct of the parties both before and subsequent to the agreement in question and the plaintiff himself had been realising the share of the profits without waiting for and irrespective of the payment of income-tax. Even if the agreement of partnership were silent on the point of the liability to pay the income-tax due Section 92 of the Evidence Act did not prevent the defendants from proving that the intention was that the tax should be paid on the individual profits of the partners and not on the profits of the business: see Haridas Ranchordas v. Mercantile Bank of India', 47 Ind App 17. As I have said, the word 'tax' mentioned in the document did not refer to income-tax but to taxes payable "in respect of the colliery." Income-tax is in the nature of a personal tax payable on account of the profits of the business and any ambiguity in the document is removed by the evidence relating to the conduct of the parties even after the agreement. In fact the term of the document for adjustment of accounts at least every six months and the monthly realisation of profits by the plaintiff himself all point to the same conclusion, and, therefore, even apart from the agreement it was open to the defendants to show that the liability to pay the income-tax was upon the partners individually and not upon the business as such. Such an inference is also in consonance with the provisions of Section 9 of the Partnership Act The section requires that partners are bound to carry on the business of the firm to the greatest common advantage. Admittedly it would not be to the common advantage of the partners to have the profits of the business assessed as such because the assessment has thereby greatly increased, and it would be evidently to the prejudice of the defendants who are the other partners to increase the burden of their liability. The common advantage of the partners, therefore, required that the income-tax should be payable upon the profits of individual partners and not upon the profits of the business as a whole. I, therefore, accept the contention of the defendants that the liability to pay the income-tax was not upon the defendants, and the whole trouble has arisen because the plaintiff after the first year of assessment, namely, for 1945-46, refused to sign the application along with the defendants for getting the firm registered as a result of which the assessment in subsequent years has increased and there was default in payment.

(12) The learned Subordinate Judge in dealing with the matter did not go into the question as to the liability for the payment of income-tax. He found that income-tax had not been paid subsequent to the date of the suit, and it was necessary that the said tax should be paid in order to save the property from sale. He found that the defendants had filed appeals against the assessment and the appeals were still pending and a certificate had been taken out against the colliery for realisa-

tion of the income-tax dues. He also found that the defendants had given assurance in writing that they would not allow any portion of the colliery to be sold and that they would pay up the demand. This assurance was not considered sufficient by the learned Subordinate Judge who directed in the first instance that the entire amount of income-tax due including the penalty should be paid within a few months from the date of his judgment. He further directed that the amount in question would be adjusted out of the profits in accordance with the respective shares of the parties. At a later stage an application was made by the plaintiff for the appointment of a receiver on the ground that the defendant had failed to comply with this order of the learned Subordinate Judge. It may be observed that the defendants made a fruitless attempt to obtain extension of time from the High Court which was also refused. The learned Subordinate Judge in disposing of the application which is the subject-matter of M. A. 342 of 1949, said that considering all the circumstances the appointment of a receiver was not called for but gave certain directions to the defendants in order to ensure that the partnership properties were adequately protected, and the funds and profits were not misappropriated or misapplied. These directions have not been seriously questioned by the defendants. They have even before this Court given an assurance that they are prepared to pay the income-tax due. In fact they have shown that they have already paid a sum of about Rs. 55,000, and they have come to some arrangement with the department under which they have been allowed to pay the income-tax due at the rate of Rs. 5,000 a month. All this shows that the defendants are anxious and serious about making the payment in order to safeguard the colliery business. They, however, contend that the liability to pay the income-tax being upon the partners the excess of tax assessed should be regarded as the liability of the plaintiff alone and the accounting should be on the basis as if the partners were separately liable for the payment of income-tax in respect of their individual share of the profits and any excess amount paid should be debited to the share of the plaintiff and should be treated as a capital amount advanced by the defendants bearing interest under the terms of the agreement. I am not prepared to concede to the argument of the defendants that the amount of income-tax paid by the defendants should be treated as a capital advance bearing interest. I must, however, accept the other part of the contention, namely that the income-tax for the purpose of accounting should be calculated on the basis that it was payable in respect of the individual profits of the partners and any excess amount assessed which came to be paid by the defendants on account of the conduct of the plaintiff in refusing to get the firm registered should be debited to the share of the plaintiff. This principle would continue to govern the parties even if in subsequent years the plaintiff refuses to get the firm registered. The directions of the learned Subordinate Judge, therefore, will have to be modified to that extent and the accounting will have to proceed upon this basis.

(13) I have alrealy held that the plaintiff has not established any case for dissolution of the partnership or for the appointment of a receiver. It is to be remembered that it is not a partnership at will. It is a partnership for a term of years under which by the agreement of the parties the defendants have been placed in the sole charge of the management of the business. The evidence shows that the defendants have been running the business on appropriate lines and have made it a profitable concern. The mere fact that the plaintiff has been trying to resile from the agreement and is creating obstructions in the way of the defendants in managing the colliery cannot be any ground for dissolution of partnership. The Court will not interfere at the suit of a partner who is himself guilty of misconduct. As Lord Romily pointed out in 'Harrison v. Tennant', (1856) 21 Beav 482:

> "No party is entitled to act improperly and then to say that the conduct of the partners and their feelings towards each other are such that the partnership can no longer be continued, and certainly this Court would not allow any person so to act and thus to take advantage of his own wrong."

The learned Subordinate Judge in this case had ample justification for holding that from the very beginning the plaintiff's attitude had been hostile. He refused to honour the agreement by making false allegations that he had not executed the deed and that his signature was obtained by fraud on blank papers. He refused to get the agreement registered until the defendants took recourse to compulsory registration, and this he did after the defendants had advanced a sum of Rs. 1,36,000 to him. The plaintiff's financial condition at the time was highly involved and his property including the coal lands and the colliery in suit were about to be sold and the lease was about to expire and there was really no chance of its renewal. It was at this critical juncture that the defendants came to his aid and advanced the sum of money mentioned above and took up the management and working of the colliery in partnership business which under the defendants' management became a thriving and profitable concern. Even immediately after the agreement there are various letters to indicate that the plaintiff went on putting obstructions in the management of the colliery by the defendants; for instance, Ex. A-1, dated 18-9-1944, Ex. A, dated 20-1-1944 and Ex. A-2, dated 6-11-1944 and various other letters as pointed out by the learned Subordinate Judge. The Court below therefore held that:

> "the entire conduct of the plaintiff from the very beginning shows that he wants to get the partnership abrogated. His keenness has increased because now he finds that the colliery is in a flourishing condition and he has been feeling very much when he sees that half the profits is going to the defendants."

I have no doubt that this finding of the learned Subordinate Judge is correct and the plaintiff has not established his case for dissolution of partnership or for appointment of a receiver.

(14) The learned Subordinate Judge has, however, directed accounts to be taken from the defendants by a Commissioner appointed for the purpose. The defendants concede that they could not resist the prayer for accounting. They, however, pointed out that the last adjustment of accounts between the parties made on the 26th of April 1946, as shown by Ex. C should not be reopened. This contention has been accepted by the learned Subordinate Judge. It appears that the Commissioner deputed to examine the accounts has submitted a long report. For the present I am not concerned with the findings of the Commissioner which will have to be examined by the learned Subordinate Judge himself. The learned Subordinate Judge appears to have been under the impression that there had been some breach of agreement made by the defendants in not sending the copies of the accounts though such a breach by itself was not a sufficient ground for the dissolution of partnership. Even here I am not convinced that there has been any real breach. I have shown that admittedly even after the adjustment of accounts the defendants did send statements of accounts to the plaintiffs but the plaintiff

refused to accept them. I am not, therefore, very certain that there was any useful purpose served in passing a preliminary decree for accounts; but the defendants not having raised any objection to the same the preliminary decree for accounts must stand. There are, however, certain items of accounting in regard to which the parties challenged the findings of the learned Subordinate Judge. The plaintiff did not press his objections relating to taking of pucca receipts from the lessors for payment of rents, royalties and commissions. He has also not pressed his allegation in regard to the defendants working against the mining rules & in an unskilful manner thereby damaging the mines. It also appears from the judgment of the learned Subordinate Judge that plaintiff's objection regarding the refusal of the defendants to agree to arbitration was also given up. The matter in any case is concluded by the decision of this Court on the point, though a faint endeavour was made to press the objection again before this Court. The learned Counsel for the plaintiff, however, assailed the finding of the learned Subordinate Judge in regard to some of the items.

(15) Firstly, he urged that allowance had been granted by the defendants to their relatives and a highly paid Engineer had been appointed. The objection relates to the appointment of one Mr. Bhupendra Kumar Bose (D.W. 1) a mining Engineer and a first class certificated colliery Manager. The Engineer appears to be a highly experienced and qualified person having been the President of the Indian Mines Managers' Association and a member of the Advisory Committee of Coal Mines Stowing Board and a Regional Coal Controller for Bengal and Bihar till 1947. This man was appointed a consulting mining Engineer by the defendants for a period of four months only at Rs. 500 a month. His evidence shows that in view of the bad condition of the old working of the mines (presumably by the plaintiff previous to the defendants having taken charge) the advice of an expert was necessary and he was consulted as such. It is true that he was also employed by Giridhari Lal Sunda, defendant No. 1, for his own colliery during the period that he was employed as the consulting Engineer of the Kujama Colliery. But, as the learned Subordinate Judge has rightly held this by itself is no ground for holding that he did not work for the Kujama Colliery. After all the remuneration paid to him is quite reasonable and verges on the side of moderation. Therefore, there is no reason to interfere with this part of the decision of the learned Subordinate Judge. The other objection relates to the employment of one Vithaldas Mehta about whom it is alleged that he was a cousin of defendant No. 2, and therefore any payment made to him although as an employee, should be considered to be a payment made to the defendants. The defendant No. 2, has challenged this relationship and the allegation of the plaintiff on the point, and he says that Vithaldas Mehta had been employed for the better working of the colliery and his services were necessary. The defendants naturally when they took over the colliery in their hands should be given some amount of latitude in selecting the personnel of their employees on whom they could rely for the efficient working of the colliery. The plaintiff's allegation on the point is not sufficiently established and the learned Subordinate Judge was therefore correct in accepting the case of the defendants. It is further contended that the firm of Messrs Heemat Lal & Co., through whom the defendants sold coal really belonged to defendant No. 2 and that any commission paid to the firm should enure to the benefit of all the parties. The defendants have denied this and have stated that they sold coal not only through this Company but through others as well, and the learned Subordinate Judge in view of the insufficiency of the materials was justified in not accepting the case of the plaintiff in this connection. The plaintiff's contention therefore in regard to these items of objection has rightly failed before the learned Subordinate Judge and cannot be entertained by this Court either.

(16) Another point which has been stressed by the plaintiff on the question of accounting is in regard to a sum of Rs. 40,000 and odd debited on account of loss suffered in connection with the speculations on the stock exchange. It must be conceded that a speculation of this character was not a part of the partnership business and ordinarily the loss sustained thereby could not be debited to the partnership account. It appears however from the evidence that this speculation was carried on by the defendants with the consent of the plaintiff who had paid them a sum of Rs. 15,000 under two cheques. This amount was credited in the books of the partnership and was intended to be for the purpose of speculation in the share market. The plaintiff has tried to explain that this was an advance for the expenses of the colliery. In view of the other materials this explanation is quite unreliable. Even plaintiff's letters do not show that the share transaction was entered into without his consent. On the contrary, they suggest that the speculation in the share market was with his consent and agreement: vide Exs. 3-a and 3-b. What is more is that this matter is concluded by the adjustment of accounts, Ex. C. The repudiation of this adjustment in evidence by the plaintiff is not supported by the record. The letters suggest that the plaintiff had checked and understood the accounts before signing the same. I have no doubt in my mind that the plaintiff's statement that the adjustment was signed without fully understanding the account is quite false. Exs. C and C-2 are the entries regarding the share transactions covered by the said adjustment of accounts. These materials therefore convincingly prove that the speculation on the stock exchange was carried on with the consent and agreement of all the parties concerned including the plaintiff although the transactions did not properly form part of the partnership business. Regard being had to these facts it is now too late for the plaintiff to contend that the loss sustained in the speculation should not be debited to the accounts of the partnership and in my opinion the learned Subordinate Judge was right in his decision on that point also.

(17) It seems to me, however, that there is much substance in the objection of the defendants in regard to certain items relating to the accounts. I have already observed that so far as the payment of income-tax is concerned, the accounting should be on the footing that the tax was payable by the partners individually and any sum that may be found to have been paid in excess to save the business should be debited to the share of the plaintiff. There are, however, two other matters with regard to which I think the learned Subordinate Judge appears to have gone wrong. One is in regard to the cost of running a car being met out of the partnership funds. The learned Subordinate Judge has justly held that a car was required for the colliery purposes. He however thinks that as the car was being used even for the defendants' private purposes therefore the entire cost of upkeep and running of the car must be paid by the defendants. It may be accepted that the car was being used by the defendants even for their private purposes although defendant No. 2 has denied it. But at the same time it should be borne in mind that the cost of running the car which is claimed on account of the partnership is not an unreasonable cost and therefore

the learned Subordinate Judge should not have held that the entire cost of running and upkeep of the car should be borne by the defendants. The evidence of the defendants on the point show that the Kujama Colliery is at some distance about 7 miles from Dhanbad and the Railway Station and having regard to the circumstances of the case it does not appear that the amount spent over petrol for running the car is in any manner excessive or unreasonable. In my opinion therefore the defendants were justified in incurring this expenditure on account of the partnership business for which an allowance should be made in their favour. The other item is in regard to the payment of costs to the Commissioner. On this point the learned Subordinate Judge has directed that the cost which will be borne by the plaintiff over the appointment of a Commissioner for the purpose of accounting will be recoverable from the defendants. I do not see why the defendants should be made liable to pay the cost of the Commissioner. The evidence shows that up to July 1947 the defendants went on sending statements of accounts to the plaintiff. It is true that thereafter copies of accounts were not sent because of disputes between the parties and filing of the suit but for this the plaintiff himself is entirely to blame. There is nothing to show that the defendants prevented the plaintiff from inspecting the accounts. The Commissioner's cost should therefore be borne by plaintiff alone. In my opinion the decree for accounting is in itself of doubtful utility because the substantial allegations made by the plaintiff in the plaint have not found support in evidence. But since there has been no objection to this part of the decree, I have not considered it necessary to interfere with it. Of course it would be for the learned Subordinate Judge to decide on the merits of the Commissioner's report itself in regard to the liabilities of the parties.

(18) The result is that the plaintiff's appeals are dismissed but the appeal of the defendants is allowed and the directions of the learned Subordinate Judge in regard to accounting are modified to the extent indicated above. The defendants will be entitled to their costs of this Court in all the three appeals.

(19) I must observe that the paper-books of these appeals have been unduly encumbered because some of the documents have been repeatedly typed in the paper-books on the different appeals; for instance, the judgment itself which covers 36 pages or more has been typed in all the three appeals. Similarly, the partnership agreement has been repeatedly typed in the different paper-books. All this volume could have been reduced and the unnecessary expenditure saved if in the preparation of the paper-book there had been a proper coordination between the Counsel of the parties. I must also observe that the judgment of the learned Subordinate Judge though slightly lengthy is careful and painstaking and shows clarity of thought and expression.

(20) JAMUAR, J.: I agree.

V.B.B. *Order accordingly.*

✠ A. I. R. (39) 1952 PATNA 39 (C. N. 13)

DAS AND C. P. SINHA, JJ.

Meghraj Tibrawala, Appellant v. Panchu Sahu Teli and others, Respondents.

Appeal From Appellate Decree No. 1356 of 1949, D/- 24-7-1951.

✠ *(a) Debt Laws — Bihar Money-Lenders Act (III (3) of 1938) and Bihar Money-Lenders (Regulation of Transactions) Act (VII (7) of 1939) — Validity — Invasion on negotiability of promissory notes — Test of validity — Government of India Act (1935), Section 100 and Schedule 7, List I Item 28; List II Item 27.*

It is not possible to make a clean-cut between the powers of the various legislatures, and subjects must still overlap, and where they do, the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. The validity of an Act cannot be determined by discriminating between degrees of invasion, but the extent of invasion is important only for the purpose of determining what is the pith and substance of the impugned Act.

The two Bihar Money-Lenders Acts, one of 1938 and the other of 1939, are valid pieces of legislation judged by the above test as in pith and substance they deal with a "money-lenders and money-lending" and no part of the provisions of those two Acts are invalid by reason of any invasion on the negotiability of promissory notes: AIR (34) 1947 P C 60, Rel. on. (*Para 8*)

(b) Debt laws — Bihar Money-Lenders (Regulation of Transactions) Act (VII (7) of 1939), Section 4 — "Loan advanced by him" — Meaning of.

A person who advances a loan on a hand-note in his name is a person who advanced the loan within the meaning of S. 4, and he cannot be allowed to say that the money came out of somebody else's funds and therefore he is not the money-lender. The question of 'benami' transaction does not arise on a negotiable instrument of this kind. (*Para 9*)

B. C. De and S. C. Ghose, for Appellant; A. B. Saran, K. N. Chaturvedy, P. B. Ganguly and S. C. Mukherji, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('47) AIR (34) 1947 P C 60: (1947 F C R 28) (Pr 7)
('41) AIR (28) 1941 F C 47: (ILR (1941) Kar F C 25) (Pr 8)
('45) AIR (32) 1945 F C 2: (ILR (1945) Kar F C 28) (Pr 6)
('40) 19 Pat 974: (AIR (28) 1941 Pat 99) (Pr 8)
('44) 23 Pat 618: (AIR (31) 1944 Pat 303 F B) (Pr 8)
('46) 25 Pat 90: (AIR (33) 1946 Pat 310) (Pr 11)
('49) 27 Pat 77: (AIR (36) 1949 Pat 400) (Pr 11)

DAS, J.: This is a second appeal by the plaintiff, and the principal point of law which arises for consideration is whether the suit brought by the appellant for the recovery of a certain sum of money on a hand-note executed on the 21st July 1944, was barred by reason of the provisions of section 4 of the Bihar Money-Lenders (Regulation of Transactions) Act, 1939.

(2) The facts are these. The appellant alleged that on the 21st of July 1944, defendant No. 1 executed a hand-note for Rs. 2,500/- in favour of the appellant, and promised to pay on demand the amount with interest at the rate of twelve annas per cent per mensem. On the 7th of March 1946, defendant No. 1 paid the sum of Rs. 365/- towards interest, and made an endorsement on the back of the hand-note. Thereafter, no further payment was made in spite of demand. Hence, the suit was brought on the 20th of November 1946. It was alleged that the loan was taken for the benefit of all the defendants, the other defendants being sons of defendant No. 1. After deducting the amount

paid on the 7th of March 1946, the appellant laid the claim at Rs. 2,655/- including interest.

(3) The defence was a plea of payment of way of certain transactions referred in paragraphs 7 and 8 of the written statement. There was a further defence that the appellant was not registered under the Bihar Money Lenders Act, 1938, and therefore, the suit was not maintainable under the provisions of Section 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939.

(4) The learned Munsiff negatived the plea of payment. On the question of the bar of Section 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, the learned Munsiff held that Section 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, applied, inasmuch as the appellant was not a casual money lender, and the registration certificates (Exs. 7 and 7-a) which were in the name of the firm Kusalchand Meghraj, were not of any help to the appellant; because the appellant had himself admitted that the firm Kusalchand Meghraj, of which the appellant was the proprietor, had nothing to do with the amount which had been advanced under the hand-note in question. The learned Munsiff expressed himself as follows on this point:

> "The firm Kushalchand Meghraj had not concern at all with those amounts. P.W. 2, has also admitted that the amounts which were advanced to defendant No. 1 out of the fund of the plaintiff's wife including the amount of the hand-note in suit was never mentioned in the account books of firm Kushalchand Meghraj."

A third point was also taken before the learned Munsiff to the effect that by reason of the expiry of Ordinance No. XI of 1945 after the 31st March 1947, Section 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, did not hit the present appellant. This contention was also negatived by the learned Munsiff who dismissed the suit on his finding that Section 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, which was still in force and effect, barred the action.

(5) The learned Subordinate Judge, who heard the appeal, affirmed the findings of the learned Munsiff, and agreed with him that Section 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, was a bar to the entertainment of the suit. Accordingly, he dismissed the appeal.

(6) Mr. B. C. De, appearing for the appellant, has urged the following contentions before us. Firstly, he has contended that Section 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, has no application to suits based on hand-notes. For this argument, Mr. De has placed strong reliance on certain observations made by the Federal Court in 'Bank of Commerce, Limited Khulna v. Kunja Behari', AIR (32) 1945 F C 2. In that case the validity of the Bengal Money Lenders Act was in question with reference to Sections 100 and 107 of the Government of India Act, 1935, and the legislative lists of the Seventh Schedule. One of the points raised was that the impugned Act was an invasion of entry 28 of list I which related to "cheques, bills of exchange, promissory notes and other like instruments." Their Lordships of the Federal Court made the following observations on this question of invasion:

> "It was contended that the rules enacted in Sections 32, 79 and 80, Negotiable Instruments Act, were among the essentials of the law relating to promissory notes and that the provisions of Sections 30, 36 and 38 of the impugned Act affect them so substantially that it would be impossible to regard them as merely amounting to an incidental encroachment on the law relating to promissory notes. This contention is in our judgment well-founded."

In another part of the judgment their Lordships said:

> "We may add that in the view that we take as to the scope of Entry 28, in List I, the attack against the impugned provisions of the Bengal Act will not be met by treating them as legislation with respect to 'contracts' (Entry 10 of List III) because Sub-section (2) of Section 100 makes even legislation on List III matters 'subject to the preceding Sub-section', whenever such legislation is enacted by a Provincial Legislature."

On the basis of the aforesaid observations, it is contended that the provisions of the Bihar Money Lenders Act, 1938, or the provisions of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, can have no effect, when the loan is on a handnote and the suit is brought on the basis of the hand-note. The contention, in brief, is that it was not open to the Provincial Legislature to make a law which would affect the "negotiability" of promissory notes, though it was open to the Provincial Legislature to make a law with regard to "money-lending and money-lenders." It is contended that though in pith and substance the Provincial Acts may relate to money-lenders and money-lending, the Acts to the extent that they affect negotiable instruments are not valid.

(7) In my opinion, this contention is no longer open to the appellant, the point having been decided by their Lordships of the Privy Council in an appeal from the very decision of the Federal Court to which Mr. De has referred. The decision of their Lordships of the Privy Council is in 'Prafulla Kumar v. Bank of Commerce Limited, Khulna', AIR (34) 1947 P C 60. Their Lordships dealt with three questions:

(1) Does the Act in question deal in pith and substance with money-lending?

(2) If it does, is it valid though it incidentally trenches upon matters reserved for the Federal Legislature?

(3) Once it is determined that the pith and substance is money-lending, is the extent to which the Federal field is invaded a material matter?

(8) Their Lordships held that the Bengal Money Lenders Act dealt in pith and substance with money lending. They said: "In truth, however, the substance is money-lending and the promissory note is but the instrument for securing the loan." On the second question, their Lordships said that it was not possible to make a clean cut between the powers of the various legislatures, and subjects must still overlap, and where they do, the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. On the third question, their Lordships pointed out that the validity of an Act could not be determined by discriminating between degrees of invasion, but the extent of invasion is important only for the purpose of determining what is the pith and substance of the impugned Act. Accordingly, their Lordships held that the Bengal Act was not void either in whole or in part as being 'ultra vires' the Provincial Legislature. This decision disposes of, I think, the contention raised by Mr. De. The two Bihar Money Lenders Acts, one of 1938 and the other of 1939, are valid pieces of legislation judged by the test, laid down by the Privy Council, and no part of the provisions of those two Acts are invalid by reason of any invasion on the negotiability of promissory notes. So far as the question of registration of a money-lender is concerned, it is diffi-

cult to understand how such registration can be considered as anything but legislation with regard to "money-lenders and money-lending." In view of the decision of the Privy Council, it is unnecessary to refer to the earlier decisions such as 'Sagarmal v. Bhuthu Ram', 19 Pat 974; 'Subrahmanyan Chattiar v. Muttuswami Goundan', AIR (28)) 1941 FC 47 & 'Deo Nandan Prasad v. Ram Prasad', 23 Pat 618 (FB). In view of the decision of the Privy Council, the question of the application or expiry of Ordinance XI of 1945 does not arise. On the day the loan was advanced and on the day the suit was brought, there was a valid piece of legislation which required a money-lender to be registered, and which said that no Court shall entertain a suit by a money-lender for the recovery of a loan advanced by him after the commencement of the Act unless such money-lender was registered under the Bihar Money Lenders Act. That being the position, I am unable to accept the contention that the provisions of Section 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, did not apply to suits brought on promissory notes, on the alleged ground that the Provincial Legislature could not encroach upon the negotiable character of a promissory note.

(9) The next contention of Mr. De. is that assuming that Section 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, applies to suits on promissory notes, the section has no application in the present case by reason of the finding of the Courts below. He has pointed out that the finding of the final Court of fact is that the money was advanced out of the funds of the wife of the appellant, with which the firm of the appellant had no concern. Mr. De has emphasised the words "for the recovery of a loan advanced by him" occurring in Section 4. He contends that on the finding of the Courts below the loan was not advanced by the appellant himself and the appellant was, as has been said by the learned Subordinate Judge, a mere name-lender. In this view of the matter, it is contended that Section 4 does not hit the appellant. I am unable to accept this contention of Mr. De. I concede that Section 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, is so worded that certain difficulties of interpretation may arise with regard to other matters. The expression "advanced by him" must, I think, mean advanced by the money-lender who has brought the suit. The expression "money-lender" is defined as meaning a person who advances a loan and includes, 'inter alia', the legal representatives and successors-in-interest' whether by inheritance, assignment or otherwise of a person who advances a loan. The question is whether the word "advanced" means only the physical act of paying the money. I do not think that it does; otherwise, a servant counting and paying over the money would become a money-lender and would require registration. I do not think that that is the intention. In the case before us, however, it is not merely the physical act of advancing which was made by the appellant. The right of recovery of the money was also in the appellant, though the money might have come out of the funds of the wife. There was some controversy before us as to whether the promissory note in question was a negotiable instrument within the meaning of Section 13 of the Negotiable Instruments Act. In view of Explanation (1) to Section 13 (1) of the Act, it seems that the promissory note in question was a negotiable instrument. Under S. 8, the holder of a promissory note means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. In the case before us, the promissory note was in the name of the appellant: he was the holder, and was entitled to recover the amount due on the handnote. In the plaint, the appellant clearly stated that he sued on the handnote. Therefore, in the case before us, not merely the physical act of payment of the money but also the right to recover the amount exist in the same person. A promissory note contains an unconditional undertaking to pay, and the question of a 'benami' transaction does not really arise on a negotiable instrument of this kind. Even if the money came out of the funds of the wife, the appellant advanced it to defendant No. 1 on a handnote, and the appellant was entitled to recover the money. That being the position, I am of the opinion that the appellant was the money lender who advanced the loan within the meaning of S. 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939. Any other interpretation would, I think, lead to very anomalous results. S. 5 talks of a suit brought by a money-lender in respect of a loan advanced after the commencement of the Act. The words "by him" do not appear in S. 5. If, however, a person who advances a loan on a handnote in his name is allowed to say that the money came out of somebody else's funds and he is not the money-lender then the position will be that he will not be hit by S. 5, nor by S. 7. It would then mean that a money-lender can always escape the provisions of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, by merely raising the plea of 'benami'. I do not think that that could be the intention of the legislature; nor do I think that the words of the section justify such an interpretation. Learned Counsel for the respondents has drawn our attention to S. 5 of the Bihar Money Lenders Act, 1938, which states that it is open to a money-lender to state the name and style under which he carries on or desires to carry on business as a money-lender. It is contended by learned Counsel for the respondents that if the wife desired to carry on money lending in the name of her husband, it was open to her to get herself registered in the name of her husband. Learned Counsel for the respondents contends that surely the Legislature could not have intended that the money-lender and his benamidar would both escape registration by merely alleging that neither of them were a money-lender within the meaning of the Act.

(10) For the reasons given above, I would hold that the Courts below were right in their view that S. 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, applied in the present case, and the appellant was not entitled to sue for recovery of the money on the handnote without being registered as a money-lender.

(11) Lastly, Mr. De has contended that the Courts below should have held that the appellant was either a casual money-lender or the registration in the name of the firm was sufficient compliance with the requirements of S. 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939. If the appellant had not himself said that the firm which was registered as a money-lender, had nothing to do with this loan, the position would have been simple enough. The registration in the name of the firm would have entitled the appellant to sue for the recovery of the money, even though the suit was brought not in the name of the firm but in the name of the sole proprietor of the firm. But the trouble is that the appellant himself said that the firm had nothing to do with the loan. On the question whether this was a casual loan, there is a clear finding of fact by the learned Munsif. On a consideration of evidence in the case, the learned Munsif clearly held as follows:

> "Under these circumstances, the amount which has been advanced under the handnote in suit cannot be said to be a casual money-lending transaction under unforeseen circumstances;

rather the plaintiff's wife or the plaintiff seems to me to be a money lender by profession".

The learned Subordinate Judge affirmed this finding. Our attention was drawn to some statements of a witness who said that the plaintiff's wife did not advance loans to the defendants on any other occasion. The Courts below had to consider the entire evidence on the record, and if there was evidence in support of the finding arrived at by the learned Munsif and it is not disputed that there was such evidence, then it is not open to us in second appeal to go behind the finding of fact arrived at by the Courts below. Our attention was drawn to two decisions, 'Mt. Surajbansi v. Mt. Larho', 25 Pat 90 and 'Bhutnath v. Nilkantha', 27 Pat 77. Those were decisions relating to a casual money lender. In view of the finding of the Courts below, those decisions are of no help to the appellant.

(12) It is true that the respondents are taking advantage of the provisions of S. 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, though their plea of payment has not been accepted but however morally reprehensible the conduct of the respondents may be, they are entitled in law to plead the bar of S. 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939.

(13) The Courts below rightly held that the bar applied. The appeal accordingly fails and is dismissed, but in the circumstances of the case there will be no order for costs of the hearing in this Court.

(14) C. P. SINHA, J.: I agree.

G.M.J. *Appeal dismissed.*

A. I. R. (39) 1952 PATNA 42 (C. N. 14)

RAMASWAMI AND RAI JJ.

S. M. Ramkali Kuer, Appellant v. Ram Bujhawan Singh, Respondent.

A. F. A. D. Nos. 1427 and 1428 of 1948, D/- 1-2-1951.

Tenancy Laws — Bihar Tenancy Act (VIII (8) of 1885) S. 65 — Suit for arrear of rent — Nature of — Landlord held entitled to money.

A suit for arrear of rent is a suit of a double character. It is ordinarily a suit to enforce the charge upon the holding which is created by the provisions of S. 65 of the Bihar Tenancy Act; and a decree which has the effect of enforcing this charge can only be made when the plaint is framed in such a manner as to comply exactly with the provisions of S. 148 of the Bihar Tenancy Act. The suit is also a suit to enforce the personal liability of the tenant to pay a certain sum of money to the landlord and a decree may be made enforcing this liability where a decree cannot be made enforcing the charge under S. 65 of the Act.

Thus where the landlord sues a tenant 'A' for rent in respect of half the area of certain khata and files another suit against tenant 'B' in respect of the other half portion of the same khata, and the tenant 'B' pleads that he has purchased the interest of the tenant 'A', and it is also proved that 'B' was in possession of both the areas and enjoyed the usufruct thereof, it is proper that a money decree in respect of the arrears for both the areas should be passed against 'B': AIR (25) 1938 Pat 306 (FB) Foll. AIR (9) 1922 Pat 608 (1) disting. AIR (19) 1932 Pat 304 doubted. (*Paras 3, 5*)

A. N. Lall; Kedar Narain Sinha and Gokhulanandan Prasad, for Appellant; Baidhyanath Prasad II, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('22) A I R (9) 1922 Pat 608 (1): (69 Ind Cas 704) (Pr 3)

('32) A I R (19) 1932 Pat 304: (139 Ind Cas 535) (Pr 4)

('38) 17 Pat 451: (A I R (25) 1938 Pat 306 F B) (Prs 3, 4)

('48) 26 Pat 66: (A I R (35) 1948 Pat 223) (Pr 4)

RAMASWAMI, J.: The question to be examined in these appeals is whether the plaintiff landlord is entitled to a money decree against the defendants for the years alleged.

(2) It is not controverted that plot No. 874, khata No. 157, area 3.40 acres, was recorded in survey in the name of Gena and Debi Singh in equal shares. The plaintiff brought Rent Suit No. 25 of 1947 against the heirs of Gena with respect to half the area comprised in khata No. 157. The heirs of Debi Singh intervened in the suit and claimed that they had purchased by a registered kebala dated 21st January 1904 the interest of Gena. The plaintiff had brought Rent Suit No. 28 of 1947 with respect to the other half share of Khata No. 157 against the sons and grandsons of Debi Singh who were recorded in survey papers. The trial Court gave a decree in favour of the plaintiff against the heirs of Debi Singh in both the suits. The decision of the trial Court has been reversed in appeal by the learned Subordinate Judge who held that the suits were not maintainable and the plaintiff was not entitled even to a money decree in either of the suits.

(3) On behalf of the plaintiff who has instituted the present appeals learned Counsel addressed the argument that the lower appellate Court was wrong in dismissing the suits outright, but, on the contrary, the plaintiff should have been granted money decrees for the actual arrear of rent due from the defendants. In my opinion the argument addressed by the learned Counsel is well founded and must prevail. It is important to remember that a suit for arrear of rent is a suit of a double character. It is ordinarily a suit to enforce the charge upon the holding which is created by the provisions of S. 65 of the Bihar Tenancy Act; and a decree which has the effect of enforcing this charge can only be made when the plaint is framed in such a manner as to comply exactly with the provisions of S. 148 of the Bihar Tenancy Act. But the suit does not necessarily fail because a decree cannot be made to enforce the charge in such a manner as to entitle the purchaser at a sale in execution to annul all incumbrances. The suit is also a suit to enforce the personal liability of the tenant to pay a certain sum of money to the landlord and a decree may be made enforcing this liability where a decree cannot be made enforcing the charge under S. 65 of the Act. In this case there is no evidence that the plaintiff landlord was aware of the kebala executed by Gena in favour of the heirs of Debi Singh. When the suit was heard a witness was examined on behalf of the defendants to prove that the purchase was made and the sale deed was produced in Court at that stage. It is the admitted case that the defendants were in possession of the land and enjoyed the usufruct thereof for the years claimed. In a case of this kind it is proper that a money decree ought to be granted to the plaintiff for the arrears of rent claimed against the defendants. It should be noticed that Rent Suit 25 of 1947 is concerned with the rest of the area of plot No. 874 of Khata No. 157 and that Suit has been brought by the plaintiff against the sons and grandsons of Debi Singh who has been recorded in the survey. In my opinion this case falls within the principle enunciated in 'Jeonandan Singh v. Janki Singh', 17 Pat 451 in which the Full Bench granted money decree to the landlord since there was an issue between the parties with respect to the question of area and rental. The facts involved in the present appeals are closely parallel to the material facts upon which the decision of

the Full Bench in '17 Pat 451' is based. On behalf of the respondent Mr. Baidyanath Prasad referred to 'Keshava Prasad Singh v. Mathura Kuar', AIR (9) 1922 Pat 608. But the facts of that case must be distinguished. A suit had been brought by the landlord for rent of a portion of a holding. The suit was dismissed by the lower Courts. On appeal the High Court held that the suit was rightly dismissed since to decree such a suit would be in effect to allow a splitting up of the tenancy without any ascertainment of the portion of the rent which was due from the particular portion of the holding for which the rent was claimed. It should be noticed that the claim was not in respect of the entire area nor for the entire Jama and the question of apportionment necessarily arose in that case and the Court in these circumstances refused to grant a decree.

(4) Learned Counsel also relied upon 'Ambika Prasad Singh v. Laxmi Ahir', 26 Pat 66 in which a suit was brought by the landlord for rent in respect of an alleged holding comprising 3.6 acres of land out of khata No. 16 in village Amaishi Dihra. The defence was that the holding was 6.53 acres with a different annual rental and the suit brought in respect of a part of the holding was not maintainable. It was held by the High Court that the plaintiff was not entitled even to a money decree because the suit was not really brought in respect of the holding at all, but in respect of an alleged different holding which did not in effect exist. The authority of this case is doubtful in view of the decision of the Full Bench in 'Jeonandan Singh v. Janki Singh', 17 Pat 451. On the other hand, reference should be made to 'Rambeas Tewari v. Akhauri Raj Mohan Sahay', A I R (19) 1932 Pat 304 in which a suit was instituted for arrears of rent in respect of a part of a holding and not in respect of the whole holding. The plaintiff was granted a decree in the lower Courts. On appeal preferred by the tenants, to the High Court, it was argued that since the suit was with respect to a part of a holding it was not maintainable at all. The argument was rejected by Kulwant Sahay and Scroope, JJ. who held that the consequence of such a suit would be to treat it not as a rent suit but as an ordinary money suit and the decree that would be passed will only be treated as a money decree and not as a rent decree.

(5) Upon a review of these authorities it is manifest that the plaintiff ought to be granted a money decree in both the suits which are the subject matter of the present appeals.

(6) Accordingly I would set aside the decree of the lower appellate Court and order that the plaintiff should be granted a money decree for the amounts for which the decrees have been granted by the trial Court. I do not propose to make any order as to costs of this Court.

(7) RAI J.: I agree.

D.R.R. *Appeals allowed.*

A. I. R. (39) 1952 PATNA 43 (C. N. 15)

AGARWALA J.

Sahabu Mahton and others, Appellants v. Hari Ram Mahto and others, Respondents.

A. F. A. D. No. 623 of 1949, D/- 8-5-1950.

(a) *Tenancy Laws — Chota Nagpur Tenancy Act (VI (6) of 1908) S. 139A — Bar of suit under — Essentials.*

A litigant who wishes to rely on S. 139A which is a bar to the jurisdiction of the Civil Court, must first show that his application comes under the provisions of S. 46, and, for this purpose, must allege facts which make the transfer invalid under that section. For that purpose he will have to show that either the transfer is not of the class to which sub-section (4)(a) of S. 46 relates or that the transferee is not of the class to which a transfer is permitted by the section. Where, therefore, the plaintiffs do not allege facts necessary to attract the provisions of S. 46, the suit is not barred by S. 139A. (*Para 4*)

(b) *Transfer of Property Act (1882) S. 105 — Limitation Act (1908), Art. 144 — Right as a tenant — Acquisition of, by adverse possession.*

The right as a tenant can be obtained by permanently occupying land only by a custom or by a grant from the owner if the latter has power to grant such a right, or under an Act of the legislature. Where, therefore, no custom is pleaded and there is no Act of the legislature conferring permanent rights on the persons occupying the land and the lease Settlement on which they rely is prohibited by the Statute, it is not open to the Court to hold that they had acquired right of tenancy by prescription. 9 Bom 198 (F B) Doubted. (*Para 5*)

Anno: T. P. Act S. 105 N. 79, 82; Lim. Act Arts. 142, 144 N. 60.

(c) *Limitation Act (1908) Art. 144 — Suit for ejectment — Onus of proving possession within 12 years — Discharge of.*

Where in a suit for ejectment the defence taken is that the defendants had been put in possession by the plaintiffs' predecessor and were tenants of the plaintiffs and had been paying and are liable to pay rent to them, the onus which lies on the plaintiffs of proving possession on their part within 12 years is discharged, for the defendants must be taken as admitting that their possession was at least permissive possession, which amounts to saying that the plaintiffs were in their possession through them. (*Para 6*)

Anno: Lim. Act, Arts. 142-144 N. 87.

Lala Atul Chandra, for Appellants; G. C. Mukherji and R. S. Chatterji, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('23) 50 Ind App 255: (A I R (10) 1923 P C 205) (Pr 5)

('24) A I R (11) 1924 P C 65: (47 Mad 337) (Pr 5)

('85) 9 Bom 198 (F. B.) (Pr 5)

('32) 11 Pat 456: (A I R (19) 1932 Pat 257) (Pr 8)

('33) 14 Pat L T 294: (A I R (20) 1933 Pat 288) (Pr 8)

('38) A I R (25) 1938 Pat 479: (176 Ind Cas 35) (Prs 5, 6)

JUDGMENT: This is an appeal by the plaintiffs against the decision of the Court below reversing the decision of the Court of first instance. It arises out of a suit for the recovery of plot No. 1018 of Khata No. 10 in village Lakshmipur. The suit comes from Dhanbad in the district of Manbhum where the tenancy law in force is the Chota Nagpur Tenancy Act. The land in suit belonged to one Gorachand, father of plaintiff No. 1 and grandfather of plaintiff No. 2, and was recorded in his name. The plaintiffs alleged that in May 1944, while Gorachand was ill, the defendants took possession of the plot and constructed a house on it. As framed, therefore, the suit was one to eject a trespasser who was alleged to have trespassed the plaintiffs' land. On the plaint the suit was governed by Art. 142 of the Limitation Act and must have been dismissed as the plaintiffs failed to prove possession within twelve years of its institution. In fact, it has been dismissed by the appellate Court, and the plaintiffs have appealed against that decision.

(2) The case has become rather complicated, however, because the defendants were not satisfied

with the plaintiffs' case that they had been in possession within twelve years of the institution of suit. They pleaded that they were under-raiyats of the plot alleging that Gorachand had settled the land with defendant No. 1 and with Chunaram father of defendants 2 and 4 in consideration of a selami of Rs. 18 in 1335 B. S., that is to say, about 1928. The Court of first instance rejected this defence holding that the defendants had not proved the alleged settlement or that they had been in possession under it. The first Court held that the defendants were mere tenants-at-will and that the plaintiffs were entitled to eject without notice.

(3) In appeal, the appellate Court had taken the view that since the defendants claimed to have entered into possession under a settlement from Gorachand, they had set up a plea of adverse possession, and that, although under the law prevailing in Chota Nagpur, it was beyond the power of Gorachand to make a settlement of the nature alleged by the defendants, the latter must be regarded as having obtained possession in 1928 and that possession must be regarded as adverse possession to the plaintiffs from its beginning, and, therefore, that the defendants had acquired a title to the land by adverse possession. Against that decision the plaintiffs have now appealed.

(4) Before dealing with the main point in the case, I propose to consider the contention of Mr. Mukherji for the respondents that this suit is barred by S. 139A of the Chota Nagpur Tenancy Act. That section prohibits any Court from entertaining any suit concerning any matter in respect of which an application is recognizable by the Deputy Commissioner under S. 139. S. 139 makes the following applications cognizable by the Deputy Commissioner and not in any other Court, namely, (a) all applications under the Act to eject a tenant of agricultural land or to cancel any lease of agricultural land, and (b) all applications in respect of which jurisdiction is conferred by the Act on the Deputy Commissioner. The first of these two applications to which I have referred falls within sub-section (4) of S. 139. But the present is neither an application to eject a tenant or to cancel a lease, the plaintiffs' allegation being that the defendants are not tenants, but trespassers. The second class of applications is governed by Sub-s. (8) of S. 139, and it is necessary to consider whether in the present suit an application would have laid to the Deputy Commissioner under the Act for the purpose of ejecting the defendants. Mr. Mukherji refers to Sub-s. (5) of S. 46 of the Act as it stood before it was amended, after the institution of the present suit, in 1947. Sub-s. (5) provides that if a raiyat transfers his holding or any portion thereof in contravention of the provisions of S. 46, the Deputy Commissioner may, of his own motion or on the application of the raiyat, eject the transferee and place the raiyat in possession of the holding within twelve years from the date of the transfer. Mr. Mukherji contends that under Sub-s. (5) an application could have been maintained to the Deputy Commissioner for restoration of possession of their land, and, therefore, S. 139A bars the Civil Court in entertaining the present suit. The application of Sub-s. (5) of S. 46, however, depends upon certain facts; for instance, under Subsection (4)(a) certain classes of raiyats may transfer their holdings to certain classes of persons. A litigant who wishes to rely on S. 139A which is a bar to the jurisdiction of the Civil Court, must first show that his application comes under the provisions of S. 46, and, for this purpose, must allege facts which make the transfer invalid under that Section. For that purpose he will have to show that either the transfer is not of the class to which Sub-s. (4)(a) relates or that the transferee is not of the class to which a transfer is permitted by the section. In the present instance the plaintiffs did not allege facts necessary to attract the provisions of that section.

(5) The main controversy in this litigation, however, is with regard to limitation. The appellate Court has found, and there can be no controversy about it, that a settlement or transfer by a raiyat of land under the provisions of the Chota Nagpur Tenancy Act for a period which may exceed nve years is altogether void 'ab initio'. Where a raiyat purports to transfer his holding or portion of it outright, then the possession of the transferee can be regarded as adverse from the date on which it takes place, but when, as in the present case, the transfer is by way of a lease the question arises what is the transferee prescribing for. It is certainly not for the raiyati interest, but may be for an interest subordinate to the raiyati interest. In the present case what the transferee was prescribing for was the interest of an under-raiyat, and, moreover, an interest of permanent nature. In the case of 'Bhukhan Mian v. Radhika Kumari Debi', A I R (25) 1938 Pat 479 a Division Bench of this Court held that a person cannot prescribe for a limited interest such as a tenancy, as a tenancy is based on contract, and on principle it is difficult to hold that a contract can be brought into existence by prescription. The further difficulty in this case is that in a case of the present nature there is a statutory bar to a contract or lease settlement of the nature on which the defendants rely. The question whether a transferee of lands can acquire by prescription a title to land the alienation of which is prohibited by statute was considered by a Full Bench of the Bombay High Court in 'Radhabai v. Anantrav', 9 Bom 198 which decided that in the absence of fraud adverse possession of twelve years would confer a title on the transferee. This matter was later on considered by the Privy Council in 'Madhavrao Waman v. Raghunath Venkatesh', 50 Ind App 255 which had the occasion to consider the decision of the Bombay High Court, and although their Lordships did not expressly overrule that decision still they expressed themselves as saying that it is somewhat difficult to see how a stranger can acquire title by adverse possession of twelve years of lands the alienation of which is in the interest of the State prohibited. Furthermore, in 'Nainapillai Marakayar v. Ramanathan Chettiar', A I R (11) 1924 P C 65 at p. 67 their Lordships stated, with respect to the acquisition of the right of occupying land permanently in India as a tenant, that such right can be obtained only by custom or by a grant from the owner if the latter has power to grant such a right, or under an Act of the legislature. In the present instance no custom is pleaded and there is no Act of the legislature conferring permanent rights on the defendants and the settlement on which they rely is prohibited by the statute. It was, therefore, in my opinion, not open to the Court of appeal below to hold that the defendants had acquired a right of tenancy by prescription.

(6) If this appeal had to be decided on the allegations in the plaint, I would have no difficulty in dismissing it on the ground that the appellants, having framed their suit as a simple suit for ejectment, had failed to prove possession of the disputed land within twelve years of the institution of the suit. But Mr. Mukherji on behalf of the respondents conceded that, in view of the course the litigation took at the trial, the question arising should be decided not on the allegations in the plaint but on the findings. The material findings are that the plaintiffs' predecessor, Gorachand, put the defendants in possession as settlees and that the plaintiffs have failed to prove their possession with-

in twelve years of the institution of the suit. In view of the defence taken that the defendants had been put in possession by the plaintiffs and were tenants of the plaintiffs and had been paying and are liable to pay rent to them, it seems to me that the onus which lay on the plaintiffs of proving possession on their part had been discharged, for the defendants must be taken as admitting that their possession was at least permissive possession. This amounts to saying that the plaintiffs were in their possession through them. In 'Bhukhan Mian v. Radhika Kumari Debi', A I R (25) 1938 Pat 479 Wort, A. C. J. refused to regard as a trespasser a person whom the plaintiff had put in possession of the disputed land. In that case the plaintiff in a suit for redemption alleged that he had deposited the money due under the mortgage. The defendant denied that he was a mortgagee and claimed to be a tenant under the plaintiff. The mortgage deed being unregistered it was inadmissible in evidence. It was in evidence that the defendant had been paying a sum of Rs. 8 per annum to the plaintiff. But as the document was inadmissible, it was not possible to determine the nature of this payment. Wort, A. C. J. observed that

> "the plaintiff here seeks to recover possession. He cannot prove his contract as the documents are not registered; and, although strictly speaking the mortgages may not be void but at the same time they are unprovable. Therefore, it may very well be that the defendant could be treated as a trespasser from the time of the so-called mortgagee of 1921. But in this case, having regard to the fact which I have mentioned, namely that he had been paying Rs. 8 per annum and which is being accepted by the plaintiff, it is impossible to hold that the defendant is a trespasser. The payment is evidence at least of the fact that the possession of the defendant by the plaintiff is permissive."

So, as I have already indicated the line of defence taken in this case also is that their possession is at least permissive possession.

(8) It remains to refer to the cases cited by Mr. Mukherji on behalf of the defendants-respondents. The first of these is 'Gobardhan Gorain v. Sibakali', 11 Pat 456. This was a suit by a settled raiyat in Chota Nagpur for ejectment of the defendant from homestead land in his possession. The defendant was in possession under a lease which offended against the provisions of S. 46 of the Chota Nagpur Tenancy Act. Nevertheless, there is an observation in the judgment that, although the lease is invalid, the plaintiff who brought the defendants upon the land and took nazrana and allowed them to build the house and to remain in possession for some 16 years could not be permitted to take advantage of his own wrong and to eject the defendants. Mr. Mukherji cited this case as an instance where this Court had not applied the rule that there can be no estoppel against the statute. The property in dispute in that case was homestead land and the real point for consideration was S. 78 of the Chota Nagpur Tenancy Act. The defendant was a settled raiyat with other lands in the village, and, as such, could not be ejected from their agricultural land by the landlord. S. 78 of the Chota Nagpur Tenancy Act, 1908, provides that when a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and, subject to local custom or usage, by the provision of this Act applicable to land held by a raiyat. The homestead in that case was held otherwise than as part of the raiyati holding. The decision, therefore, turned on the application of S. 78 and not on the rule that there can be no estoppel against the statute. The second case is that of 'Abdul Jabbar v. Gulab Khan', 14 Pat L T 294 which is a decision of Macpherson, J. sitting single. That learned Judge held that a mortgagee in possession under a mortgage by a raiyat of a holding in Chota Nagpur which contravenes the provisions of S. 46 of the Act begins to prescribe from the date of the mortgage and if he holds adverse possession as such for the statutory period, the raiyat can only recover possession by redeeming it. The learned Judge also said that while a mortgagee will ordinarily prescribe as such, he is not debarred from prescribing in another capacity, as for instance, on a claim of title as raiyat of the holding, if the circumstances show that the adverse possession which he thereafter asserted was as the raiyat. In neither of these two cases is there any reference to the decision of the Privy Council to which I have referred above.

(9) In my view, in view of the allegations in the written statement, the plaintiffs-appellants have proved their possession within twelve years of the institution of the suit and the suit should, therefore, have been decreed. The judgment and the decree of the appellate Court, are, therefore, set aside and those of the Court of first instance are restored. In view of the manner in which the plaintiffs framed their claim, I consider that they should bear their own costs throughout this litigation.

D.R.R. *Appeal allowed.*

A. I. R. (39) 1952 PATNA 45 (C. N. 16)

SHEARER AND JAMUAR JJ.

Suman Tawaff, Petitioner v. Gaya Municipality, Opposite Party.

Criminal Revn. No. 786 of 1950, D/- 17-11-1950.

(*a*) *Municipalities — Bihar and Orissa Municipal Act (VII (7) of 1922) S. 203(2).*

Where the Magistrate directs that if a person does not remove his stair-case within a fortnight from the date of his order, he will be liable to pay a certain fine for every day thereafter that the stair case is allowed to remain, the order is illegal as in effect, it amounts to imposing a sentence in anticipation of the Commission of an offence. A I R (24) 1937 Pat. 352 Rel. on. (*Para 1*)

(*b*) *Municipalities — Bihar and Orissa Municipal Act (VII (7) of 1922) S. 203 — Magistrate holding local inspection but omitting to record any memorandum — Irregularity does not vitiate trial.* (*Para 1*)

Brish Ketu Saran Sinha, for Petitioner; A. K. Prasad, for Opposite Party.

Case referred to:

('37) A I R (24) 1937 Pat 352: (38 Cri L Jour 416) (Pr 1)

SHEARER J.: In making the order which he did the learned trying Magistrate misdirected himself in law as to the scope of sub-section (2) of S. 203 of the Bihar and Orissa Municipal Act, 1922. Under that provision it was open to the trial Court to impose a daily fine for.....every day after the expiration of eight days from the date of service of the requisition to remove the staircase. The effect of such an order would have been that a warrant would have issued against the petitioner for the realisation of a certain sum of money. What the learned trying Magistrate has done, however, was to direct that if the petitioner does not remove her staircase within a fortnight from the date of his order, she will be liable to pay a fine of Rs. 5 for every day thereafter that the staircase is allowed to remain. Agarwala, J., as he then was, in 'Haluman Sah. v. Motihari Municipality', A I R (24) 1937 Pat 352 pointed out that this was illegal as, in

effect, it amounted to imposing a sentence in anticipation of the commission of an offence. The learned advocate for the petitioner has complained that the learned trying Magistrate held a local inspection and yet omitted to record any memorandum. An irregularity of this kind is not, however, sufficient to vitiate the trial. The purpose of the learned trying Magistrate in making the local inspection was merely to discover whether the petitioner had two staircases or one satircase, and it is scarcely possible that the omission to record a memorandum caused any prejudice to the petitioner. The order of the Courts below will be varied to this extent that that part of it imposing a daily fine will be set aside. Subject to this modification, the application is dismissed.

(2) JAMUAR, J.: I agree.

D.H. *Order accordingly.*

A. I. R. (39) 1952 PATNA 46 (C. N. 17)

LAKSHMIKANTA JHA, C. J. AND CHATTERJI, J.

Maharaj Singh and another, Appellants v. Budhu Chamar and others, Respondents.

Letters Patent Appeal No. 7 of 1950, D/- 11-5-1951.

(a) *Tenancy Laws — Chotanagpur Tenancy Act (6 of 1908), S. 139 — "Suit under the Act".*

Where an occupancy tenant brings an ejectment suit against a defendant holding under a darraiyati settlement on his refusal to restore the land on demand in accordance with the terms of the lease:

Held that the suit could not be said to be a suit under the Act and the Civil Court was not barred under S. 139 from trying the suit. (*Para 5*)

(b) *Limitation Act (1908), Art. 142 — Discontinuance of possession.*

Making over possession to a tenant, though under an invalid lease, does not amount to discontinuance within the meaning of Art. 142. (*Para 6*)

Anno: Lim. Act, Arts. 142 and 144 N. 9.

(c) *Limitation Act (1908), Art. 144 — Possession under invalid lease.*

Where a person came into possession of the land under an invalid lease, that is to say, without any title, his possession from the beginning is that of a trespasser and is adverse to the true owner, at any rate, so far as his right to khas possession was concerned, and a suit to restore possession brought more than 12 years after such possession became adverse, is barred. (*Para 8*)

The right to khas possession must be distinguished from possession through tenants. If the owner has been receiving rent from the lessee the possession of the lessee may not be adverse to the owner, so far as his right to receive rent is concerned but if the lessee has been paying rent in assertion of a permanent tenancy right, his possession must be adverse to the true owner, so far as his right to khas possession is concerned. (*Para 12*)

Anno: Lim. Act Arts. 142 & 144 N. 60.

(d) *Tenancy Laws — Chota Nagpur Tenancy Act (6 of 1908), Ss. 46 and 230 — Suit to recover possession from lessee holding under invalid lease — Limitation Act, applicability.*

Under S. 46 a lease for a period exceeding 5 years is prohibited, and the raiyat who leases out his holding under an invalid lease is entitled to sue to recover possession of his holding. But if he does not bring his suit within the period of limitation prescribed by the Limitation Act, he cannot recover possession and the alienee may acquire interest in the land by adverse possession. (*Para 15*)

A. B. Saran and K. N. Chaturvedi, for Appellants; Rajkishore Prasad and Shambhu Barmeshwar Prasad, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('84-85) 12 Ind App 188: (12 Cal 484 P C) (Pr 11)
('38) A I R (25) 1938 Pat 479: (176 Ind Cas 35) (Pr 10)
('41) 22 Pat L T 200 (Pr 13)

CHATTERJI, J.: This is an appeal under Cl. 10 of the Letters Patent by the defendants in a suit for ejectment. Admittedly the suit land forms part of an occupancy holding of the plaintiffs, the incidents of which are governed by the Chotanagpur Tenancy Act. The plaintiffs' case was that about 10 years ago Rachhi Singh, deceased father of defendant No. 1 and husband of defendant No. 2, took dar-raiyati settlement of the suit land from the plaintiffs and about 6 years ago he built a house on a part of the suit land on condition that the house would be demolished and the suit land restored to its former condition and delivered to the plaintiffs on demand. After the death of Rachhi Singh, the defendants have been in possession of the suit land. On 16th of July, 1945 the plaintiffs served a notice on them to vacate the land. As they did not do so, the plaintiffs instituted the present suit in 1946.

(2) The suit was contested by defendant No. 1, who will be referred to hereinafter as the defendant, and his defence in substance was that the plaintiffs settled the suit land with Rachhi Singh under a deed dated the 15th Aghan 1325 fs. on an annual cash rent of Rs. 9-4-6 and it was agreed between the parties that Rachhi Singh would acquire permanent right in the land by virtue of the settlement; Rachhi Singh thereafter built a big house and dug a well on the land at a cost of about Rs. 10,000/-; the plaintiffs, therefore, are not entitled to eject the defendants. It was also pleaded that the civil Court had no jurisdiction to try the suit.

(3) The learned Munsif who tried the suit held that the lease relied upon by the defendants contravened the provisions of S. 46 of the Chotanagpur Tenancy Act and was, therefore, invalid. He, however, held that as the defendants' predecessor was inducted on the land on the assurance that he would have a permanent right in the land, the plaintiffs were not entitled to eject the defendants. He accordingly dismissed the suit. On the question of jurisdiction, he held that the suit was cognizable by the civil Court.

(4) On appeal, the learned Subordinate Judge held that the lease set up by the defendants was for an indefinite period and was, therefore, invalid in view of the provisions of S. 46 of the Chotanagpur Tenancy Act. He also held that the defendants' predecessor built the house on the suit land more than 20 years ago and they have been in possession of the land and the house for up-wards of 20 years. He further held that the plaintiffs forfeited their right to eject the defendants from the land on which the house was built, but were entitled to eject them from the rest of the land. He held that the suit was cognizable by the civil Court. He accordingly allowed the appeal in part and decreed the suit with regard to the land on which no house or structure stands. On second appeal, Shearer J. affirmed the decree of the lower appellate Court.

(5) The first point argued by Mr. A. B. Saran on behalf of the appellants is that the civil Court is barred under S. 139 of the Chotanagpur Tenancy Act from trying the suit. But the section itself bars "suits under this Act." It has not been shown how the present suit can be said to be a suit under this Act.

(6) The next point argued by Mr. Saran is that the suit is barred by limitation. According to the

finding of the lower appellate Court, the defendants have been in possession under an invalid lease for more than 20 years. It is, therefore, contended that the suit is barred under Art. 142 of the Limitation Act. Art. 142 refers to suit

"For possession of immoveable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession".

On the facts of the present case, Art. 142 by its terms cannot apply. According to both parties' case, the defendants' predecessor was inducted on the land as a tenant, though under an invalid lease. It cannot, therefore be said that the plaintiffs have been dispossessed or have discontinued the possession. Making over possession to a tenant, though under an invalid lease, does not amount to discontinuance within the meaning of the Article.

(7) The suit will, therefore, be governed by the residuary Art. 144. Under this Article, 12 years will have to be computed from the time "when the possession of the defendant becomes adverse to the plaintiff."

(8) The question for determination, therefore, is when the possession of the defendants became adverse to the plaintiffs. S. 46 of the Chotanagpur Tenancy Act, as it stood at the date of the defendants' lease, that is, in 1921, was as follows (omitting the portions which are not material to our present purpose) :

"1. No transfer by a raiyat of his right in his holding or any portion thereof—

(a) by mortgage or lease, for any period, expressed or implied, which exceeds or might in any possible event exceed five years, or

(b) .....shall be valid to any extent".

The finding of the lower appellate Court is that the lease granted by the plaintiffs in favour of the defendants' predecessor was for an indefinite period; in other words, it was for a period which might in any possible event exceed 5 years. Consequently, it was not valid to any extent. The position, therefore, is that the defendants' predecessor Rachhi Singh came into possession of the land under an invalid lease, that is to say, without any title, and his possession from the very beginning was that of trespasser and necessarily it was adverse to the plaintiffs, at any rate, so far as their right to khas possession was concerned. The finding of the lower appellate Court is that the defendants have been in possession of the suit land for upwards of 20 years. If, therefore, their possession was adverse from the very beginning, the suit is obviously barred even assuming that their possession became adverse after 5 years from the commencement of the lease, still the suit will be out of time.

(9) Mr. Rajkishore Prasad on behalf of the respondents contends that the possession of the defendants could never be adverse, because there is the admission of the defendant in the written statement that the defendants have always been paying rent to the plaintiffs for the suit land; in other words, the defendants have always admitted the superior title of the plaintiffs. But the admission must be taken as a whole. It is definitely asserted in the written statement that the defendants have been in possession of the disputed land as permanent tenants and have been paying rent for it. There is thus a clear assertion of hostile claim against the plaintiffs, so far as their right to khas possession is concerned.

(10) In 'Bhukhan Mian v. Radhika Kumari Debi', A I R (25) 1938 Pat 479 there are, of course, certain observations of Wort, A. C. J. which may support Mr. Rajkishore Prasad's contention. In that case the plaintiffs sued for redemption. The mortgage sought to be redeemed, being unregistered, was invalid and was not admitted in evidence. The question arose whether the defendant who was in possession under the invalid mortgage prescribed for the limited interest of a mortgagee. Wort A. C. J. stated :

"The plaintiff here seeks to recover possession. He cannot prove his contract as the documents are not registered; and, although strictly speaking, the mortgages may not be void but at the same time they are unprovable. Therefore it may very well be that the defendant could be treated as a trespasser from the time of the so-called mortgages of 1921. But in this case, having regard to the fact which I have mentioned, namely, that he has been paying Rs. 8 per annum and which is being accepted by the plaintiff (and that fact is clear), it is impossible to hold that the defendant is a trespasser. The payment is evidence at least of the fact that the possession of the defendant by the plaintiff is permissive."

The plaintiffs' suit, however, was dismissed on the ground that there was no evidence to prove their right to possession. In the present case, the defendant's admission that they have been paying rent to the plaintiffs is coupled with an assertion that they are permanent tenants of the land. Upon these facts, the observation of Wort, J., is hardly of any assistance.

(11) Mr. Rajkishore Prasad relies on the Privy Council decision in 'Tekait Ram v. Madho Kumari', 12 Ind App 188. In that case a ghatwal sued to eject the defendants from a subordinate tenure on the ground that it was a tenure-at-will. On the question of limitation, their Lordships had to consider when the possession of the defendants became adverse to the plaintiff. Their Lordships stated :

"It can scarcely be contended that immediately on the creation of the sub-tenure the possession of it became adverse when there was no dispute or conflicting claim. If not so when did the possession become adverse?"

It is clear that in that case there was a valid subordinate tenure and consequently the possession of the subordinate tenure-holder could not be adverse from the moment the tenure was created. In the present case, there was no valid tenancy created in favour of the defendants' predecessor and his possession became adverse from the very inception.

(12) Shearer, J. is of opinion.

"No person can, by adverse possession acquire rights against the true owner unless the true owner has been kept out of possession for the statutory period. The plaintiffs were not however, kept out of possession, as they have throughout been receiving rent from the defendants, that is, they have been in the enjoyment of certain rights in the property."

But the right to khas possession must be distinguished from possession through tenants. If the plaintiffs have been receiving rent from the defendants, the possession of the defendants may not be adverse to the plaintiffs, so far as their right to receive rent is concerned. But if the defendants have been paying rent in assertion of a permanent tenancy right, their possession must be adverse to the plaintiffs, so far as their right to khas possession is concerned.

(13) In 'Shiva Shankar v. Beni Ram', 22 Pat LT 200, decided by Harries, C. J., and Fazl Ali, J., (as he then was,) it was held that the lessees under an unregistered patta which was invalid as a lease came upon the land as trespassers and as they and their successors-in-interest asserted the rights of tenants over the land for more than 12 years, they undoubtedly acquired a limited interest in the land by adverse possession.

(14) In the present case, it is unnecessary to decide what sort of interest the defendants have acquired by adverse possession. It is enough to consider if the plaintiffs' suit is barred by limitation.

(15) Shearer, J., gives another reason for rejecting the plea of adverse possession:

"When the legislature in the public interest prohibits certain holders of land from alienating it, it is not easy to understand how an alienee can acquire rights in the land by adverse possession and so indirectly defeat the policy of the legislature."

But, because Section 46 forbids alienation, it does not at all follow that the law of limitation will not take its own course. Section 230 of the Chota Nagpur Tenancy Act provides:

"The provisions of the Indian Limitation Act, 1908, shall so far as they are not inconsistent with this Act, apply to all suits, appeals and applications under this Act."

The present suit is not a suit under this Act. Consequently, it will be governed by the provisions of the Limitation Act. Under Section 46 of the Chota Nagpur Tenancy Act a lease for a period exceeding 5 years is prohibited, and the raiyat who leases out his holding under an invalid lease is certainly entitled to sue to recover possession of his holding. But if he does not bring his suit within the period of limitation, he cannot recover possession and the alienee may acquire interest in the land by adverse possession. The result may seem to be anomalous, but so long as the legislature does not amend the law of limitation in order to give full effect to the policy underlying Section 46, there can be no escape from the position that a suit for possession brought after the expiry of the period of limitation must have to be held to be barred by limitation.

(16) In the result, I would allow the appeal, set aside the decision of Shearer, J., and dismiss the suit. In the circumstances, there will be no order for costs.

(17) LAKSHMIKANTA JHA, C. J.: I agree.

V.B.B. *Appeal allowed.*

A. I. R. (39) 1952 PATNA 48 (C. N. 18)

SARJOO PROSAD AND C. P. SINHA, JJ.

Sheosagar Singh, Appellant, v. Sitaram Kumhar and another, Respondents.

A. F. O. O. No. 264 of 1948, D/- 21-12-1950.

(a) Civil P. C., (1908), Section 151, Order 43, Rule 1 (m) — Appeal.

Where the effect of the order under Section 151 is that the petition to record a compromise is rejected, the order would be appealable under O. 43, R. 1 (m). *(Para 3)*

Anno: C. P. C., S. 151, N. 9; O. 43, R. 1, N. 7.

(b) Civil P. C. (1908), Section 151 — 'Prevent abuse of the process of the Court.'

If fraud has been committed upon the party and as a result of that fraud the Court has been misled into passing certain orders which otherwise it would not have passed, then it is a fraud upon the Court itself. In such a case, under its inherent powers, the Court is not only entitled to, but it must set aside any order or orders which may have been passed by it upon a false representation. AIR (10) 1923 Pat 483 and AIR (30) 1943 Pat 13, Rel. on. *(Para 5)*

Anno: C. P. C., S. 151, N. 6.

(c) Civil P. C. (1908), Order 32, Rule 7 — Duty of Court in granting leave.

The provision in Order 32, Rule 7, for obtaining leave of the Court by the guardian or next friend for entering into compromise on behalf of the minor is a very salutary provision for the protection of the interest of the minor and before granting leave it must appear from the order sheet itself that the Court did consider the interest of the minor.

It is the duty of the Court to see that the interests of minors are adequately protected and where a compromise affecting the minor is proposed to be effected, it is of very great importance that the conscience of the Court should be satisfied that the compromise is really in the interest of the minor and that in ordinary circumstances when the Court records an order to that effect it may be assumed, unless there be indication to the contrary, that the Court has exercised its judicial discretion. But in cases in which the circumstances, however, are peculiar or suspicious it is clear that a heavy responsibility lies upon the Court to scrutinise with care the terms of the proposed compromise and the circumstances connected therewith in order that the conscience of the Court may be satisfied that the compromise is really for the benefit of the minor. *(Para 6)*

Anno: C. P. C., O. 32, R. 7, N. 3, 5.

(d) Civil P. C. (1908), Order 32, Rule 7 — Compromise by karta of joint Hindu family.

If a father or other natural guardian is appointed to act as a guardian-ad-litem, he is as much bound by the provisions of O. 32, R. 7 of the Code as any other guardian or next friend. Hence a compromise entered into by the father as the karta of the family would not be binding on the minor son if the provisions of O. 32, R. 7 have not been complied with. *(Para 7)*

Anno: C. P. C., O. 32, R. 7, N. 7.

Kailash Roy and B. K. Sharma, for Appellant; T. P. Sinha and B. N. Pd. Samayan, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('06) 33 Ind App 128: (28 All 585 P C) (Pr 6)
('16) 39 Mad 115: (AIR (2) 1915 P C 33) (Pr 6)
('20) 44 Bom 574: (AIR (7) 1920 Bom 37) (Pr 7)
('06) 29 Mad 104 (Pr 6)
('13) 36 Mad 295: (40 Ind App 132 P C) (Pr 7)
('16) 39 Mad 853: (AIR (4) 1917 Mad 672) (Pr 7)
('23) 2 Pat 731: (AIR (10) 1923 Pat 483) (Pr 5)
('41) 22 Pat L T 223: (AIR (27) 1940 Pat 663) (Prs 6, 7)
('42) 23 Pat L T 602: (AIR (29) 1942 Pat 344) (Pr 6)
('43) AIR (30) 1943 Pat 13: (202 Ind Cas 666) (Pr 5)
('45) AIR (32) 1945 Pat 391: (24 Pat 529) (Pr 6)

C. P. SINHA, J.: This is an appeal by the plaintiff who had brought a suit for recovery of Rs. 513/- and odd on the basis of a hand-note against respondents 1 and 2, respondent No. 2, brother of respondent No. 1, was a minor then. The trial Court dismissed the suit with costs and the appellant (the plaintiff) preferred an appeal to the District Judge which was numbered as Money Appeal No. 5 of 1947. Respondent No. 2, who was respondent No. 1 in the said money appeal, was described in the memorandum of appeal as being under the guardianship of one Babu Gajadhar Prasad, Pleader guardian appointed by Court. It appears that this guardian was appointed in the Court of first instance. Notices of the appeal were

served upon the respondents and the hearing of the appeal was postponed from time to time and ultimately the 20th of February 1948, was fixed for the hearing of the appeal. On the 18th of February, 1948, however, the order-sheet records the following order:

"Parties have put in a compromise petition. Respondent No. 2, has put in a petition praying that he may be appointed guardian of minor respondent No. 1. It is stated in the petition that he has no interest adverse to the minor and that he is the karta of the family. Another petition for permission to compromise has also been put in.

Put up on the date fixed."

On the 20th of February 1948, the order of the Court runs thus:

"Petition of compromise and other petitions filed on 18-2-1948, are put up.

Heard appellant's lawyer. The appointment of the Pleader Guardian ad litem is cancelled. The respondent No. 2, is appointed G.-A.-litem of the respondent No. 1. The appeal is permitted to be compromised. The appeal is allowed in terms of the compromise that be recorded."

The compromise was to the effect that the appellant had remitted Rs. 50/- out of the costs and that the respondents were to pay the amount claimed by the plaintiff-appellant and the remaining costs within three months from the late of the compromise, that is, the 18th of February 1948, failing which the plaintiff-appellant was to realise the same by execution.

(2) On the 16th of March 1948, the present respondent No. 1, Sitaram Kumhar, who was respondent No. 2, in the said money appeal, filed an application under Section 151, of the Code of Civil Procedure in the money appeal for setting aside the compromise decree, which, according to him had been obtained by fraud. It is alleged in his petition that the plaintiff-appellant had represented to him that he would withdraw the appeal, provided the respondent remitted his costs, and that the plaintiff-appellant had obtained his thumb impression on blank papers and blank printed Vakalatnama saying that the petition for withdrawing the appeal had to be filed through another Pleader. It was asserted by the respondent No. 1 that the blank paper bearing his thumb mark was utilised for the compromise petition, leading to the consent decree. It was further alleged that the respondent No. 1, came to know of this fact on the 26th February 1948, when the appellant threatened him with realisation of the decree in the money suit. The plaintiff-appellant objected to the decree being set aside and alleged that the compromise was a 'bona fide' one and there was no fraud committed by him. The Court below started miscellaneous Case No. 21 of 1948, under Section 151 of the Code of Civil Procedure and after hearing the parties came to the conclusion that fraud had been perpetrated in the matter of compromise and that the respondent No. 1 had never consented and could not have consented to the terms embodied in the petition of compromise. In that view of the matter, the Court below allowed the application under Section 151 of the Code, set aside the order of that Court, dated the 20th of February 1948, rejected the petitions filed on the 18th of February, 1948, and has restored the money appeal to its original file and number. The plaintiff-appellant having felt aggrieved has filed the present appeal.

(3) A preliminary point has been raised that no appeal lay against an order passed under Section 151 of the Code of Civil Procedure. The learned Counsel for the appellant has argued that the effect of the order under appeal is that the Court below has refused to record the compromise and as such an appeal is competent under O. 43, R. 1, Sub-clause (m), Civil P. C. The right of appeal is given by statute and it is obvious that an order passed under Section 151 of the Code of Civil Procedure is not appealable. The order appealed against however, shows that the petitions filed on the 18th of February 1948, have been rejected and one of these petitions was the petition filed by the parties embodying the terms of the compromise with a prayer that a decree be passed in favour of the plaintiff-appellant and that the appeal be allowed in terms of the compromise. By rejecting that petition, the Court below has refused to record the compromise under Order 23, Rule 3 of the Code and, therefore, in that view of the matter the order is appealable under Order 43, Rule 1, Sub-clause (m) of the Code.

(4) Coming to the merits, I feel no doubt that fraud has been committed upon the respondents and upon the Court in obtaining the order of the 20th of February 1948. The respondents had obtained a decree for costs against the plaintiff-appellant and the plaintiff's claim had been entirely dismissed and I see no earthly reason why the respondents would be anxious to forego their valuable rights under the decree of the first Court. It has been contended that the Court below was not justified in coming to the conclusion that a fraud had been perpetrated by the plaintiff-appellant. (After discussing the evidence the judgment proceeds:) On the facts and circumstances mentioned above, I feel no hesitation in holding that the respondent had given no consent to the terms of the compromise as mentioned in Ex. A and that a fraud was committed upon him and the Court when, on false allegations, an order was obtained from the Court recording that compromise.

(5) It has been contended by the learned Counsel for the appellant that the provisions of Section 151 of the Code of Civil Procedure did not entitle the Court to set aside the order passed on the 20th of February 1948, and it is suggested that the respondents should have taken recourse to some other remedy open to them in law. I find absolutely no merit in this contention. If fraud has been committed upon the party and as a result of that fraud the Court has been misled into passing certain orders which otherwise it would not have passed, then it is a fraud upon the Court itself. In such a case, under its inherent powers, the Court is not only entitled to, but it must, set aside any order or orders which may have been passed by it upon a false representation. In that view of the matter, I must hold that the Court below had ample jurisdiction to set aside its order under Section 151 of the Code; and this position in law is settled beyond dispute as will appear from the cases of this Court in 'Sadho Saran Rai v. Anant Rai', 2 Pat 731 and 'Chutur Prasad v. Mt. Bishuni Kuer', AIR (30) 1943 Pat 13.

(6) The learned Counsel for the respondents has contended that the order of the 20th of February 1948, is liable to be set aside on the ground that the provisions of Order 32, Rule 7 of the Code of Civil Procedure have not been complied with. Minor respondent No. 2 in this appeal was respondent No. 1 in the aforesaid money appeal and he was represented by a guardian-ad-litem appointed in the Court of first instance. He continued to be the guardian of the minor until the 20th of February, 1948. On the 18th of February 1948, a petition was filed by the respondent No. 1, Sitaram for the change of guardian and some of the grounds given were that the Pleader guardian-ad-litem had not taken any steps till then though he had received notice long ago and that he was not looking after the interest of the minor respondent and further

that respondent No. 2 was the karta of the family and he looked after the interest of the minor respondent No. 1. This petition was ordered to be put up on the 20th of February and the order passed on that date has already been quoted. In that order no express permission was given to the guardian-ad-litem to enter into the proposed compromise. All that the order on this point says is that the appeal is permitted to be compromised and the Court does not consider whether the compromise is for the benefit of the minor. In the leading case of 'Manohar Lal v. Jadu Nath Singh', 33 Ind App 128, Lord MacNaghten has made the following observation with reference to the duties of a Court in sanctioning compromise in which a minor is concerned:

"There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shewn, by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained."

In 'Subramanian Chettiar v. Raja Rajeshwar Dorai', 39 Mad 115, their Lordships of the Privy Council quoted with approval the aforesaid observation of Lord MacNaghten in 'Manohar Lal's case' and pointed out that the provisions relating to the leave of the Court in permitting compromise on behalf of minors are of great importance for the protection of the interest of a minor. It is now a well-established principle of law that it is the duty of the Court to see that the interests of minors are adequately protected and where a compromise affecting the minor is proposed to be effected, it is of very great importance that the conscience of the Court should be satisfied that the compromise is really in the interest of the minor and that in ordinary circumstances when the Court records an order to that effect it may be assumed, unless there be indication to the contrary, that the Court has exercised its judicial discretion. But in cases in whch the circumstances, however, are peculiar or suspicious — as they are in the present case — it is clear that a heavy responsibility lies upon the Court to scrutinise with care the terms of the proposed compromise and the circumstances connected therewith in order that the conscience of the Court may be satisfied that the compromise is really for the benefit of the minor. In 'Govindaswami v. Alagiri Sami', 29 Mad 104, it has been held that in sanctioning compromise on behalf of minors the order should state in terms that the question that the compromise was for the benefit of the minors was considered. In 'Sri Narayan Singh v. Posan Singh', 23 Pat L. T. 602, it was held that:

"the Court cannot give effect to a compromise which has been entered into by the guardian of the minors without its previous sanction."

It is true that no particular formula is required to be used by the Court in granting leave to a guardian-ad-litem to compromise a suit on behalf of a minor, but the order itself must show that leave has been expressly granted to the guardian and that the question of the benefit of the minor was before the Court and had been considered by it. In 'Awadhesh Prasad v. Widow of Tribeni Prasad', 22 Pat L T 223, a Bench of this Court held that a guardian-ad-litem cannot enter into a compromise without the leave of the Court, and such leave must be expressly recorded by the Court and that the terms of Order 32, Rule 7 of the Code of Civil Procedure are not complied with by merely asking the Court to approve of a compromise which has actually been entered into. The Court must consider the proposed terms before they are agreed to by the parties. This case was considered later by another Bench of this Court in the case of Dharnidhar Roy v. Phul Kumari Debi', AIR (32) 1945 Pat 391, and the observation made therein to the effect that leave to enter into agreement must be obtained before the agreement is entered into appears to have been modified. Sinha, J., with whom Chatterji, J., concurred, made the following observations:

"In my opinion, the Code of Civil Procedure does not insist upon the guardian-ad-litem first obtaining the leave of the Court to negotiate the terms of the compromise. It is only when negotiation has reached the stage of settlement that the guardian-ad-litem would be in a position to know the exact terms on which the contending parties would agree to settle their differences. Only when that stage has been reached, it is possible for the guardian-ad-litem to obtain the necessary sanction of the Court. Hence, in my opinion, if the leave of the Court is granted to the guardian-ad-litem before the compromise is actually recorded, the terms of R. 7, of O. 32 of the Code would be substantially complied with, because, until the compromise has been recorded, it does not become operative between the parties so far as the pending litigation is concerned."

In my view, in the present case the Court did not consider the effect of the compromise so far as the minor was concerned. The order of the 20th of February 1948, does not show if the Court was at all conscious of its responsibility under Order 32, Rule 7 of the Code of Civil Procedure at the time of making the order although the terms of the compromise were on their very face against the minor. The provision in the Code for obtaining leave of the Court by the guardian or next friend for entering into compromise on behalf of the minor is a very salutary provision for the protection of the interest of the minor and before granting leave it must appear from the order-sheet itself that the Court did consider the interest of the minor. In the present case, the Court has signally failed to carry out the letter and spirit of the provisions contained in Order 32, Rule 7 of the Code. In a case like this, on the very face of it, suspicion of the Court below should have been aroused and it should have heard the parties and the guardian-ad-litem upon the terms of the compromise whether they could be said to be for the benefit of the minor. If the Court had done its duty, so much time of the Court should not have been wasted and the parties should have been saved the costs and harassment of this subsequent litigation.

(7) It was faintly argued that respondent No. 1 to this appeal was the karta of the joint family consisting of himself and of the minor and, therefore, the karta having accepted the terms of the compromise, the compromise was binding upon the minor himself. In 'Ganesha Row v. Tuljaram Row', 36 Mad 295, their Lordships of the Privy Council, while considering the provisions of Section 462 of the Code, which corresponds to Order 32, Rule 7 of the present Code, had ruled that the powers of a natural guardian who was appointed a guardian-ad-litem by a Court were controlled by the provisions of Section 462 of the Code and that he could not, without leave of the Court, do any act in his capacity of father, or managing member of the joint family, which he was debarred from doing as guardian-ad-litem. If a father or other natural guardian is appointed to act as a guardian-ad-litem, he is as well bound by the provisions of O. 32, R. 7 of the Code as any other guardian or next friend. This point of view was made clear by a decision of the Madras High Court in 'Vijaya Ramayya v. Venkatasubba Rao', 39 Mad 853. In that case the father had entered into a compromise on behalf of himself and his minor son though the latter was represented by his brother as guar-

dian-ad-litem. It was held by their Lordships that the father could not enter into compromise binding on his son where he was represented by a different person as guardian-ad-litem and the same view was taken in 'Gurmallappa Mallappa v. Mallappa Martandappa', 44 Bom 574. This view has also been held by this Court in 'Awadhesh Prasad Missir's case' 22 Pat L T 223. I would, therefore, hold that the compromise is also bad on the ground that the provisions of Order 32, Rule 7 of the Code of Civil Procedure have not been complied with and that the same is not binding on the minor respondent No. 2.

(8) It was also contended by the learned counsel for the appellant that although the compromise may not be binding upon the minor, the same may be held binding against the other respondent (respondent No. 1) who was major at the time of the compromise. In view of the finding that fraud was practised upon the party and upon the Court also, this question does not arise for consideration.

(9) In the result, I would dismiss the appeal with costs and affirm the decision of the Court below. Money Appeal No. 5 of 1947 must now proceed to hearing.

(10) SARJOO PROSAD, J.: I am doubtful if this appeal is competent; otherwise I entirely agree.

K.S. *Appeal dismissed.*

A. I. R. (39) 1952 PATNA 51 (C. N. 19)

SARJOO PROSAD, J.

Satyendra Kumar Gupta and another, Appellants v. Rameshwar Mandal and others, Respondents.

A. F. A. D. No. 2052 of 1948, D/- 5-1-1951.

(a) Tenancy Laws — Bihar Tenancy Act (VIII (8) of 1885), Schedule III, Article 3 — Possession delivered in execution of rent decree — Dispossession — Nature of.

Where in execution of a decree for rent not obtained against the entire body of tenants the lands are sold and purchased by the landlord himself who obtains delivery of possession through Court and the tenants who were not made parties to the suit then file a suit for declaration of title and delivery of possession, the suit is not barred by limitation under Article 3, Schedule III of the Tenancy Act, as the dispossession in such a case by the landlord is not dispossession 'qua' landlord but the landlord claims possession by virtue of the execution sale and delivery of possession as a representative of a person whose right, title and interest he had purchased. Moreover, where dispossession is by an act of Court, and the landlord gets into occupation of land by a process of Court it is not an act of dispossession by the landlord within the meaning of the Article. AIR (27) 1940 Pat 476, Disting. (*Para 7*)

(b) Tenancy Laws — Bihar Tenancy Act (VIII (8) of 1885), Section 153 — Question of fact — Representation of family by particular tenant. — Civil P. C. (1908), Section 100.

Whether a particular person could or could not represent the interest of the other tenants in the holding for purposes of a rent suit is a pure question of fact, and, it is no longer open to appellants to contend in the second appeal that the decision of the lower appellate Court on the point is erroneous. (*Para 5*)

Anno: C. P. C., Ss. 100, 101, N. 52.

Rama Kant Varma, for Appellants; U. N. Sinha and Shamshul Huda, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('24) AIR (11) 1924 Pat 339: (75 Ind Cas 321) (Pr 5)

('30) 9 Pat 788: (AIR (17) 1930 Pat 256 FB) (Pr 7)

('40) AIR (27) 1940 Pat 476: (187 Ind Cas 539) (Pr 7)

('47) 25 Pat 695: (AIR (34) 1947 Pat 392) (Pr 7)

JUDGMENT.: The defendants first party are the appellants in this appeal. It arises out of a suit for declaration of title and confirmation of possession, or, in the alternative, for recovery of possession of an area of about 25 bighas, 1 katha, 2 dhurs of land appertaining to Khata No. 17/K of Village Thalaha. The khata in question stood recorded in the record of rights in the name of Bachcha Mandal. This Bachcha Mandal executed a sale-deed on the 7th of February, 1922, conveying the entire area to one Raj Kumar Mandal and the said vendee came in possession of the area demised, and thereafter the son of Raj Kumar, who is the plaintiff in the suit, came in possession of this land on the death of his father. The plaintiff alleges that in Asrah 1351, Fasli he learnt that the defendants first party appellants, who were the landlords, instituted a suit for rent in respect of the holding in question, and in execution of the decree got the lands sold and purchased themselves. It is alleged that all the tenants interested in the holding were not made parties to the rent suit or in the execution proceedings arising out of the said decree; nor was the plaintiff's father or the plaintiff who was purchaser of the holding from the recorded tenant as early as 1922 impleaded as a party to the execution case as it should have been done after the amendment of the Bihar Tenancy Act recognising such a transfer as binding on the landlord. The plaintiff accordingly averred that the decree obtained in the suit had the effect merely of a money decree, and the execution sale also took the character of sale in execution of a money decree, and consequently only the right, title and interest of the judgment-debtor passed under the sale and not the holding itself.

(2) The defendants first party and the defendants second party, who claimed to be the settlees under the defendants first party, filed written statements contesting the suit. The defendants first party alleged that the plaintiff had no cause of action, and that the suit was barred by general and special law of limitation, that the sale-deed in favour of the plaintiff or his father was a fraudulent transaction and that the plaintiff or his father never came in possession of the lands by virtue of the said purchase. They also averred that the rent suit and the rent decree were properly constituted, and the sale in execution of the decree which was a rent decree passed the holding itself and not merely the right, title and interest of of the judgment-debtor. The defendants first party further stated that after the delivery of possession through Court they came into possession of the property, and thereafter they settled portions of the land out of the holding with defendants second party. The defendants second party supported these allegations of the defendants first party appellants, and claimed to be in possession of the entire lands.

(3) The two Courts below have concurrently found that the sale-deed in favour of the plaintiffs' father in 1922 was a genuine document, and by virtue of the sale, the plaintiff and his father came in possession of the disputed lands. They have also held that the rent decree had the effect of

merely a money decree inasmuch as all the heirs of the recorded tenant, Bachcha Mandal, were not made parties to the suit, and secondly because the plaintiff or his father whose transfer had come to be recognised as binding on the landlord by virtue of the amendment to the Bihar Tenancy Act was not made a party to the execution proceedings, and, therefore, the sale held in execution of such a decree had merely the effect of a money sale and did not affect the title of the plaintiff to the disputed lands. A further contention which was raised in the case was whether the suit was barred by limitation in view of Article 3, Schedule III of the Bihar Tenancy Act, because the dispossession was alleged to be a dispossession by the landlord. Both the Courts below have repelled this contention, and they have held that the suit was governed not by this special limitation but by general limitation, and, as such, was well within 12 years of the alleged dispossession. The trial Court found on remand that the dispossession took place as a result of delivery of possession in October 1938, whereas the appellate Court has found that there was no actual dispossession of the plaintiff at the time of the said delivery of possession but the plaintiff was dispossesed from the lands by the settlement-holders sometime about 1944 within two years of the date of the suit. In that view the appellate Court has held that even if the special limitation under the Bihar Tenancy Act applied to the case, the suit was not barred. Accordingly the Courts below have decreed the suit granting the reliefs claimed by the plaintiff.

(4) Mr. Rama Kant Varma on behalf of the appellants has not challenged the findings of fact arrived at by the two Courts below, but he has urged three points for consideration. In the first place, he submits that the decree obtained in the aforesaid suit for rent was not a money decree. Secondly, he argues that if it was dispossession of the tenants in execution of a money decree, then the dispossession was effected by the landlord, and, therefore, the special article of limitation — Article 3, Schedule III applied to the case; and thirdly his contention is that the appellate Court's finding of dispossession is illegal inasmuch as it does not take any notice of the fact that the defendants first party landlords have been in possession of a large area of the disputed lands. I shall consider these findings in their order.

(5) In my opinion, the Courts below were justified in holding that it was necessary for the defendants first party to make Bhola or Bidya as parties to the rent suit, they being also interested in the holding, and in the absence of these parties, the suit could not be properly constituted as a suit for rent. Mr. Varma's argument is that in any case Kamal, who was the karta of the family, represented the entire holding, and, therefore, the decree obtained against him was sufficient to bind the entire body of tenants. As to whether Kamal did or did not represent the entire holding was a question of fact, and that question of fact has been answered against him by the Court of appeal below. The Court of appeal below says that the presence of Kamal in the suit or in the execution case was not such as to represent the interest of Bhola or Bidya in the holding. On behalf of the appellants I have been referred to a decision of this Court in 'Jagdeo Nath v. Pratap Udai Nath', AIR (11) 1924 Pat 339. That case, in my opinion, has been rightly distinguished by the learned Additional District Judge who heard the appeal. In any case whether Kamal could or could not represent the interest of the other tenants in the holding was a pure question of fact, and, in my opinion, it is no longer open to the learned Counsel for the appellants to contend before me that the decision of the lower appellate Court on the point is erroneous.

(6) The other point which has been argued is that it was not necessary for the landlord to make the plaintiff or his father a party to the execution case. Section 26-B of the Bihar Tenancy Act came into operation by virtue of an amendment on the 10th of June, 1935, and by authority of that provision the transfer effected in 1922 came to be binding on the landlord. The attachment in the execution case was served on the 6th of July 1935, and the sale took place on the 12th of August 1935. Now it is well settled that the sale in order to have the effect of a sale in execution of a rent decree must be in the presence of a person who is the tenant of the land. The effect of this change in the law was that on the 10th of June 1935, the judgment-debtor against whom the decree had been obtained had ceased to be a tenant of the landlord, and the plaintiff or his father had become a tenant of the land. It was, therefore, very necessary to make the sale effective as a sale in execution of a rent decree to make the plaintiff or his father a party to the execution proceedings, because the relationship of landlord and tenant must continue up to the date of sale, and if it had ceased during this period, then the sale held in presence of a party who is not the actual tenant or has ceased to be a tenant cannot have the effect of passing title to the holding itself. In my opinion, therefore, the decision of the Courts below is perfectly justified on both these points.

(7) The only question which has worried me is the next question, namely, whether Article 3, Schedule 3 applies to the case. The argument of Mr. Varma which he has forcefully put before me is that the relationship of landlord and tenant having continued, and the sale having the effect of a money sale, the dispossession of the tenant even though as a result of delivery of possession through Court is by the landlord, and, therefore, Article 3, Schedule 3 applies to the case. For this purpose he relies upon the observations of Meredith, J., in 'Mt. Deorati Kuer v. Dasrath Dubey', AIR (27) 1940 Pat 476, where his Lordship observed as follows:

> "In any case, however, I think that the point does not really arise in the present case, since the finding is that the decree obtained against the original tenant was only a money decree and the tenancy continued. The landlord therefore was auction-purchaser only of the right, title and interest of the original tenant (defendant No. 3), whatever that might have been, and not of the holding or of the tenancy right of the plaintiff. Therefore, in dispossessing the plaintiff, the dispossession was not really in the capacity of auction-purchaser of his interest, but merely upon the excuse of being an auction-purchaser, just as it was upon the excuse of having got the decision of a Criminal Court in the landlord's favour. In my opinion this is clearly a case where the special limitation under Article 3, Schedule 3, Bihar Tenancy Act, is applicable."

It is to be noticed that in that case the landlord had dispossessed the tenant subsequent to the alleged delivery of possession taking advantage of a criminal proceeding and dispossession was not by process of Court. Under those circumstances clearly Article 3, Schedule III, of Bihar Tenancy Act did apply. But the observations do lend countenance to the contention of Mr. Varma, that even if the delivery of possession was through Court, the relationship of landlord and tenant having continued, the dispossession would attract the mischief of this special limitation under the Bihar Tenancy Act. This decision of Meredith, J., with which Fazl Ali, J., (as he then was,) agreed,

has been distinguished in a later case of this Court in 'Kapil Singh v. Feda Ali', 25 Pat 695. Ray, J., who delivered the judgment in the case observed that the decision in question was obiter. This case, in my opinion, therefore, does not help the contention of Mr. Varma, a contention which is directly met by the decision of the Special Bench of this Court in 'Gajadhar Rai v. Ram Charan Gope', 9 Pat 788. In that case also the decree in question had not been obtained against the entire body of tenants. In execution of such a decree the lands had been sold and purchased by the landlord himself who obtained delivery of possession of the same. The tenants who were not made parties to the suit then filed a suit for declaration of title and delivery of possession. It was urged that the suit was barred by limitation under Article 3, Schedule III of the Tenancy Act, and their Lordships following a long line of cases of the Calcutta High Court as well held that the suit in question was not so barred. The principle which they lay down is that the dispossession in such a case by the landlord is not dispossession 'qua' landlord but the landlord claimed possession by virtue of the execution sale and delivery of possession as a representative of a person whose right, title and interest he had purchased. Therefore, even if the dispossession was in execution of a money decree, the dispossession would not be deemed to be dispossession by the landlord but as a person representing the interest of a co-tenant. The further principle which they lay down is that where the dispossession is by an act of Court, and the landlord gets into occupation of land by a process of Court, it is not an act of dispossession by the landlord within the meaning of the Article. I do not see any reason to hold that the value of this authority has in any manner been shaken or affected by the observations of Meredith, J., in the case to which I have already referred. In my opinion, therefore, the dispossession in the present case even though in execution of a money decree was by process of Court, and consequently was by a person who claimed to represent the interest of some of the tenants in the land. In either event the mischief of Article 3, Schedule III of the Bihar Tenancy Act could not affect the suit of the plaintiff, and the Courts below were, therefore, justified in holding that the suit was not barred by limitation in any case. The lower appellate Court has come to a definite finding that the plaintiff was not dispossessed as a result of delivery of possession in 1938 but the dispossession, if at all, took place in 1944. This part of the finding is challenged by Mr. Varma on the ground that the entire land had not become inundated, and the Court says nothing about the possession of the defendants first party in respect of a large portion of the land. As I have said, to some extent the point has become academic in view of what has been held by the Court below that the suit is not hit by Article 3, Schedule III of the Bihar Tenancy Act. But the finding to my mind quite clearly shows that the defendants first party landlords did not acquire possession by virtue of that delivery of possession. It follows, therefore, that the plaintiff was not dispossessed as a result of the delivery of possession, and he continued to be in possession until the settlees came to be in occupation of the lands sometime in 1944 or thereafter when the dispossession took place.

(8) Having regard to all these factors, I hold that the decision of the Court of appeal below is right and must be affirmed. The appeal accordingly fails and is dismissed with costs.

D.R.R. *Appeal dismissed.*

A. I. R. (39) 1952 PATNA 53 (C. N. 20)

LAKSHMIKANTA JHA, C.J. AND CHATTERJI, J.

Sundar Lall Jha and others, Appellants v. Nabi Misser and others, Respondents.

Letters Patent Appeal No. 15 of 1949, D/- 28-3-1951.

Landlord and tenant — Rent decree — Tenants interested in holding allowing one of them to represent holding — Death of such tenant after rent decree — In execution against his son alone entire holding sold — Whether interest of other tenants passes — Civil P. C. (1908), Section 2 (11).

Out of the several tenants of an occupancy holding who had interest in the holding one 'B' was allowed to represent the holding and he was accordingly alone recorded in the landlord's sharista. On the rent falling into arrears, the landlord brought a suit against 'B' alone for arrears of rent and obtained a decree. 'B' died after the decree. Execution was taken out against his son and the entire holding was sold in execution of the decree, and purchased by the landlord. In a suit brought by the other tenants for declaration of their title and possession:

'Held' that on the death of 'B' the arrangement of representation came to an end, that as his son was not allowed to represent the others, the son could not be the legal representative of 'B' that the proper course for the landlord was to take out execution against all the persons who were interested in the holding, and that, therefore, the right, title and interest of 'B' alone in the holding passed leaving the interest of others in it unaffected. AIR (29) 1942 Pat 383, Expl. (Para 9)

M. N. Pal, for Appellants; H. P. Sinha and Baidyanath Jha; for Respondents.

Case referred to:

('42) AIR (29) 1942 Pat 383: (202 Ind Cas 62) (Para 10)

JUDGMENT.: This is an appeal by the plaintiffs under Clause 10 of the Letters Patent from the Judgment of Das, J., who, agreeing with the Courts below, has dismissed their suit for declaration of title and recovery of possession in respect of 12 annas interest in the land in suit, and for a further declaration that the sale-deed in Rent Execution case No. 2163 of 1940 was not binding on them.

(2) The facts giving rise to this appeal, which are no longer in controversy, are as follows: One Puhupnath Jha, purchased the suit land, which is an occupancy holding, on the 13th of July, 1886. He died issueless, leaving behind as his heirs, the sons of his four pre-deceased brothers. The plaintiffs are the heirs of three of those brothers. The fourth brother had a son, Brahmalal, father of the defendant third party in the action. Brahmalal, was alone recorded in the record of rights, prepared at the time of the cadastral survey, as the tenant in respect of the holding. The Courts below concurrently found that the heirs of all the four brothers of Puhupnath had interest in the holding, but Brahmalal was allowed to represent the holdings and he was accordingly alone recorded in the landlord's sharista. The rent of the holding fell into arrears and the landlord brought a suit against Brahmalal alone for arrears of rent and obtained a decree on the 14th of June 1938. Brahmalal died after the decree, and execution was taken out on the 2nd of August 1940, in Rent Execution Case No. 2163 of 1940 against his son Ratanlal and the entire holding was sold on the 17th of January 1941, in execution of the decree and purchased by the landlord, who later on settled the land with the defendant first party.

(3) The case of the plaintiffs is that they had no knowledge of the execution case or the sale

of the holding and they came to know of the sale for the first time in May, 1945, when they were dispossessed by the defendant first party. It is not disputed now that the decree for arrears of rent obtained against Brahmalal had the effect of a rent decree; but the plaintiffs' case is that the sale held in execution of the decree, taken out against Ratanlal alone, is not binding on them because, according to them, Ratanlal was never put forward by them to represent the holding, nor was he impleaded in the execution proceeding in a representative capacity.

(4) Both the Courts below held, as already stated, that the decree obtained against Brahmalal had the effect of a rent decree and the sale held in the presence of Ratanlal had the effect of a rent sale. The Court of appeal below recorded its finding thus:

"It is true that Ratanlal so long did not represent the holding, which was represented by his father. But in the circumstances, the landlord had no other alternative than to execute the decree against the heir and legal representative of Brahmalal."

(5) It has been contended before us by Mr. M. N. Pal, on behalf of the appellants, that though Brahmalal represented the plaintiffs in the landlord's sharista and, therefore, the decree obtained against Brahmalal would operate as a rent decree, the principle of representation came to an end with the death of Brahmalal, and after his death, Ratanlal was never put forward before the landlord to represent the holding; and, therefore, if, on his death, the landlord did not choose to execute the decree against all the tenants of the holding, the sale held in execution taken out against Ratanlal alone could not have the effect of a rent sale and only the right, title and interest of Ratanlal passed and the plaintiffs' interest was not at all affected by the sale.

(6) The same argument was advanced before Das, J. In rejecting this contention, he observed "A benamidar is some sort of a trustee, and it is, I think, well settled that on the death of the benamidar his son succeeds to the trusteeship." and on the analogy of this benami theory, he held:

"On his "(Brahamalal's) " death the decree-holder could under Section 50, Civil Procedure Code, proceed against his legal representative, namely, his son Ratanlal." He further held "In my opinion, execution against Ratanlal, the legal representative of the recorded tenant who represented the holding, did not deprive the landlord of his right to enforce the decree against the holding itself. Therefore, by the execution sale ....., the holding itself passed, and whatever interest the appellants had in the holding passed with that sale."

(7) In my opinion, the analogy of a benamidar cannot hold good in the present case. When Brahmalal was recorded in the landlord's sharista and put forward as the person responsible for the payment of the rent of the entire holding, such arrangement must, in my opinion, be presumed to have been to the knowledge of the landlord. On Brahmalal's death, therefore, all the persons interested in the holding and liable for payment of rent ought to have been substituted in order to have the effect of a rent sale.

(8) Section 50, Code of Civil Procedure, provides: "Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased."

Now, "Legal representative", as defined in the Code of Civil Procedure, means:

"a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

Thus where the deceased was sued in his personal capacity, his heir is the legal representative; if there is some person who intermeddles with the estate of the deceased, then the intermeddler, though a stranger, becomes his legal representative; and if a party is sued in a representative character, then the person or persons on whom the estate devolves on the death of the party so sued becomes or become his legal representative.

(9) Here Brahmalal was sued, certainly not in his personal capacity, but in a representative character. He was the person put forward as the tenant liable for payment of rent of the entire holding on behalf of all the persons interested therein, including the plaintiffs. On his death, however, according to the finding of the Court of appeal below, this arrangement came to an end. Therefore, on his death, the liability for the payment of rent devolved on all those persons who were interested in the holding. There is no suggestion that after his death Ratanlal alone was allowed to be recorded in the landlord's sharista. In the circumstances, Ratanlal could not be said to be the legal representative of Brahmalal. In my opinion, therefore, the proper course for the landlord was to take out execution against all the persons who were interested in the holding and were in possession thereof. Consequently, if the landlord took out the execution against Ratanlal alone, only his right, title and interest in the holding passed, and the plaintiffs' interest therein remained unaffected.

(10) Mr. H. P. Sinha, on behalf of the respondents strongly relies on the decision in 'Manrup Mandal v. Badri Sao', AIR (29) 1942 Pat 383, in which it was held:

"Where there are several tenants of a particular holding, but they allow the holding to be represented by one of themselves in the landlord's serishta, the landlord would be entitled to bring a suit only against that person who represents the holding and the decree obtained by him in such a suit will be a rent decree and not a money decree, and in execution of the decree the entire holding can be sold."

Stress is laid on the concluding words "in execution of the decree the entire holding can be sold." But this pre-supposes that the execution is taken out against the person who represents the holding. It cannot mean that where the judgment-debtor is dead and execution is taken out against only one of the persons who represent the holding, the whole holding will still pass by the sale.

(11) On the findings, the plaintiffs have got 12 annas share in the holding. They are, therefore, entitled to a declaration of their title to 12 annas share. Since they have been dispossessed, the dispossession is illegal and they must, in law, get back possession.

(12) In the view we take, it is unnecessary to consider the other point raised by Mr. M. N. Pal, namely, whether section 26-N or 26-B of the Bihar Tenancy Act governs the present case.

(13) The appeal is accordingly allowed, the decisions of Das, J., as well as of the Courts below are set aside. In the circumstances parties should bear their own costs throughout.

V.S.B. *Appeal allowed.*

A. I. R. (39) 1952 PATNA 55 (C. N. 21)

RAMASWAMI AND RAI, JJ.

Girja Kuer and others, Appellants; v. Ghafoor Mian and others; Respondents.

A. F. A. D. No. 1983 of 1948, D/- 7-2-1951.

Tenancy Laws — Bihar Tenancy Act (VIII (8) of 1885), Sections 25, 48-A 48-B, 87 — Transfer of a portion by Shikmidar.

Where the suit has not been brought against shikmidars but against transferees of a portion of the shikmi holding on the ground that they had not acquired any valid title by the sale-deed executed in their favour by the shikmidar, such a suit is not maintainable, for in the first place, the plaintiff must in order to obtain a decree for ejectment not only show that a portion of the land of the holding is in occupation of a person who has no title but he must further show that either the interest of the shikmi raiyat has ceased or that he is entitled to eject the shikmi raiyat for one of the reasons mentioned in Section 25 of the Bihar Tenancy Act. The Shikmi tenancy is not forfeited by unauthorised transfer of a portion of the shikmi holding in favour of the transferees and in spite of the transfer, the shikmi tenancy still subsists and the liability of the shikmidars to pay the entire rent to the plaintiffs continues. It follows that the shikmidars cannot be evicted from whole or a portion of the shikmi holding nor can the plaintiffs seek to evict the transferees from the land occupied by them because the tenancy still survives and the landlord has no cause of action, his only remedy being to sue the original shikmidar for rent if it remains unpaid. (*Para 3*)

A. B. N. Sinha, for Appellants; B. N. Mitter; A. K. Mitter and B. K. N. Singh, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('05) 2 Cal L J 369 (Pr 3)
('93) 20 Cal 590 (Pr 3)
('15) 42 Cal 172: (AIR (2) 1915 Cal 242 FB) (Pr 3)
('41) 22 Pat L T 749: (AIR (28) 1941 Pat 593) (Pr 3)
('49) AIR (36) 1949 Pat 444: (27 Pat 194) (Pr 3)

RAMASWAMI, J.: The question to be determined in this appeal is as to whether the plaintiffs are entitled to a decree for eviction of defendants 1 and 2 from 9 kathas, 3 dhurs of Plot No. 268, Khata No. 15 of Village Misrawalia.

(2) The plaintiffs brought the suit alleging that he and defendant No. 11 were kashtkars of the land, that defendants 3 to 10 had taken shikmi settlement of 1 bigha, 3 katha, 14 dhurs on payment of annual rent, that by a sale-deed, dated 3rd June 1943, defendants 3 to 10 had transferred a portion of the shikmi holding viz., 9 katha and 3 dhurs of Plot No. 268 to defendants 1 and 2. The plaintiffs asserted that the shikmidars had no right to transfer the land to defendants 1 and 2, that there was no custom of transferability of shikmi holding in the village, that defendants 1 and 2 were mere trespassers and the plaintiffs were entitled to re-enter upon the portion of the land transferred to them. Defendants 1 and 2 contested the suit alleging that there was custom of transferability of shikmi holding, that they had built pucca house on the disputed land to the knowledge of the plaintiffs who were therefore estopped from asking for ejectment. It was stated that the defendants 1 and 2 were purchasers of only a portion of the shikmi holding and in consequence the plaintiffs ought not to be granted a decree for ejectment. Upon the examination of the evidence the learned Munsiff held (1) that the custom of transferability was not established, (2) that the house was built by defendants 1 and 2 after the institution of the suit and so the plaintiffs were not estopped from claiming a decree for ejectment and (3) that defendants 3 to 10 being shikmidars had no right to transfer the disputed land to defendants 1 and 2. The learned Munsiff granted a decree for ejectment in favour of the plaintiffs. In appeal the decision of the learned Munsiff has been reversed by the Subordinate Judge of Chapra, who held that the plaintiffs had no right to re-enter since the transfer was with respect to only a part of the shikmi holding and the suit of the plaintiffs ought to be dismissed.

(3) In support of this appeal Mr. A. B. N. Sinha maintained that the learned Subordinate Judge was erroneous to hold that the principle in 'Dayamoyi v. Ananda Mohan', 42 Cal 172 (FB) was applicable to the material facts found in the present case. Learned Counsel pointed out that S. 87 of the Bihar Tenancy Act was not applicable to shikmi raiyats and since no question of abandonment can arise with respect to a shikmi raiyat the principle of 'Dayamoyi's case', cited supra, cannot be relevant. In my opinion, the argument advanced by the learned Counsel is untenable and cannot succeed. It is of importance to notice at the outset that the newly enacted S. 48-B of the Bihar Tenancy Act expressly states that

> "an under-raiyat, who has acquired a right of occupancy in any land under S. 48-A, shall be subject to the same provisions....succession to, and eviction from, such land as an occupancy raiyat".

In the present case, it was not disputed by the learned Counsel who argued in support of the appeal that the shikmidars, viz., defendants 3 to 10, had acquired a right of occupancy by virtue of the newly enacted S. 48-A of the Bihar Tenancy Act. It is important to state that under S. 25 of the Bihar Tenancy Act an occupancy raiyat cannot be ejected by his landlord from his holding, except in execution of a decree for ejectment passed on the ground (a) that he has used the land comprised in his holding in a manner which renders it unfit for the purposes of the tenancy, or (b) that he has broken a condition consistent with the provisions of this Act, and on breach of which he is, under the terms of a contract between himself and his landlord, liable to be ejected. It was conceded by the learned Counsel that the suit has not been brought against shikmidars for ejectment from the entire shikmi holding on the ground contemplated by sub-cls. (1) and (2) of S. 25 of the Bihar Tenancy Act. It is manifest on the other hand that the suit has not been brought against shikmidars but against transferees of a portion of the shikmi holding on the ground that they had not acquired any valid title by the sale-deed executed in their favour by the shikmidars. Such a suit is not, in my opinion, maintainable for, in the first place, the plaintiff must in order to obtain a decree for ejectment not only show that a portion of the land of the holding is in occupation of a person who has no title but he must further show that either the interest of the shikmi raiyat has ceased or that he is entitled to eject the shikmi raiyat for one of the reasons mentioned in S. 25 of the Bihar Tenancy Act. As is pointed out in the case of 'Kabil Sardar v. Chunder Nath', 20 Cal 590 the reason why a landlord is entitled to re-enter when a non-transferable holding has been sold and placed in the occupation of the purchaser, is that the sale and transfer of possession to the purchaser conveys no title to him, and as the tenant has left the holding

and disclaims any interest in it, he must be held to have abandoned it, so that the land remains a piece of land within the zamindari in the occupation of a trespasser; but it is evident that it is essential that the raiyat must have abandoned it 'altogether', because if he has not, he is the person entitled to possession of it and in order to entitle the landlord to re-enter it should be shown that the interest of the raiyat has ceased. In the case before us, it has neither been alleged nor proved that before the institution of the suit the shikmidars had repudiated the liability to pay rent for the portion transferred. It must be held upon the material facts of this case that the shikmi tenancy has not been forfeited by unauthorised transfer of a portion of the shikmi holding in favour of defendants 1 and 2 and that in spite of the transfer, the shikmi tenancy still subsists and the liability of the shikmidars to pay the entire rent to the plaintiffs continues. It follows that the shikmidars cannot be evicted from whole or a portion of the shikmi holding nor can the plaintiffs seek to evict the transferees from the land occupied by them because the tenancy still survives and the landlord has no cause of action, his only remedy being to sue the original shikmidar for rent, if it remains unpaid. This opinion is supported by 'Kamaleswari Pd. Singh v. Harbullabh Narain Singh', 2 Cal L J 369 in which a suit was brought by a landlord under S. 155 of the Bengal Tenancy Act for ejectment on the ground that the occupancy raiyat had used the land in a manner which had rendered it unfit for the purposes of the tenancy within the meaning of S. 25 of the Act. It appears that the first defendant in that case had an occupancy holding of 11 cottas, 14 dhurs, out of which he transferred about 8 cottas to the second defendant by a conveyance and on a subsequent date the purchaser began to erect a building thereon. The plaintiff brought the suit on the allegation that the holding was not transferable either by custom or usage in its entirety or in part and that the land had been used in a manner which had rendered the holding unfit for the purpose of the tenancy and that the tenancy had been forfeited by reason of unauthorised transfer and misuse of the land. The plaintiff asked for a decree for the ejectment of the defendants from the portion transferred, for the removal of the building and for damages. The defendants resisted the claim substantially on the ground that the action could not be maintained for ejectment from a portion of the lands comprised in the tenancy. The Court of first instance found that the holding was agricultural, that the first defendant had acquired the status of an occupancy raiyat, that the holding had not been proved by custom or usage to be transferable, that the land had been used in a manner which rendered it unfit for the purposes of the tenancy, and that the tenancy had been forfeited by reason of illegal transfer of a part of the land. In this view of the matter, a decree was made in favour of the plaintiff for ejectment of the defendants and for removal of the building from the portion transferred, to which alone the claim in the plaint was expressly restricted. The decree was affirmed in appeal by the District Judge. The original tenant and the transferee preferred separate appeals to the High Court and on their behalf the decision of the lower Court was assailed substantially on the ground that the transfer of a portion of the lands of the holding had not effected a forfeiture of the tenancy, and the plaintiff respondent was not entitled to maintain an action for ejectment of the portion so transferred either against the transferor or the transferee. The argument was accepted by the High Court and the appeals were allowed and the suit was dismissed with respect to the claim for ejectment and for removal of the building. Mookerjee, J. who delivered the judgment of the High Court pointed out that the transfer by an occupancy raiyat of a portion of his holding did not effect a forfeiture of his tenancy, if he continued in occupation of the remainder, and although the landlord might be entitled to a declaration that the transfer was not binding upon him, he was not entitled to maintain an action in ejectment either against the transferor or the transferee. The ratio of this case has been approved by the Full Bench in 'Dayamoyi's case', 42 Cal 172 in which one of the question referred was whether in the case of a transfer of a portion of an occupancy holding, such transfer not binding the landlord unless made with his consent, the transferee can by suit recover possession from the landlord who has forcibly dispossessed him. The question was answered by the Full Bench in the affirmative; the decree of the lower appellate Court was set aside and a fresh decree was passed in favour of the plaintiff for possession. From the report of the case, it would seem that the Full Bench based their decision on the principle of 'Kamaleswari Prasad Singh v. Harbullabh Narain Singh', 2 Cal L J 369 and other authorities cited by the learned Judges who made the order of reference. In support of this appeal Mr. A. B. N. Sinha referred to 'Abas Khan v. Md. Hussain', 22 Pat L T 749 and 'Srikishun Lal v. Harihar Sah', A I R (36) 1949 Pat 444 but the precise question at issue in the present appeal was not argued or decided in these two authorities. On other hand it would appear that in 'Shri Kishun Lal v. Harihar Sah', AIR (36) 1949 Pat 444 the entire shikmi holding was transferred by the shikmidar in favour of the defendant, whom the plaintiff sought to eject. As regards '22 Pat L T 749' it is not clear from the narrative of the facts whether the transfer was with respect to a part of the shikmi holding or with respect to the whole of it. In my opinion, these authorities are not of any assistance to the appellants as the material facts of the present case are different.

(4) For the reasons already stated I am of opinion that the lower appellate Court has rightly refused to grant a decree for ejectment in favour of the plaintiffs. I would accordingly affirm the decree of the lower appellate Court and dismiss this appeal with costs.

(5) RAI, J.: I agree.

D.H. *Appeal dismissed.*

✠ A. I. R. (39) 1952 PATNA 56 (C. N. 22)

JAMUAR AND RAI, JJ.

Standard Coal Company Limited, Petitioner v. S. P. Varma and others; Opposite Party.

Miscellaneous Judicial Case No. 206 of 1951, D/- 26-9-1951.

✠*(a) Industrial Disputes Act (1947), Section 10 (1) — Industrial dispute — Reference to Tribunal — Agreement terminating dispute between workers and management — Representation of workers — Workers' representative representing only one-eighth of total workers — Agreement concluded behind back of real representative of workers — Agreement does not terminate industrial dispute.*

An agreement by a representative of the workers of a colliery with the management cannot bind all the workers of the Colliery when only some 200 workers out of the total number of about 1,600 were members of the Union of which he was the President. *(Para 13)*

Such an agreement does not terminate the industrial dispute between the workers and the management existing before that date, particularly when the management was fully aware that some

other person was set up as a representative on behalf of a large number of workers, and the agreement was arrived at behind his back and without giving him any notice. In such a case, the Government is entitled under Section 10, to refer the dispute for the decision of the Tribunal: AIR (38) 1951 Mad 616, Disting. (Paras 13, 14)

The fact that a large number of workers have accepted final payment under the agreement, will not make the order of reference without jurisdiction. (Para 20)

✠(b) *Industrial Disputes Act (1947), Section 36 (1) (c) — Representation of workers — Rules under Section 36 (1) (c), not framed — Letter of authorisation by workers.*

In the absence of any rules framed under Section 36 (1), (c), any letter of authorisation by the Workers (in this case, one sent to the Regional Labour Commissioner), is sufficient to make the authorised person their representative within the meaning of S. 36 (1), (c). (Para 14)

✠(c) *Industrial Disputes Act (1947), Section 2 (k) — Industrial dispute — Demand for redress on management — No necessity.*

There may be instances where workers may consider it wholly useless to make a demand for redress on the management and prefer to move the appropriate machinery set up by Government for the redress of their grievances. But nevertheless, it will be an industrial dispute if it comes within the meaning of S. 2 (k) of the Act. AIR (38) 1951 Mad 616, Ref. (Para 15)

Anno: Industrial Disputes Act, S. 2 (k) N. 1.

(d) Constitution of India, Article 226 — Writ against authority constituted by Central Government — Authority functioning within jurisdiction. — (Quaere.)

'Quaere': Whether the High Court is competent to issue any writ under Art. 226, on the Industrial Tribunal functioning within its jurisdiction though it owes its appointment to the Central Government. (Para 22)

B. Das, Bhabanand Mukherji and A. K. Mitter; for Petitioner; Jaleshwar Prasad; S. K. Mitra and T. K. Prasad, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

(1937) A C 898: (AIR (24) 1937 P C 265) (Prs 9, 16)

('51) 55 Cal W N 528: (AIR (39) 1952 Cal 103) (Pr 22)

('51) AIR (38) 1951 Mad 616: (1949-2 Mad L J 789) (Prs 8, 15)

('51) AIR (38) 1951 Raj 94 (2): (1951-20 ITR 214) (Pr 22)

ORDER.: The petitioner, Messrs. Standard Coal Company, Limited, has moved this Court under Article 226 of the Constitution for issue of writs in the nature of mandamus, prohibition and certiorari against the opposite party, in connection with the order dated the 16th of May 1951, made by the Government of India, Ministry of Labour, referring certain matters for adjudication to the Central Government Industrial Tribunal at Dhanbad and, in connection with the notice dated the 26th of May 1951 issued to the petitioner by that Tribunal.

(2) The facts relevant to the matter under consideration may shortly be stated as follows. On the 30th of December 1950, the petitioner gave notice that the working of the Standard Colliery would be closed from the 20th January 1951. An information to this effect was sent to one Sri P. C. Bose, M.L.A., President Indian Miners' Association, Jharia. On the 5th of January 1951 the said Sri P. C. Bose sent a telegram to the Hon'ble Labour Minister, Government of India, to the following effect:

"Standard Coal Company closing down Standard Colliery on ground of exhaustion of available coal and highly uneconomic working stop 1,650 workers with families involved stop kindly advise Regional Labour Commissioner and Mines Department to enquire condition of colliery and press for employment of workers if colliery is unworkable."

(3) On the 7th of January 1951 a letter was sent to the Regional Labour Commissioner, Dhanbad, on behalf of large number of workers requesting him to intervene in the matter of the closing down of the Standard Colliery. A request was made in that letter for a direction to the management of the Colliery to maintain the status quo until the dispute was settled. The letter further authorised Sri Shivakali Bose, a member of the working committee of the Indian National Trade Union Congress, Bihar Branch, to represent their case. A copy of this letter was sent to the Hon'ble the Labour Minister of India, New Delhi, (2) to the Secretary, Ministry of Labour, New Delhi, (3) to the Chief Labour Commissioner, New Delhi, (4) to the Conciliation Officer, Dhanbad, and to several other officers. The first page of the letter contained either the signature or the thumb-impression of fifteen workers of the colliery. It is contended by the opposite party that in fact the signature or thumb-impression of a thousand workers was attached to this letter, but the other pages containing those signatures and thumb-impressions of the workers were returned. This appears to be so as a mention to such a representation by a thousand workers was made in a letter dated the 17th of February 1951, sent by Sri Shivakali Bose to the Regional Labour Commissioner, Dhanbad, as also in the report dated the 19th of February 1951 sent by the latter to the Secretary to the Government of India, Ministry of Labour, New Delhi. The said letter dated the 7th of January 1951 was accompanied by a copy of an express telegram sent on the 4th of January 1951 by the said Sri Shivakali Bose to the Hon'ble Sri Jag Jiwan Ram, Labour Minister, New Delhi. The telegram ran as follows:

"Standard Beniahir Colliery of Bird, Heilgers and Company declared lock-out from 20th January 1951 on uneconomic plea which is far from the actual truth. Thus huge National asset (coal) is bound to be wasted. About 2,000 labourers of the colliery and on their behalf myself pray your immediate intervention in the matter and request you to kindly refer this serious dispute to the Industrial Tribunal, Dhanbad, at once."

On the 10th of January some conciliation was arrived at between the said Sri P. C. Bose representing the workers and Sri Das and Sri Gupta representing the management. The following agreement seems to have been arrived at as appears from the minutes of the conciliation proceeding dated the 10th January 1951.

"(1) It is agreed that as many workers of this colliery as are necessary for the time being will be given work in this colliery so long there is work.

(2) Those for whom there is no work here or when there is no work they will be gradually absorbed in Sanda Colliery of this management which is being opened shortly. If there be still some for whom there is no work at Sanda they will be taken in other collieries or industrial concerns of this management.

(3) If there are some who cannot be absorbed anywhere they will be kept on the waiting list and will be given the 1st choice whenever a

vacancy occurs if found suitable for the job and if they are willing and turn up within a week of the receipt of notice which the company will issue.

(4) Water supply, light and ration will continue as before so long there is work at Standard Colliery.

(5) Transfer facilities should be given free.

(6) Working families should be transferred together."

(4) The Regional Labour Commissioner, Dhanbad, however, sent a letter on the 10th of January 1951 to the Chief Inspector of Mines, Dhanbad, calling for a report whether it is possible to continue working of the Standard Colliery. On the 1st of February 1951 the Chief Inspector of Mines, Dhanbad, sent the required report to the Regional Labour Commissioner, Dhanbad, in which while mentioning about the possibility of absorbing the labour at other mines he said:

"POSSIBILITIES OF ABSORBING THE LABOUR AT OTHER MINES."

About 1,650, persons will be affected by closing the mine. The question of absorbing these persons in the other mines of Messrs. Bird & Co. was discussed with the C.M.E. who stated that he was in a position to transfer about 50 per cent of these persons to the other mines and that he would endeavour to absorb as many of the remaining 50 per sent. as he could. He further produced an agreement he had entered into with Sri P. C. Bose, M.L.A., the recognised President of the Labour Union at Standard mine in which he agreed to do his best to absorb the retrenched persons at the other mines under his charge."

On the 3rd of February 1951 the Regional Labour Commissioner, Dhanbad, sent information to the (1) Chief Mining Engineer Messrs Bird & Co., Ltd., (2) Sri P. C. Bose, (3) Sri S. K. Bose, informing them that the question of the lock-out noticed dated the 30th of December 1950 to close down the Standard Colliery would be taken up for conciliation at 10 A.M. on the 14th of February 1951. It appears that nothing was done on the 14th of February 1951, the date fixed in the above notice, but on the following day an agreement was arrived at between Sri P. C. Bose representing the workers and Sri R. B. Das and Sri D. N. Gupta representing the management. The terms of the agreement ran as follows:

"1. It is agreed that as many workers of this colliery as are necessary for the time being will be given work in this colliery so long as there is work.

2. Those for whom there is no work at Standard Colliery or when there is no work the management will make all attempts to gradually absorb them in other collieries of this group.

3. If there are some who cannot be absorbed anywhere they will be kept in the waiting list and will be given the first choice wherever a vacancy occurs if found suitable for the job and if they are available at the time when the vacancy occurs.

4. It is clearly to be understood that when a worker or workers have been offered jobs elsewhere and they refuse, their names will be scratched out from the list and they will not be offered any job thereafter.

5. Water supply, light and sanitary arrangements will continue as before, so long as there is work at Standard Colliery.

6. Rations will be supplied to those employed so long as employment continues.

7. Transport facilities will be given to the workers who will be transferred elsewhere.

8. Working families wherever possible will be transferred together.

9. In suitable cases the question of gratuity or pension to the old and invalid workers will be favourably considered by the management."

On the 17th of February 1951 Sri Shivakali Bose sent a letter to the Regional Labour Commissioner, Dhanbad, wherein he complained that though he had attended his office at 10 a.m. on the 14th of February 1951, to participate in the proceeding nothing could be done due to his being out of station that day but he was surprised to know that without any further information having been given to him the conciliation proceeding was taken up on the 15th of February 1951 behind his back between Sri P. C. Bose, who did not in fact represent the workers of the Standard Colliery, and the representatives of the management. In that letter it was also said that the workers of the colliery emphatically repudiated the said agreement. On that very date the Regional Labour Commissioner Dhanbad, sent a letter to the Chief Mining Engineer, Standard Colliery to the following effect:

"Subject: Closing down of the Standard Colliery.

Dear Sir,

In the conciliation proceeding held on the above dispute on the 15th instant, there was agreement between your representatives and Shri P. C. Bose, on the report of the Chief Inspector of Mines, Dhanbad. A number of workers of your above named colliery afterwards approached me with a statement that Shri P. C. Bose no longer represents them rather Shri S. K. Bose is their representative. I am sending my reports to Government on the subject on the basis of the report of the Chief Inspector of Mines and the points raised by Shri S. K. Bose. I would request you in the meantime pending receipt of my report by the Government and their decision to observe provisions of Section 33 of the Industrial Disputes Act, 1947."

(5) A copy of this letter was forwarded both to Sri S. K. Bose and to Sri P. C. Bose. On the 19th of February 1951 the Regional Labour Commissioner, Dhanbad, sent a report to the Secretary to the Government of India, Ministry of Labour, New Delhi, and to the Chief Labour Commissioner, New Delhi. In that report at one place it was mentioned:

"Sri S. K. Bose, another representative of workers had approached me to represent the workers in this case and had requested the Chief Inspector of Mines to associate him with the investigation but the management, before the Chief Inspector of Mines and before also during conciliation, declined to negotiate with him on the ground that this gentleman did not represent their labour whom he was encouraging to think that the mine would not be closed. He has shown me a petition bearing signatures and thumb-marks of about a thousand workers out of about sixteen hundred of this colliery affirming that Sri S. K. Bose is their representative. Sri S. K. Bose has challenged the report of the Chief Inspector of Mines and presses that the dispute might be referred to the Tribunal for a decision."

At another place the report said:

"In making a reference to the Tribunal the first point to be decided is whether the Tribunal will go against the advice of the Chief Inspector of Mines about the working of Seams 11 & 12 where he holds that pumping of water is difficult and very costly. In deciding whether questions of closure could be referred to the Tribunal one thing has to be taken into consideration. It is that other collieries may similarly come up for permission to close down on the ground of costs. Should that on principle be accepted without

reference to the Tribunal for examination whether the claim is genuine or not. Even if genuine, should not the workers be given some compensation and if so, on what basis. In the new Labour Relations Bill the Government want provisions for compensation to the workers in such cases. These are the questions which can be settled by Tribunal finally. If the Tribunal could decide the principles of compensation that will be a guide for us in similar cases. In this view of the matter, in my opinion, this case might be referred to the Tribunal only for deciding the amount of compensation could be paid to those who have to be retrenched or prefer retrenchment to transfer."

On the 20th of February 1951, a letter was sent by the Standard Coal Company, Limited to the Regional Labour Commissioner (Central) Dhanbad, informing him that Section 33 of the Industrial Disputes Act does not apply to the facts and circumstances of this case and that the Company was not obliged to act in accordance with the provisions of that section. A letter dated the 26th February 1951 sent by Standard Coal Company, Limited, to the Regional Labour Commissioner, Dhanbad, refers to the following advice received from their solicitors concerning the conciliation proceeding which was fixed for the 10th March 1951:

"If the Regional Labour Commissioner persists in pursuing the purported conciliation proceedings he will be acting without authority or jurisdiction and such proceedings will be void."

(6) On the 1st of March 1951 the Regional Labour Commissioner, Dhanbad, sent a letter to the Chief Mining Engineer of the Standard Colliery along with a copy of the telegram received from the Ministry of Labour requesting him to pay compensation or gratuity to the workers who had not been or are not likely to be given any alternative employment in accordance with Clause 38 of the proposed new Labour Relations Bill. On the 2nd of March 1951, the Regional Labour Commissioner, Dhanbad, wrote a letter to the Secretary to the Government of India, Ministry of Labour, New Delhi, which amongst others, contained the following passage:

"Due to the stoppage of work the labour would be losing their earned leave and proportionable bonus. They should get them and the Railway fare to go home in case it is closed. If the management do not agree to compensation a reference to the Tribunal might be made on these subjects."

In reply to the aforesaid letter dated the 1st of March 1951 sent by the Regional Labour Commissioner to the Chief Mining Engineer of the Standard Colliery, the later wrote back that it was not possible to make general payment of gratuity. In this connection the letter ran as follows:

"As far as gratuity is concerned, kindly note that it was intended to make some ex-gratia payment to the old and infirm and mention of this was made in the terms of settlement already reached before you. So far of course nothing of this kind can be done as labour are refusing to cooperate with us in any way."

After some other correspondence, followed the order dated the 16th of May 1951 which is attached by the petitioner in the present petition. The order referred the following points for adjudication to the Central Government Industrial Tribunal at Dhanbad.:

"1. Compensation for earned leave.
2. Proportionate bonus for the quarter.
3. Railway fare".

(7) The learned Counsel for the petitioner contended that the order dated the 16th May 1951 passed by the Government was without jurisdiction. According to him, the authority of the Government for referring this matter to the Tribunal for adjudication arises from S. 10 of the Industrial Disputes Act, 1947 (Act XIV of 1947) which runs thus:

"10. Reference of disputes to Boards, Courts or Tribunals.

1. If any industrial dispute exists or is apprehended, the appropriate Government may, by order in writing,

(a) refer the dispute to a Board for promoting a settlement thereof; or

(b) refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry or

(c) refer the dispute to a Tribunal for adjudication;

Provided that where the dispute relates to a public utility service and a notice under S. 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced.

2. Where the parties to an industrial dispute apply in the prescribed manner whether jointly or separately for a reference of the dispute to a Board, Court or Tribunal, the appropriate Government if satisfied that the persons applying 'represent the majority of each party', shall make the reference accordingly.

3. Where an industrial dispute has been referred to a Board or Tribunal under this section, the appropriate Government may by order prohibit the continuance of any strike or lock out in connection with such dispute which may be in existence on the date of the reference."

(8) According to him, all disputes which had arisen on the notice to close down the Standard Colliery had come to an end on the 15th of February, 1951 when an agreement was arrived at between Sri P. C. Bose representing the workers and Sri Das and Sri Gupta representing the management. He further submitted that after such an agreement no dispute can be legally said to exist at least for a period of six months from the 15th of February 1951 and the said agreement is binding on all the workers of the Colliery in accordance with the provisions of Ss. 18 and 19 of the Industrial Disputes Act, 1947. According to him, it was after the 15th of February, 1951 that some dissatisfied workers raised up a hue and cry that the said agreement was not beneficial to them. Resolutions were passed subsequently at a worker's meeting to the effect that Sri Shivakali Bose was their representative which fact would not nullify the validity of the agreement, dated the 15th of February, 1951, by Sri P. C. Bose who was the real representative of the workers. In this connection he referred us to the decision in the case of the 'Kandan Textiles Ltd. v. The Industrial Tribunal Madras', AIR (38) 1951 Mad 616 and contended that the Government had no jurisdiction to pass the order on the 16th of May, 1951 which fell within six months from the 15th of February, 1951. He further contended that the three items referred to the Central Government Industrial Tribunal for adjudication cannot be considered to be items of disputes even on the representation of Sri Shivakali Bose who all along stressed that the colliery should not be closed and never put forward any claim for these three items and as such there cannot be said to be any industrial dispute necessitating the reference.

(9) The learned Counesl for the petitioner further contended that if the decision of the Gov-

ernment was based on the report of the Regional Labour Commissioner dated the 19th of February, 1951, then also the order is without jurisdiction because the decision to refer should not have been founded on the possibility of cropping up of similar disputes in other collieries which might decide to close down in future. In support of his argument, the learned Counsel relied upon the case of 'Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust', (1937) A C 898 (P C).

(10) The learned Counsel for the petitioner further contended that the Regional Labour Commissioner, Dhanbad, could not have allowed Sri Shivakali Bose to represent the workers of the Standard Colliery as his representation cannot come within the provisions of S. 36 (1) (a) or (b) or (c) of the Industrial Disputes Act 1947 which runs thus:

"36. Representation of parties: (1) a workman who is a party to a dispute be entitled to be represented in any proceeding under this Act by
(a) an Officer of a Registered Trade Union of which he is a member;
(b) an officer of a federation of trade unions to which the trade union referred to in Cl. (a) is affiliated;
(c) where the worker is not a member of any trade union by an officer of any Trade Union connected with or by any other workman employed in, the industry in which the worker is employed and authorised in such manner as may be prescribed."

(11) He submitted that the representation by Sri Shivakali Bose could not come within the meaning of S. 36(1)(c) of the Act as no rules have been framed so far which were essential for its applicability.

(12) The learned Counsel for the petitioner thereafter read portions from his petition and from several affidavits sworn on behalf of the petitioner to show that a large number of workers had already withdrawn their pay and were not at all dissatisfied with the agreement arrived at by Sri P. C. Bose and as such it is not a case of any existing dispute which could have been referred for decision of the Industrial Tribunal.

(13) We are, however, not in agreement with any of the submissions of the learned Counsel for the petitioner. On the records of the case, it cannot be said that no dispute existed on the date of the order of reference in question. In our opinion, the agreement by Sri P. C. Bose cannot bind all the workers of the Colliery when on the petitioner's own affidavit only some 200 workers out of the total number of about sixteen hundred were members of the Union of which he was the President. Sri Shivakali Bose had sent a telegram to the Hon'ble Labour Minister as early as on the 4th of January 1951 ventilating the grievances of the workers of the Standard Colliery on the question of the lock out proposed by the management. On the 7th of January, 1951 a letter was sent to the Regional Labour Commissioner, Dhanbad, on behalf of about a thousand workers of the Standard Colliery that they would be represented by Sri Shivakali Bose at the proceeding before him. The management of the colliery was also fully aware that Sri Shivakali Bose was set up as representative on behalf of a large number of workers. But inspite of all that, an agreement is said to have been arrived at on the 15th of February, 1951, behind the back of Sri Shivakali Bose and without giving him any notice that the matter would be taken up on that date. Sri Shivakali Bose lodged a protest on the 17th of February, 1951 challenging the binding nature of the alleged agreement. In our opinion, the agreement dated the 15th of February, 1951, did not terminate the dispute as is contended on behalf of the petitioner.

(14) We also do not agree with the argument of the learned Counsel for the petitioner that as no rules had been framed under the provisions of S. 36(1)(c) of the Industrial Disputes Act, 1947, Sri Shivakali Bose could not have represented the workers of the Standard Colliery. In our opinion, in the absence of any such rules any letter of authorisation including the one sent to the Regional Labour Commissioner on the 7th of January, 1951 was sufficient to make him their representative within the meaning of that section. It is also clear from the report of the Regional Labour Commissioner dated the 19th of February 1951 that about a thousand workers had put forward Sri Shibakali Bose as their representative before him. In fact, the notice of the conciliation proceeding was sent to Sri Shivakali Bose also on the 3rd of February, 1951. Thus, the representation of Sri Shivakali Bose could not have been ignored and so it cannot be said that Sri P. C. Bose alone will be deemed to have represented all the workers of the Standard Colliery and that his agreement is binding on all of them. From the records of the Regional Labour Commissioner also it is clear that he had not treated the dispute as having come to an end by the agreement of the 15th of February, 1951; on the contrary, he had fixed the 10th of March, 1951 as the date for taking up the conciliation proceeding. From his reports to the Government of India also it is clear that he had never considered the dispute to have come to an end. In our opinion, therefore, there was ample justification for the Government of India to have come to the conclusion on the 16th of May, 1951 that there was an industrial dispute in existence entitling them to refer it for the decision of the Tribunal within the meaning of S. 10 of the Act.

(15) The case of 'The Kandan Textiles Ltd. v. The Industrial Tribunal Madras', A I R (38) 1951 Mad 616 relied upon on behalf of the petitioner is not on all fours with the present case. In that case, the proceeding before the Tribunal had come to an end and most of the points referred to the Tribunal were not contested before it. The learned Judges who decided that case came to the conclusion on the facts of that case that no dispute existed which could have given jurisdiction to the Government to make a reference within the meaning of S. 10 of the Act. The learned Counsel for the petitioner had very vehemently argued relying upon certain passages from that judgment that unless the demand for redress of certain grievances made by the workers had been refused by the employer, those grievances cannot form the basis of any 'industrial dispute' as defined by the Industrial Disputes Act, 1947. In our opinion, those passages were not intended to be absolute tests applicable in all cases, but if they were so intended we respectfully beg to differ from the learned Judges on that particular point. There may be instances where workers may consider it wholly useless to make a demand on the management and prefer to move the appropriate machinery set up by Government for the redress of their grievances. But nevertheless, it will be an industrial dispute if it comes within the meaning of S. 2(k) of the Act. In our opinion, the Madras judgment cannot be of any assistance to the petitioner in the present case.

(16) The case of 'Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust', (1937) A C 898 (P C) also is not of any assistance to the petitioner. In that case the appellant had applied for issue of a writ of prohibition against the respondents prohibiting them from further proceeding in respect of a declaration made by the respondents of that case that a block of 97 houses in-

cluding the house of the appellant, were all insanitary within the meaning of S. 57 of the Singapore Improvement Ordinance No. 10 of 1927. S. 57 of the Ordinance ran as follows:

"Whenever it appears to the Board that within its administrative area any building which is used or is intended or is likely to be used as a dwelling place is of such a construction or is in such a condition as to be unfit for human habitation, the Board may by resolution declare such building to be insanitary."

(17) While making that declaration the authorities had come to their decision with reference to "The Manual on Unfit Houses and Unhealthy Areas" issued officially by the Ministry of Health for official use and particularly to Volume I, second part chapter 5, under heading "standards of fitness" Their Lordships of the Judicial Committee held in that case that it was not proper to make declaration under S. 57 of the Ordinance by referring to the standard of building mentioned in the Manual on Unfit Houses and Unhealthy Areas" referred to above. Their Lordships were of the opinion that the powers of the authorities while making that declaration were strictly limited by the terms of the Ordinance, and that they should not have allowed their judgment to be influenced by a consideration as to what would be an ideal house according to the said "Manual of Unfit Houses and Unhealthy areas." In this view of the matter their Lordships held;

"To sum up this part of the case, their Lordships have come to the conclusion that the 'grounds' on which the respondents made the declaration, as explained by the affidavit of their chairman, were grounds which did not justify the declaration. In other words, the respondents were applying a wrong and an inadmissible test in making the declaration and in deciding to submit it to the Governor in Council. They were therefore acting beyond their powers, and the declaration is not enforceable".

(18) On any view of the matter, it is not right to say, as has been argued on behalf of the petitioner, that the Government decided to make the reference in question to evolve some common formulae for settling disputes which might crop up if other collieries also decided to close down their work in future. In this connection, the learned Counsel for the petitioner had referred to a stray passage in the report dated the 19th of February, 1951 sent by the Regional Labour Commissioner Dhanbad, to the Secretary to the Government of India Ministry of Labour, quoted above. But the Regional Labour Commissioner, Dhanbad, had suggested the items for reference in his letter dated 2nd of March, 1951, and in face of this letter it is idle to suggest that the decision of the Government to refer the dispute was based on some extraneous matter referred to in the letter dated the 19th of February 1951, mentioned above. In our opinion, there is no force in the contention of the learned Counsel for the petitioner on this count also.

(19) The learned Counsel for the petitioner vehemently contended that about 1100 workers who have already accepted their final payment and other facilities including the payment of gratuity or pension in suitable cases were already included in the agreement dated the 15th of February, 1951. But the attitude of the Company regarding the payment of gratuity as disclosed in their letter dated the 3rd of March 1951 addressed to the Regional Labour Commissioner, Dhanbad, was wholly different. In our opinion, the decision of the Government to make the reference in question cannot be said to be without justification.

(20) The learned Counsel for the petitioner further contended that because a large number of workers have accepted final payment they will be deemed to have ratified the agreement dated the 15th of February, 1951. In our opinion, this will not make the order dated the 16th of May, 1951, without jurisdiction.

(21) An argument was advanced on behalf of the Government that we have no jurisdiction to issue any writ under Art. 226 of the Constitution on opposite party No. 3, the Union of India; nor have we any jurisdiction to issue any writ prohibiting the Industrial Labour Tribunal at Dhanbad (appointed by the Central Government) to proceed with the adjudication.

(22) In reply the learned Counsel for the petitioner conceded that no writ could be issued against opposite party No. 3, the Union of India, but, according to him, it could be certainly issued against the Tribunal functioning within the jurisdiction of the State of Bihar though it owes its appointment to the Central Government. In this connection the learned Counsel relied upon the cases of 'Soorajmull Nagarmull v. The Assistant Collector of Customs', 55 Cal W N 528 and 'Madangopal v. The Union of India', AIR (38) 1951 Raj 94. It is, however, not necessary for us to decide whether this Court is competent to issue any writ under Art. 226 of the Constitution on opposite party No. 1, Sri S. P. Varma, Chairman, Central Government Industrial Tribunal at Dhanbad, because of the view taken by us of the matter as indicated above. In our opinion, no point has been made out for issuing any writ under Art. 226 of the Constitution.

(23) The result is that the Miscellaneous Judicial case fails and is dismissed but in the circumstances of this case there will be no order for costs.

V.B.B. *Petition dismissed.*

A. I R. (39) 1952 PATNA 61 (C. N. 23)

RAMASWAMI AND SARJOO PROSAD, JJ.

Hazaribagh Mica Mining Company Limited, Plaintiff-Appellant v. Mrs. Ashalata Kapoor and others, Respondents.

Appeal from Original Decree No. 333 of 1947, D/- 5-9-1951.

Trusts Act (1882), Section 82 — Property purchased in joint names of husband and wife, the former contributing money — Presumption of advancement — Onus — Rule in India — Husband in affluent position and no motive for entering into benami transaction — Transaction held for advancement of wife — (Husband and wife —Advancement) (Benami transactions), (Evidence Act (1872) S. 114.)

The general principle of equity, applicable both in England and in India, is that in the case of a voluntary conveyance of property by a grantor, without any declaration of trust there is a presumption of a resulting trust in favour of the grantor, unless it can be proved that an actual gift was intended. But the presumption may be rebutted in either of two ways. First it may be rebutted by another presumption of equity, a presumption arising from special relationship as of husband and wife, or father and child that the transaction was intended as a gift "by way of advancement." For instance, in English law a gift to a wife is presumed where money belonging to the husband is deposited at a bank in the name of wife, or where a deposit is made in the joint names of both husband and wife. In India the English Law as to presumption of aavancement has not been adopted. 6 Moo Ind App 53 PC, Relied on;

In the second place the presumption of resulting trust may also be rebutted by parol or other evi-

dence that the purchaser really wished to benefit those in whose names the conveyance of the legal estate was taken. (1875) 10 Ch A 343; (1885) 31 Ch D 282, Relied on. (*Para 7*)

The principle applies in India. Section 82 of the Trusts Act recognises that money may have been contributed by another person towards the purchase with the intention of giving beneficial interest to the person in whose name the purchase is made. In this context the relationship of husband and wife, between the person who contributes money and the person in whose name it is taken will be very important factor in determining whether the transaction was really meant for the benefit of the wife or not.

The onus lies in the first instance on the defendant who pleads that these transactions are benami. The mere suspicion that the purchases might not have wholly been made with the lady's money will certainly not suffice to establish that the purchases were benami, nor even the suspicion that moneys belonging to the husband whether in a small measure or a larger measure, must have also contributed to these purchases. Even in cases where there is positive evidence that money had been contributed by the husband and not by the wife, that circumstance is not conclusive in favour of the benami character of the transaction though it is an important criterion: AIR (25) 1938 Mad 8, Relied on. (*Para 9*)

Where the purchase of the house was made in the joint names of the husband and wife and there is evidence to indicate that at the material time the husband was in an affluent circumstance and there was no motive why he should enter into benami transaction, and it was therefore impossible to suggest that he was involved in debt at the time or that there was any motive on his part for entering into benami transaction with view to defeat or delay creditors:

'Held' that the transaction of the purchase of the house was not benami and that the husband made the purchase for the advancement of his wife. AIR (26) 1939 Pat 462, Distinguished; AIR (32) 1945 P C 10; AIR (15) 1928 P C 172, Rel. on. (*Paras 10, 11*)

Anno: Trusts Act, S. 82, N. 3.

B. C. De; K. D. De; Dalip Kumar Sinha, for Appellant.

G. C. Mukherjee; S. K. Mazumdar and N. Chatterji, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

(1854-57) 6 Moo Ind App 53: (1 Sar 493 P C) (Pr 7)
('69) 13 Moo Ind App 232: (4 Beng L R 1 P C) (Pr 7)
('15) 37 All 557: (AIR (2) 1915 P C 96) (Pr 9)
('28) 55 Ind App 235: (AIR (15) 1928 P C 172) (Prs 6, 12)
('44) 71 Ind App 197: (AIR (32) 1945 P C 10) (Pr 12)
('38) AIR (25) 1938 Mad 8: (ILR 1938 Mad 220) (Pr 9)
('39) 20 Pat LT 787: (AIR (26) 1939 Pat 462) (Pr 10)
(1875) 10 Ch A 343: (44 L J Ch 367) (Pr 7)
(1885) 31 Ch D 282: (55 L J Ch 218) (Pr 8)

RAMASWAMI, J.: This appeal is presented on behalf of the plaintiff against the judgment and decree of the Additional Subordinate Judge of Ranchi, dated 31st May 1947.

(2) The plaintiff, Hazaribagh Mica Mining Company, Limited, had instituted a money suit in the Court of the Subordinate Judge of Hazaribagh and obtained a decree for Rs. 24,540 inclusive of costs against Mr. G. C. Kapoor, defendant No. 3. In the course of execution proceedings, the plaintiff attached two properties, (1) a house and land appurtenant thereto located on the Peace Road, Ranchi and (2) a plot of garden land, area 1.70 acre on Booty Road in Mahalla Morabadi. Defendant No. 1, Mrs. Ashalata Kapoor objected to the attachment on the ground that half share of the house belonged to her and that the entire garden land belonged to her minor son, defendant No. 2, Motichand Kapoor. The executing Court allowed the objection and set aside attachment of the properties. The plaintiff thereupon brought the present suit under Order 21, Rule 63, Civil P.C., asking for a declaration that the properties belonged to defendant Mr. G. C. Kapoor and were liable to be sold in execution of the decree. Defendants 1 and 2 contested the suit but defendant No. 3 did not appear. Upon examination of the evidence, the learned Subordinate Judge held that Mr. G. C. Kapoor had title only to half share of the house on the Peace Road, that the other half share of the house belonged to Mrs. Ashalata Kapoor and that the Morabadi garden was owned by Motichand Kapoor and defendant No. 3 had no share in it. The learned Subordinate Judge accordingly granted a decree to the plaintiff in part.

(3) As regards the Morabadi garden described in Schedule 2 of the plaint learned Counsel for the appellant argued that the purchase was made benami in the name of Motichand Kapoor, that Mr. G. C. Kapoor had really supplied the purchase money and hence the Morabadi garden was liable to be attached in execution of the decree obtained by the appellant. But, in my opinion, the circumstances proved in the case indicate that the purchase of the Morabadi garden was not made benami in the name of Motichand Kapoor. It is not disputed that on 15th November 1942 a cheque for a sum of Rs. 6,500 was drawn by Mr. G. C. Kapoor and Budh Singh jointly in favour of Mrs. Ashalata Kapoor. This cheque was credited to the current account of Mrs. Kapoor on the same date. On 16th of November 1942 the deed of sale, Exhibit J/1, was executed by Sheo Prasad Marwari in favour of Motichand Kapoor and a cheque for Rs. 6,500 was given by Mrs. Ashalata Kapoor in favour of Ramrikhdas Mamraj, which was cashed on 18th November 1942. It was contended on behalf of the respondents that Mrs. Kapoor had lent Rs. 7,500 to her husband Mr. Kapoor for the purpose of partnership. Mr. Khosla, D.W. 1, has corroborated the evidence of Mrs. Kapoor on the point. For the appellant, it was pointed that it was improbable that Mrs. Kapoor should lend this amount to the firm without any document being executed. But there is no evidence adduced on behalf of the plaintiff to show that Mrs. Ashalata Kapoor in whose favour the cheque, Exhibit 3/A, was drawn was a mere benamidar for Mr. Kapoor. On the other hand, there is evidence that Mrs. Kapoor was in possession of the necessary funds at the material time. D.W. 3 stated that in 1943 Mrs. Kapoor was owner of a race-horse named Sublaw which was worth about Rs. 10,000 or thereabout. The witness added that the horse had won the Governor's Cup in the Tollygunge race. The evidence of J. N. Ray, Manager of the Bengal Central Bank, also shows that Mrs. Kapoor had purchased shares in the Bengal Central Bank in her own name worth about Rs. 1,000. There is also no evidence adduced in the case that Mr. Kapoor had any motive for entering into a benami transaction. Budh Singh admitted that Mr. Kapoor paid off all the advances made by him for the partnership business to the extent of Rs. 1,13,000 before 24th of November 1942. There is in truth no evidence to suggest that Mr. Kapoor was heavily indebted at

the time. On the contrary, D.W. 3, Kalicharan Poddar deposed that in 1942 Mr. Kapoor was owner of a separate race-horse. The letter Exhibit D/1 shows that in September 1943 Mr. Kapoor had made a donation of Rs. 5,005 to the war fund. It is manifest that there was no motive for Mr. G. C. Kapoor to enter into any benami transaction at the material time. There are other facts to be taken into account. After the purchase of the Morabadi garden Mr. Kapoor granted a lease of it on behalf of her minor son to the military authorities. The first lease was executed on 12th of April 1945, Exhibit E/1, in which there is a statement that Rs. 1,850 would be paid as rent to Mrs. Ashalata Kapoor as guardian of Motichand Kapoor. The second lease, Exhibit E/1, was executed on 29th of October 1946 and there was a clause therein that Rs. 2,300 would be payable as annual rent to Mrs. Ashalata Kapoor as guardian of Motichand Kapoor. Mrs. Kapoor gave evidence that she had been realising rent from the authorities on behalf of her son. Upon a review of the evidence it is apparent that the plaintiff has not established that the Morabadi garden was purchased benami by Mr. G. C. Kapoor in the name of her minor son Motichand Kapoor.

(4) The case with respect to the house on the Peace Road is somewhat different. This house was purchased from Rai Sahib Chunilal Bhagat for Rs. 15,000 by a sale-deed, Exhibit J, dated 13th July 1942, executed in the name of Mr. G. C. Kapoor and Mrs. Ashalata Kapoor. On behalf of the plaintiff it is pointed out that on 10th July 1942 a cheque, Exhibit 3, was drawn by the partnership in favour of Gopichand Kapoor for Rs. 15,000. The cheque was credited to the account of Mr. G. C. Kapoor and on the same day he withdrew the sum of Rs. 14,000 (vide entry in the current account ledger, Exhibit F/3.). The sale-deed, Exhibit J/3, was executed on the identical date by Rai Sahib Chunilal Bhagat. It is alleged for the plaintiff that Mr. G. C. Kapoor had paid the entire consideration for the sale but on behalf of the defendants it is asserted that Mrs. Kapoor had paid half the price of the house, viz., Rs. 7,500. Mrs. Kapoor deposed that she had paid to Mr. G. C. Kapoor a sum of Rs. 8,000 about a month before the kebala was executed and that on the next day Mr. G. C. Kapoor returned the balance of Rs. 500. On this point Mr. Khosla, D.W. 1 has given evidence to corroborate the statement of Mrs. Ashalata Kapoor. But it is difficult to believe the evidence of Mrs. Kapoor on this part of the case since she has made contradictory statements. She asserted that before 1942 she had money in the Punjab National Bank at Calcutta and Allahabad, that she had withdrawn about Rs. 5,000 or Rs. 6,000, that she had, besides, a sum of Rs. 8,000 or Rs. 9,000 with her in cash. But in her previous deposition in the execution case she stated that she never kept any money in any bank before going to Ranchi and that she "could not say what money she had and where, from July 1942 to November 1942 as she did not remember the details." In view of her conflicting statements, it is difficult to rely upon the evidence of Mrs. Ashalata Kapoor that she had paid a sum of Rs. 7,500 to Mr. G. C. Kapoor for purchase of half share of the house in dispute.

(5) Upon the evidence adduced, it appears highly probable that Mr. G. C. Kapoor paid the entire consideration money of Rs. 15,000 for the purchase of the house located on the Peace Road. Upon this finding, it was argued for the appellant that the transaction must be held to be benami and that Mr. G. C. Kapoor was really owner of the entire house purchased.

(6) In support of his argument learned counsel cited 'Guran Ditta v. Ram Ditta', 55 Ind App 235, in which there was a deposit by a Hindu of his own money in a bank in the joint names of himself and wife, and on the terms that it is to be payable to either of the survivor. It was held by the Judicial Committee that the deposit did not on the death of Hindu constitute a gift by him to his wife but there was a resulting trust in his favour in the absence of proof of contrary intention since there was in India no presumption of an intended advancement in favour of a wife. But the material facts are different from those of the present case. There was no evidence to suggest that it was the intention of Teku Ram to make any advance in favour of his wife under the terms of the deposit note. It was suggested that one of the provisions in the Will of Teku Ram was evidence of such an intention. But the Judicial Committee thought that no weight should be attached to this evidence. In the absence of any evidence as regards intention of Teku Ram, the Judicial Committee decided the question on the construction of the terms of the deposit note holding that there was a resulting trust in favour of the grantor who made the voluntary conveyance.

(7) The general principle of equity, applicable both in England and in India, is that in the case of a voluntary conveyance of property by a grantor, without any declaration of trust, there is presumption of a resulting trust in favour of the grantor, unless it can be proved that an actual gift was intended. But the presumption may be rebutted in either of two ways. First it may be rebutted by another presumption of equity, a presumption arising from special relationship as of husband and wife, or father and child — that the transaction was intended as a gift "by way of advancement." For instance, in English law, a gift to a wife is presumed where money belonging to the husband is deposited at a bank in the name of a wife, or where a deposit is made in the joint names of both husband and wife. In India, the English law as to presumption of advancement has not been adopted (vide 'Gopeekrist v. Ganga Prasaud', 6 Moo Ind App 53 and 'Uzur Ali v. Bebee Ultaf Fatima', 13 Moo Ind App 232. In the second place, the presumption of resulting trust may also be rebutted by parol or other evidence that the purchaser really wished to benefit those in whose names the conveyance of the legal estate was taken. In 'Fowkes v. Pascoe', (1875) 10 Ch A 343, testatrix, both before and after she made her will, purchased sums of stock in the names of herself and the son of her daughter-in-law. By her will she gave the residue of her estate to her daughter-in-law for life, and after her death to the son and the daughter of the daughter-in-law. It was held by the Court of Appeal that, under the circumstances, the sums of stock so purchased were a gift to the son of the daughter-in law and that in such a case the evidence of the son and his wife was admissible, and could not be disregarded as rebutting the presumption of a resulting trust; and that, coupled with the circumstances under which the stock was purchased, it was sufficient to rebut the presumption. At page 352 of the report Lord Justice Mellish, L.J., states:

> "There can be no doubt that the question in this case is a question of fact. It cannot be decided simply on the ground of legal presumption, because whatever effect is given to the evidence of Mr. Pascoe and his wife, their evidence is evidence to rebut the presumption, and therefore the Court must consider whether the presumption is rebutted or not.
>
> Now, the Master of the Rolls appears to have thought that because the presumption that it was a trust and not a gift must prevail if there were no evidence to rebut the presumption, therefore when there was evidence to rebut the presumption he ought not to consider the probability

or improbability of the circumstances of the case, and whether the presumption was really true or not, but ought to decide the case on the ground that the evidence of Pascoe and his wife taken alone was not satisfactory. But, in my opinion, when there is once evidence to rebut the presumption, the Court is put in the same position as a jury would be, and then we cannot give such influence to the presumption in point of law as to disregard the circumstances of the investment, and to say that neither the circumstances nor the evidence are sufficient to rebut the presumpion."

(8) The same principle is enunciated in 'Standing v. Bowring', (1885) 31 Ch D 282, in which the plaintiff, a widow, in the year 1880, caused £6, 000 Consols to be transferred into the joint names of herself and the Defendant, who was her godson. She did so with the express intention that the defendant, in the event of his surviving her, should have the consols for his own benefit, but that she should have dividends during her life; and she had previously been warned that if she made the transfer she could not revoke it. The first notice the defendant had of the transaction was a letter from the plaintiff's solicitors about the end of 1882 claiming to have the fund retransferred to the plaintiff. The Court of Appeal held that the legal title of the defendant as a joint tenant of the stock was complete, although he had not assented to the transfer until he was requested to join in retransferring the stock; that the legal title of a transferee of stock is complete without acceptance and that a transfer of property to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of the transfer. It was further held that the plaintiff could not claim a retransfer on equitable grounds, the evidence clearly shewing that she did not, when she made the transfer, intend to make the defendant a mere trustee for her except as to the dividends, and that, therefore, the plaintiff was not entitled to have the stock re-transferred to her. At page 289 of the report Lord Lindley, L.J., states:

"The plaintiff in her statement of claim and in the Court below rested her case on equitable grounds, and sought to establish a trust in her favour. But the only trust which was consistent with the evidence was a trust to pay her the income of the consols for the joint lives of herself and the defendant. This trust was not in controversy, but is not sufficient for the plaintiff's purpose. No trust will suffice short of an absolute trust for herself. But it is impossible to impose such a trust on the defendant, when the evidence conclusively shews that she never intended to create any trust of the kind. Trusts are neither created nor implied by law to defeat the intentions of donors or settlors; they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied. It appears to me there are no equitable as distinguished from legal grounds on which the plaintiff can obtain relief."

(9) The principle applies in India. For S. 82 of the Indian Trusts Act recognises that money may have been contributed by another person towards the purchase with the intention of giving beneficial interest to the person in whose name the purchase is made. In this context the relationship of husband and wife, between the person who contributes money and the person in whose name it is taken will be very important factor in determining whether the transaction was really meant for the benefit of the wife or not. Section 82 of the Act states:

"Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying providing the consideration."

In 'Sitamma v. Sitapatirao', AIR (25) 1938 Mad 8, a wife had separate income of her own though the amount was not known and certain properties were purchased in her name but it was impossible to connect any sale-deed relating to the properties with a particular item of asset belonging to the wife. The husband had no intelligible motive for entering into any benami transaction. Even during the period when he was taking sale-deeds in his wife's name in respect of the suit properties, he was entering into other transactions of sale and mortgage in his own name, thus showing that he had no reason at the time to make it appear that he had no properties of his own other than the ancestral properties. Upon this evidence it was held by Varadachariar and King, JJ., that the sale-deeds relating to suit properties were not taken in the wife's name benami for husband. At page 10 the report states:

"The onus lies in the first instance on the defendant who pleads that these transactions are benami. The mere suspicion that the purchases might not have wholly been made with the lady's money will certainly not suffice to establish that the purchases were benami, nor even the suspicion that moneys belonging to Jagannadha Rao, whether in a small measure or a larger measure, must have also contributed to these purchases. Even in cases where there is positive evidence that money had been contributed by the husband and not by the wife, that circumstance is not conclusive in favour of the benami character of the transaction though it is an important criterion. It is true that in the Indian law the English rule as to presumption of advancement has not been adopted, but S. 82, Trusts Act, as well as the observation of the Judicial Committee in 'Mt. Bilas Kunwar v. Desraj Ranjit Singh', 37 All 557, at pp. 564 and 565 recognise that money may have been contributed by another towards a purchase with the intention of giving a beneficial interest to the person in whose name the purchase is made. The relationship of husband and wife between the person who contributes the money and the person in whose name the sale is taken will be a very important factor in determining whether the transaction was really meant for the benefit of the wife or not."

(10) In support of the appeal Mr. B. C. De, relied upon 'Sahdeo Karan Singh v. Usman Ali Khan', 20 Pat L T 787. But the material facts in that case were different. The question in that case was whether a purchase of property by defendants 1 and 2 in the name of their son was benami transaction or not. It was proved that defendants 1 and 2 had paid the entire purchase money but in addition there was important evidence to indicate that there was no intention on their part to transfer the beneficial interest. There was evidence, accepted by the High Court, that defendants 1 and 2 were financially in a bad state at the time the sale-deed was executed and the transactions were carried out in the name of the son with a view to protect the property in case of attachment and sale occurring later on. There was a subsequent mortgage of the property in dispute by defendants 1 and 2 and in the document there was the important recital that the property had been purchased in the farzi name of the plaintiff. Upon the consideration of the evidence the High Court came to the conclusion that the plaintiff was

benamidar and that he had wholly failed to prove that his parents intended to make a gift of the property to him. In the present case the material facts are wholly dissimilar. There is, in the first place, the important fact that the purchase of the house was made in the joint names of Mr. Kapoor and Mrs. Ashalata Kapoor. If the transaction was meant to be benami it appears improbable that Mr. Kapoor himself should have joined in the purchase. In the second place, there is evidence to indicate that at the material time Mr. Kapoor was in an affluent circumstance and there was no motive why he should enter into benami transaction. D.W. 3, Kalicharan Poddar deposed that in the year 1942 and 1943 Mr. Kapoor owned a race-horse named Commenjula which ran in Tooly-gunge race. Budh Singh the plaintiff admitted in his evidence that Mr. Kapoor had repaid all the advances made by the partnership to the extent of Rs. 1,13,000 on or before 24th November 1942. The letter, Exhibit D/1, also shows that Mr. Kapoor had made a donation of Rs. 5,005 to the War fund in the name of the Governor of Bihar. It is therefore impossible to suggest that Mr. Kapoor was involved in debt at the time or that there was any motive on his part for entering into benami transaction with a view to defeat or delay creditors.

(11) Upon the circumstances proved in this case I am of opinion that the transaction of the purchase of the house was not benami and that Mr. Kapoor made the purchase for the advancement of his wife Mrs. Ashalata Kapoor.

(12) This conclusion is supported by the 'ratio' of the decision of the Judicial Committee in 'Shambhunath v. Pushkarnath', 71 Ind App 197, in which a suit was brought for partition of the properties of a deceased Hindu, some of which were held jointly in the names of the deceased and individual relatives of his, and the question to be determined was whether the properties so held were for the advancement of each surviving relative and so to be excluded from the partible property. Lord Porter reiterated the rule previously laid down by the Judicial Committee in 'Guran Ditta v. Ram Ditta', 55 Ind App 235 — "the deposit by a Hindu of his money in a bank in the joint names of himself and his wife and on terms that it is payable to either as survivor does not on his death constitute a gift by him to his wife. There is a resulting trust in his favour in the absence of proof of a contrary intention, there being in India no presumption of an intended advancement was put forward by the defendant in his written statement but the contention was that the deceased had either made an out-and-out immediate gift or that there had been a 'donatio mortis causa.' The High Court held that the contentions on behalf of the defendants had not been established. The Judicial Committee took the same view but proceeded to investigate the question of fact whether there was evidence of intention to advance. At page 201 Lord Porter states:

"Their Lordships agree with the High Court in thinking that the deceased would have been unlikely to choose destitute widows as joint holders of property if their names had been made use of as nominees only. In their view the number of the nominees, the transfers from one name to another, the fact that some were purdanashin ladies, unable and unfit to deal direct with the banks, and that the absence at times of the male depositees in distant parts of India, all lead to the inference that the deposits were for advancement and that those whose names were used were not merely nominees."

Like the High Court the Judicial Committee thought that the evidence and circumstances pointed to intention on the part of the deceased man to advance the joint holders.

(12) For the reasons assigned I hold that the plaintiff has not established that the properties described in Schedules A and B to the plaint really belonged to the defendant Mr. C. C. Kapoor or that the two transactions of sale were benami or that the properties are liable to be attached and sold in execution of his decree. In my opinion the decree of the learned Subordinate Judge is correct and this appeal must be dismissed with costs.

(13) SARJOO PROSAD, J.: I agree.

R.G.D. *Appeal dismissed.*

A. I. R. (39) 1952 Patna 63 [*C. N. 24.*]

SHEARER AND AHMAD, JJ.

Mt. Bibi Waziuddinnissa and another, Appellants v. Janak Singh and others; Respondents.

A.F.A.D. No. 1729 of 1948, D/- 12-9-1951.

Civil P. C. (1908), S. 100 and O. 5, R. 17 — Due diligence in trying to find the party — Question of fact.

The question whether the process-server had affixed the summons after using all due and reasonable diligence to find the party to be served is one of pure fact and a finding thereon based upon evidence will not be interfered with in second appeal. (*Para 1*)

Anno: C. P. C., S. 100 & 101, N. 51, 52, O. 5, R. 17, N. 5.

B. N. Mitra and B. N. Bhagat, for Appellants; B. C. De, Dasu Sinha and Tribeni N. Sinha, for Respondents.

Case referred to:

('16) 23 Cal L J 183: (A I R (3) 1916 Cal 181 (2)) (Para 1)

SHEARER, J.: The question that is sought to be raised in this second appeal is not a question of law, nor strictly speaking, can it, I think myself, be said to be even a mixed question of law and fact. On the 20th of May 1943, a Nazarat peon went to village Keora with a notice under Section 7 of the Public Demands Recovery Act addressed to one of the plaintiffs. He went to the house of this plaintiff, and, eventually, hung the notice up on the wall of an 'osara' in the house. It is contended by Mr. B. N. Mitra for the appellants that before hanging the notice up, the peon had not used "all due and reasonable diligence" to find the plaintiff. Now, it is conceded that the plaintiff, to whom the notice was addressed, was in her house when the peon went there. It is also conceded that at her house at the time there was one Radhe, who was her 'gorait.' This Radhe did not admit that the notice was sent into the house to the plaintiff, and that she refused to accept it and returned it. On the other hand, he did not say either that this had not been done. Mr. B. N. Mitra for the appellants has referred us to the observations of Sir Comer Petheram, C. J., quoted in 'Kassim Ebrahim v. Johurmull Khemka', 23 Cal L J 183 at p. 187. In that case, however, as in the cases cited by the learned Subordinate Judge, the person for whom the summons or notice was intended was not at his house when the peon went to it, and the peon had not gone to look for him or waited a sufficient time for him to return. There was no reason why the peon should have sat down at the plaintiff's house and waited until she came out of it. She was not likely to come out, and if she had, as she was a 'pardanashin' woman, the peon would, in any case, have been unable to tender the notice to her. The learned Additional District Judge was, in my opinion, correct in draw-

ing the inference which he did. The question is really a question of fact, and as there was evidence on which the learned Additional District Judge could decide the point in the way he did, there is no merit in the appeal, which must be dismissed with costs.

(2) AHMAD J.: I agree.

K.S. *Appeal dismissed.*

A. I. R. (39) 1952 Patna 66 *[C. N. 25.]*

SHEARER, J.

Zeauddin and others, Petitioners v. Abdur Rafique and others, Opposite Party.

Civil Revision No. 198 of 1951, D/- 14-8-1951.

Arbitration Act (1940), Ss. 25, 47 Proviso — Suit pending — Parties referring matter in dispute without intervention of Court — Award whether can be treated as adjustment of suit — Civil P.C. (1908), O. 23, R. 3.

Where the parties to a suit have referred the matters in dispute between them to arbitration without the intervention of the Court and an award has been made, then either party to the suit may insist on his right to have the suit tried out. The Court has no jurisdiction to treat an award as an adjustment of the suit and to record it unless all the parties have consented in Court to the matters in dispute between them being referred to arbitration and to be bound by any award which may be passed. AIR (32) 1945 Mad 294; AIR (29) 1942 All 145 FB Disting; AIR (9) 1922 Cal 404; AIR (8) 1921 Lah 232; AIR (8) 1921 Bom 310, Ref. (*Para 1*)

Anno: Arb. Act, S. 47, N. 1; C.P.C., O. 23, R. 3, N. 9 Pts. 21, 22

R. K. Bagchi, for Petitioners; Murtaza F. Ali, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('42) ILR (1942) All 357: (AIR (29) 1942 All 145 F B) (Pr 1)

('21) 45 Bom 245: (AIR (8) 1921 Bom 310) (Pr 1)

('22) 49 Cal 608: (AIR (9) 1922 Cal 404) (Pr 1)

('22) 67 Ind Cas 123: (AIR (8) 1921 Lah 232) (Pr 1)

('46) ILR (1946) Mad 39: (AIR (32) 1945 Mad 294) (Pr 1)

JUDGMENT.: The petitioners in this application in revision are the defendants in a suit, the subject-matter of which is a small parcel of land on which their house stands. The plaintiffs are their neighbours, and according to them there has been a partition at which the land was allotted to them. When the suit came on for hearing, the plaintiffs asserted that the defendants and themselves had agreed to refer the matter in dispute to arbitration, that arbitrators had been appointed and made an award, and that this award had been accepted by each of the defendants. Under the award, it appears, the defendants were to relinquish the land while the plaintiffs were merely to relinquish any claim which they had to costs. The defendants contended that there was no truth whatever in this story, and the learned Munsiff, after going into the matter, accepted this. On appeal, however, the learned Subordinate Judge came to the opposite conclusion, and directed that the agreement or compromise embodied in the award should be recorded under Order 23, Rule 3 of the Code of Civil Procedure. Until Section 89 of the Code of Civil Procedure was repealed there was a conflict of opinion as to whether, when the parties to a suit had referred the matters in dispute between them to arbitration without the intervention of the Court and an award had been made, the award could be regarded as an adjustment of the suit and could be recorded as such under Order 23, Rule 3 of the Code. The Calcutta High Court was of opinion that it could not ('Amar Chand v. Banwari Lall Rakshit', 49 Cal 608) as also was the Lahore High Court ('Hari Prashad v. Mt. Soogni Devi', 67 Ind Cas 123) while the Bombay High Court was of opinion that it could ('Manilal v. Gokal Das', 45 Bom 245. It was consequence of these conflicting decisions that the proviso to Section 47 of the Arbitration Act was enacted. It seems to me quite clear that the consent of the parties required under that proviso is a consent to the Court taking the arbitration award into consideration, and not, as was suggested by the learned Advocate for the plaintiffs, a consent expressed by the parties out of Court to be bound by the award. If the Legislature had intended what the learned Advocate for the plaintiffs suggests it did, the word 'may' would have followed and not preceded, the words "with the consent of all the parties interested." The only decision cited as to the construction of the proviso was 'Arumuga Mudaliar v. V. S. V. Balasubramania Mudaliar', ILR (1946) Mad 39. In that case, however, the parties had, in Court, consented to the matters in dispute between them being referred to an arbitrator, and had also agreed to be bound by any award which was passed by him. What was really decided in that case was that an intimation, made to the Court by the parties that they proposed to refer the matters in dispute between them to arbitration and that they agreed to be bound by any award which might be made, amounted to a consent on their part to the award, if and when made, being taken into consideration by the Court. Leach, C.J., observed: "There is nothing in the proviso which precludes antecedent consent." The decision can have no application where, as in the present case, no intimation was given to the Court by any of the parties concerned that there had been, or was to be, a reference to arbitration. The learned Advocate for the plaintiffs also referred to 'Dular Koeri v. Payag Koeri', ILR (1942) All 357. It is true that that is a decision of 1942 after the Arbitration Act, 1940, came into operation. But the agreement or compromise, which it was sought to enforce, had come into existence in 1939. The learned Judges decided on the principle of 'stare decisis' to follow an earlier decision of the Court which had taken the same view of the controversial point as had been taken by the Bombay High Court. In my opinion, even assuming that there was a reference to arbitration and an award, nevertheless, either party to the suit may insist on his right to have the suit tried out. The Court has no jurisdiction to treat an award as an adjustment of the suit and to record it, unless all the parties have consented in Court to the matters in dispute between them being referred to arbitration and to be bound by any award which may be passed. The application will, accordingly, be allowed with costs. The order of the lower appellate Court is set aside, and the suit is remanded to the trial Court to be disposed of according to law. The hearing fee is assessed at two gold mohurs.

V.S.B. *Application allowed.*

A. I. R. (39) 1952 Patna 67 [C. N. 26.]

LAKSHMIKANTA JHA, C. J. AND CHATTERJI, J.

Mt. Akhaj and others, Defendants-Appellants v. Arjun Koeri and another, Plaintiffs-Respondents.

Letters Patent Appeal No. 17 of 1949, D/- 5-4-1951.

(a) *Hindu Law — Widow — Relinquishment — Family arrangement.*

One R died, leaving behind his widow and daughter A. On the death of the widow, one M put forward his claim to immediate possession as the next reversioner of R; on the other hand one X, husband of A who was living with R as his 'ghar-damad' claimed to be in possession. The dispute was referred to arbitrators who divided the property between the claimants.

'Held' (Per Lakshmikanta Jha, C. J.) that when succession opened on her mother's death, A disclaimed all interest in her father's property. Such disclaimer on her part operated as her civil death and accelerated the succession of M, who was the nearest reversionary heir to her father's estate at the moment. When M entered into an arbitration and allowed the property to be divided by arbitrators, he dealt with his vested interest and not with mere 'spes successionis'. The estate vested in M on the widow's death and it was open to him to allow a part of the estate to go to X, to purchase peace and put an end to all disputes over the property of R. The division of property between M and X and allotment of specific portions to the latter could not, therefore, be challenged by other reversioners, even if the transaction by which the division was effected might not be supportable as a family arrangement. (*Para 12*)

(Per Chatterji, J.): If X actually came into possession, A must be deemed to have relinquished her interest. In that case, M, who was then the nearest reversionary heir of R, would come in as such heir. It is apparently for this reason that dispute arose between him and X. A was obviously interested in the cause of X. There was thus a bona fide dispute with respect to R's property in which all three were concerned. Neither M, nor X could, in the circumstances, be regarded as a stranger to the family. When, therefore, the dispute was referred to arbitration and there was an award, it could not but be regarded as a family arrangement, which was a fair and honest settlement, and was binding on the estate, and, therefore, on the other reversioners. A I R (21) 1934 P C 105 foll. (*Paras 14, 17*)

(b) *Hindu Law — Widow — Relinquishment — Transfer of Property Act (1882) S. 9.*

(Per Lakshmikanta Jha, C. J.): Relinquishment or surrender does not require any writing. It may be effected by a limited owner under the Hindu law by any voluntary act which may operate as her civil death. If a limited owner dies a natural death, the heirs of the last male owner succeed, and the same result follows if she dies a civil death. Therefore, relinquishment by a limited owner of her interest simply extinguishes her own right and does not create any interest in favour of the next reversioner. It simply causes her civil death and the next reversioner succeeds by operation of law. AIR (5) 1918 P C 196; A I R (21) 1934 P C 105 foll. A I R (26) 1939 P C 27 Rel. on. (*Para 10*)

Anno: T. P. Act, S. 9 N. 12.

D. N. Varma, for Appellants — Tarkeshwar Nath, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('19) 46 Ind App 72: (A I R (5) 1918 P C 196) (Pr 10)

('34) 61 Ind App 200: (A I R (21) 1934 P C 105) (Prs 11, 15)

('39) 43 Cal W N 337: (AIR (26) 1939 P C 27) (Pr 11)

LAKSHMIKANTA JHA, C. J.: This is an appeal by the defendants under the Letters Patent from the judgment of Shearer, J. in a second appeal arising out of a suit for a declaration that a deed of gift executed by defendant No. 1 holding a Hindu woman's estate as a daughter is not binding on the plaintiffs as reversionary heirs of the last male owner.

(2) One Ramprasad Koeri, who was governed by the Mitakshara school of the Hindu law, died possessed of certain property; including the suit land in or about the year 1920, leaving behind his widow, Musammat Kubri, and a daughter, Musammat Akhji (defendant No. 1).

(3) Akhji was married to one Baldeo Koeri, who died in Ramprasad's lifetime, and on his death she took another husband Aliar Koeri, who left his native village and came to live with Ramprasad as his 'ghardamad.' On the death of Ramprasad, his widow came in possession of his property, but she died about a year after.

(4) Admittedly, on the death of Ramprasad's widow a dispute arose in respect of his property. One Mahabir, father of the plaintiffs, put forward his claim to immediate possession as the next reversioner of Ramprasad; on the other hand, the said Aliar claimed to be in possession. The dispute was referred to arbitration and the arbitrators divided the property between the claimants.

(5) The plaintiffs' case, however, in short, is that the dispute was between Mahabir and Akhji, and the arbitrators divided the property between them, giving one moiety absolutely to Mahabir and the other to Akhji for life in lieu of her maintenance. According to the plaintiffs, therefore, Akhji has only a life estate in the property given to her by the arbitrators in lieu of her maintenance and, therefore, the deed of gift executed by her on the 1st May, 1946, is not binding on them as the presumptive reversionary heirs of Ramprasad.

(6) The case of the defendants, on the other hand, is that on the death of Musammat Kubri (Ramprasad's widow), Musammat Akhji did not exercise her right of possession as a daughter and allowed her husband, Aliar, out of deference to the wishes of her father, to take possession of the entire heritage. According to their case, the dispute was between Mahabir and Aliar, and the arbitrators divided the property between them giving one moiety to Mahabir absolutely and the other moiety absolutely to Aliar; the latter remained in possession of the disputed property as absolute owner for over twenty years; and on his death the property was inherited by defendant No. 1 as his widow, who remained in possession till she made a gift of the same to defendants Nos. 2 to 5, who are the grandsons of her first husband's brother. The plaintiffs, therefore, are not entitled to the declaration sought.

(7) The trial Court decreed the suit, holding that Akhji got only a limited interest and that Aliar acquired no title over the land at any time. On appeal, the learned Subordinate Judge, before whom it came up for hearing, dismissed the suit. He was of opinion that

> "in the absence of any explanation given by the plaintiffs it is reasonable to expect that the dispute was really between Aliar and Mahabir and that the compromise was effected as stated by the defendants by way of bona fide settlement of family dispute".

and he found as a fact that

> "Aliar acquired an absolute interest in respect of half of the properties held by Ramprasad and

that the defendant No. 1 has come in possession of the same as an heir of Aliar and not as an heir of Ramprasad".

(8) On second appeal by the plaintiffs, Shearer, J. set aside the judgment of the Court of appeal below and decreed the suit. He considered that

"the lower appellate Court was, however, plainly in error in supposing that the possession of Aliar Koeri was, in consequence, adverse to the reversioners".

In his view

"it is not open to a limited owner to divide the estate with the existing nearest reversioner, nor, of course, is it open to her to relinquish the whole of her interest in the estate and allow it to be divided between the nearest reversioner and a third person."

Accordingly he held that the deed of gift was not binding on the plaintiffs and that, even if there was an estoppel against Mahabir, the plaintiffs, who claimed not as heirs of Mahabir, but as the nearest reversioners of Ramprasad, were not estopped from challenging the deed of gift executed by defendant No. 1.

(9) The plaintiffs' claim as reversioners must fail, if there was already a valid surrender by Akhji of her interest when succession opened to her on her mother's death. The point for determination therefore is as to whether she relinquished her estate when succession opened on her mother's death.

(10) Relinquishment or surrender does not require any writing. It may be effected by a limited owner under the Hindu law by any voluntary act which may operate as her civil death. If a limited owner dies a natural death, the heirs of the last male owner succeed, and the same result follows if she dies a civil death. Therefore, relinquishment by a limited owner of her interest simply extinguishes her own right and does not create any interest in favour of the next reversioner. It simply causes her civil death and the next reversioner succeeds by operation of law. The Judicial Committee observed in 'Rangaswami Goundan v. Nachiappa Gounden', 46 Ind App 72

"It is settled by long practice and confirmed by decision that a Hindu widow can renounce in favour of the nearest reversioner if there be only one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death."

(11) It may be stated that in many decisions, including the decision in Gounden's case', it has been observed that the surrender must be in favour of the nearest reversioners. But by this observation their Lordships did not mean to lay down that the limited owner by her relinquishment creates any right in the reversioner, and this is clear from the later decision of the Privy Council in 'Sitanna v. Viranna', 61 Ind App 200 at pp. 207-8, where their Lordships observed

"But though the doctrine of surrender by a widow has undergone considerable development in recent years, it must be remembered that the basis of it is the effacement of the widow's interest, and not the 'ex facie' transfer by which such effacement is brought about. The result is merely that the next heir of the husband steps into the succession in the widow's place."

The same view has been reiterated in 'Radharani Dassya v. Brindarani', 43 Cal W N 337 at p. 346.

(12) Unquestionably, Akhji did not assert or exercise her right of possession on her mother's death. Her case, as alleged in her written statement, is that it was the wish and direction of her father that Aliar should get possession of his entire property on Musammat Kubri's death and accordingly after her death,

"Aliyar Koeri entered in possession of the entire property left by Ramprasad Koeri in accordance with his desire and direction."

In other words, when succession opened on her mother's death, she disclaimed all interest in her father's property. Such disclaimer on her part, in my opinion, operated as her civil death and accelerated the succession of Mahabir who was the nearest reversionary heir to her father's estate at the moment. According to the finding of the learned Subordinate Judge, which was binding in second appeal, the dispute cropped up between Mahabir on the one hand and Aliar on the other, and division of the property was between them. This finding necessarily implies that Akhji was not in the picture at all. In the face of this finding, Shearer, J. was not justified in holding that the dispute was between Mahabir and Akhji and the arbitrators divided the property between them — this was the plaintiffs' version of the panchayati which was definitely disbelieved by the learned Subordinate Judge. When Mahabir entered into an arbitration and allowed the property to be divided by arbitrators, he dealt with his vested interest and not with mere 'spes successionis'. In my opinion, the estate vested in Mahabir on Kubari's death and it was open to him to allow a part of the estate to go to Aliar to purchase peace and put an end to all disputes over the property of Ramprasad. The division of property between Mahabir and Aliar and allotment of specific portions to the latter cannot, therefore, be challenged by the plaintiffs, even if the transaction by which the division was effected be not supportable as a family arrangement. I am accordingly of the opinion that the plaintiffs' suit is not maintainable. In this view, it is unnecessary to decide the other points raised before us. The appeal is, therefore, allowed and the suit is dismissed with costs throughout.

(13) CHATTERJI, J.: I agree that the appeal should be allowed, but I should like to give my own reasons.

(14) Admittedly, a dispute arose with regard to Ramprasad's property on the death of his widow. According to the plaintiffs, the dispute was between Mahabir, on the one hand, and Akhji, on the other, whereas according to the defendants it was between Mahabir and Aliar. The lower appellate Court accepted the defence version. It is not disputed that Aliar was living with Ramprasad's family as 'ghar-damad'; as such, he was treated as one of the family. According to the defendants' case, Ramprasad in his life time had expressed his wish and directed that after his death and the death of his wife, Aliar should come into possession of his entire land, and in accordance with his desire and direction Aliar came into possession on the death of his widow. If he actually came into possession, as alleged, Akhji must be deemed to have relinquished her interest. In that case, Mahabir who was then the nearest reversionary heir of Ramprasad would come in as such heir. It is apparently for this reason that dispute arose between him and Aliar. Akhji was obviously interested in the cause of Aliar, her husband. There was thus a bona fide dispute with respect to Ramprasad's property in which all three were concerned. Neither Mahabir nor Aliar could, in the circumstances, be regarded as a stranger to the family. When, therefore, the dispute was referred to arbitration and there was an award, it cannot but be regarded as a family arrangement. There can be no doubt that it was a fair and honest settlement.

(15) In 'Sitanna v. Viranna', 61 Ind App 200, a settlement come to between the widow and a claimant, an alleged illatom son-in-law of

her husband's father, was upheld by their Lordships of the Privy Council. There, on the death of a Hindu, a dispute arose between his widow and his sister's husband who claimed to be his father's illatom son-in-law. The dispute was referred to arbitration and there was an award by which the estate was partitioned between the widow and the said claimant. On the death of the widow, the reversionary heir of her husband brought a suit claiming the whole estate, impleading the alleged illatom son-in-law as defendant No. 1. The latter's claim based on illatom adoption was rejected by the Courts, but his right by virtue of the award was upheld. Their Lordships said:

"Looking at the evidence as a whole, their Lordships see no reason for doubting that the award was a fair and honest settlement of a doubtful claim based both on legal and moral grounds, and are therefore of opinion that there are no grounds for interfering with it."

(16) In the present case, the plaintiffs themselves in their plaint accepted the panchayati as valid and binding, though, of course, they asserted that the dispute was between Mahabir and Akhji and the latter got the land in suit in lieu of maintenance. Reading paragraphs 3, 4 and 7 of the plaint, it is quite clear that the plaintiffs, far from disputing the panchayati, based their claim on the footing that there was a valid and binding panchayati. In the first two Courts, the case also proceeded on that footing, and the first appeallate Court formulated the point for decision thus:

"The only point for determination is whether the plaintiffs' or the defendants' case of panchayati is true and whether the plaintiffs are entitled to the declaration sought for".

In my opinion, this was a right approach to the case. The plaintiffs cannot now be permitted to resile from the position they took in the plaint as well as in the first two Courts.

(17) In the circumstances, I see no reason why the panchayati should not be regarded as a fair and honest settlement and as such binding on the estate, and, therefore, on the plaintiffs.

D.H. *Appeal allowed.*

A. I R. (39) 1952 Patna 69 *[C. N. 27.]*

SHEARER AND AHMAD, JJ.

Ram Palak Mahton, Appellant v. Bilas Mahton, Respondent.

A.F.A.D. No. 1198 of 1948, D/- 12-9-1951.

(a) Civil P. C. (1908), O. 6, R. 2 — Inconsistent pleas.

In a suit for ejectment it is not open to the defendant to assert in one breath that he was not a tenant of the plaintiff, and in another, to assert that he was a tenant and his tenancy had not been properly determined. *(Para 1)*

Anno: Civil P. C. O. 6, R. 2, N. 5.

(b) T. P. Act (1882), S. 106 — Notice — Expiry of.

A notice expiring on the anniversary of the commencement of the tenancy is not a bad notice. *(Para 1)*

Anno: T. P. Act S. 106, N. 40, Pt. 3.

Tarkeshwar Nath, for Appellant; A. B. N. Sinha, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to come after the Indian Cases.)

('1900) 27 Cal 570: (4 Cal W N 210) (Pr 1)
('19) 46 Cal 458: (AIR (5) 1918 P C 102) (Pr 1)
('44) 48 Cal W N 76: (AIR (31) 1944 Cal 84) (Pr 1)
(1895) 1 Q B 378: (64 L J Q B 200) (Pr 1)

SHEARER, J.: This second appeal arises out of a suit in ejectment, which has been decreed. The defendant put forward two alternative pleas. One plea was that he was the owner of the premises and that the plaintiff was not his landlord. The other was that, if in fact he was a tenant, the notice to quit which had been served on him was not, in law, a valid notice, and did not terminate his tenancy. As these two pleas were based on facts which were wholly incompatible with one another, it is not clear to me why the defendant was permitted to put them forward. It was clearly not open to the defendant to assert in one breath that he was not a tenant of the plaintiff, and in another, to assert that he was a tenant and his tenancy had not been properly determined. The Courts below have both negatived the first of the two pleas which were taken, and there is clearly no substance in the contention now put forward by Mr. Tarkeshwar Nath that the plaintiff, not being the nearest reversioner of Chandrika, was not the owner of the premises occupied by him. The conveyance executed by Mt. Sona Kuar to the plaintiff could only be challenged by the nearest reversioner, who is an uncle of the plaintiff, and moreover, cannot be challenged so long as Mt. Sona Kuar is alive. The other plea put forward is based on the fact that the defendant was called on to vacate the premises on the 1st January 1946, whereas he ought to have been called on to vacate them on the 31st of December 1945. It has long been well settled in England that while in the case of a periodic tenancy a notice to quit must be expressed to expire on the last day of a period, a notice expressed to expire on the anniversary of the commencement of the tenancy is nevertheless a good notice. The decisions bearing on the point were reviewed by Lindley, L.J., in 'Sidebotham v. Holland', (1895) 1 Q B 378. The decision was cited with approval by a Division Bench of the Calcutta High Court as far back as 1900. (Vide 'Ismail Khan Mahomed v. Jaigun Bibi', 27 Cal 570 at p. 579. Mr. Tarkeshwar Nath for the appellant has cited a number of decisions which, no doubt, show that the notice ought to be expressed to be a notice expiring on the last day of a period of the tenancy. In none of these decisions it is, however, laid down that a notice expiring on the anniversary of the commencement of the tenancy is a bad notice. Mr. Tarkeshwar Nath relied very strongly on 'Calcutta Landing and Shipping Co. Ltd. v. The Victor Oil Co. Ltd.', 48 Cal W N 76. That, however, was a somewhat peculiar case inasmuch as the defendant in the ejectment suit appears to have been required to give up possession of the premises "on the expiry of the 1st December 1940." The notice was, therefore, not one which was expressed to expire on the anniversary of the commencement of the tenancy. On the contrary the tenant was permitted to continue in occupation of the premises for 24 hours after a fresh period of the tenancy had commenced. While the exact point with which we are now concerned was not before their Lordships of the Judicial Committee in 'Harihar Banerji v. Ramshahi Roy', 46 Cal 458 (PC), nevertheless, it is clear from the observations made by their Lordships at pages 471 and 472 of the report that they were of opinion that such English decisions as 'Sidebotham v. Holland', (1895) 1 Q B 378, could and ought to be followed in this country. In my opinion, the appeal fails, and must, in consequence, be dismissed with costs.

(2) AHMAD, J.: I agree.

V.R.B. *Appeal dismissed.*

A. I. R. (39) 1952 Patna 70 *[C. N. 28.]*

AHMAD J.

Kailashpati Mishra and others, Appellants v. Nand Lal Ahir, Respondent.

Criminal Appeal No. 9 of 1950, D/- 18-7-1951.

Criminal P. C. (1898), S. 476 — Preliminary enquiry — Object of — "Record a finding to that effect" — Compliance.

S. 476 lays down two conditions for its operation. Firstly, preliminary inquiry, if necessary, shall be held and secondly, that the Court shall record a finding to the effect stated in the section. The idea underlying the inquiry, is that the person or persons likely to be prosecuted should not be taken by surprise, but should be given an opportunity in order to explain their position in connection with the charge alleged against them and in order to place all the necessary evidence in support of the explanation they may like to submit. (*Para 6*)

There may be cases where offences like perjury complained of against a particular person may not be of a kind in which prosecution should be resorted to, because mere contradiction by itself in every case will not attract the operation of the provisions of S. 476, Criminal P. C., but there may be cases where contradiction made in the depositions were conscious and deliberate in order to thwart the administration of justice, or to obstruct the Court in coming to a correct conclusion. In such cases the Court has to consider whether in the light of evidence before it, it is a fit case or that it is expedient in the interests of justice that an inquiry should be made into the offence. (*Para 10*)

The expression "This is a fit case" amounts, substantially, to the expression that "it is expedient in the interest of justice" that an enquiry should be made into the offence within the meaning of S. 476. (*Para 10*)

Anno: Cri. P. C. S. 476 N. 7, 10, 13.

R. J. Bahadur, for Appellants; Thakur Prasad and J. N. Sahai, for Respondent; S. C. Chakravarty, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('28) 55 Cal 1312: (A I R (15) 1928 Cal 862: 30 Cri L J 221) (Prs 9, 10)

('30) A I R (17) 1930 Cal 352: (126 Ind Cas 416) (Pr 10)

('30) A I R (17) 1930 Cal 705: (32 Cri L J 237) (Pr 10)

('31) 58 Cal 1117: (A I R (18) 1931 Cal 190: 32 Cri L J 842) (Pr 10)

('31) 58 Cal 965: (A I R (18) 1931 Cal 760: 32 Cri L J 1236) (Pr 10)

('33) A I R (20) 1933 Cal 147: (34 Cri L J 684) (Pr 10)

('37) A I R (24) 1937 Lah 867: (39 Cri L J 237) (Pr 10)

('33) 56 Mad 157: (A I R (20) 1933 Mad 67: 33 Cri L J 960) (Prs 8, 10)

('37) A I R (24) 1937 Pat 534: (172 Ind Cas 237) (Pr 10)

('48) A I R (35) 1948 Pat 5: (48 Cri L J 942) (Pr 10)

JUDGMENT: This is an appeal against an order passed in a proceeding under S. 476 of the Code of Criminal Procedure directing that a complaint for the prosecution of Kailashpati Mishra (appellant No. 1) under S. 211, Indian Penal Code, and another for the prosecution of all the appellants Nos. 1 to 7 under S. 193, Indian Penal Code, shall be filed before the Sub-divisional Officer, Arrah Sadar.

(2) The proceeding arose out of Sessions Trial No. 42 of 1950 disposed of by the 2nd Assistant Sessions Judge, Arrah, by his judgment dated the 8th July, 1950. The appellants appeared as prosecution witnesses in that Sessions trial, and the case had been started in consequence of a written report given to the police by Kailashpati, the appellant No. 1. The occurrence was said to have taken place on the 21st February, 1950, at about midday, while Jadubans Mishra (appellant No. 4) had come to Arrah in connection with some case. The case had been investigated by the Sub-Inspector who appeared as prosecution witness No. 9 at the trial, and a charge-sheet was submitted by him. A charge under S. 436, Indian Penal Code, had also been framed against one of the accused that is Laimohar Ahir. So the Magistrate committed the case to the Court of Session. The learned Assistant Sessions Judge, to whom the case had been sent for disposal, found that the entire case and the evidence in support of it were false. In his judgment, he has observed: "I can only say that not only the evidence appears to be unreliable, but every word of what has been said is absolutely false". He has further found, "I think it is fit case in which the complainant and the witnesses should be proceeded against for false information and perjury."

(3) It appears that an application under S. 476, Criminal P. C., was thereafter filed by the persons accused in the Sessions trial for the prosecution of the appellants for launching a false case and giving false evidence in support of the same. On the 25th July, 1950, the 2nd Assistant Sessions Judge passed the Order: "Heard. Admit. Issue notice to the opposite parties to show cause as to why the application should not be allowed". Sometime thereafter, the Court of the 2nd Assistant Sessions Judge, Arrah, was abolished. The case was, therefore, withdrawn by the Sessions Judge and transferred to the file of the 1st Assistant Sessions Judge, Arrah, for disposal. On a report given by the 1st Assistant Sessions Judge, the case was again recalled to the file of the Sessions Judge. The learned Sessions Judge, after an inquiry into the case, allowed the application giving the direction as stated above. He has as well come to the same conclusion, as the learned Assistant Sessions Judge, that there was no reliable evidence on the record and has further found that the findings given by the learned Assistant Sessions Judge were correct. The grounds given by the learned Sessions Judge for giving the aforesaid findings are, (1) that there was no motive for the accused persons to make a sudden raid on the house of Jaduban Mishra on the 21st February, 1950, at about midday; (2) that there was inherent improbability in the prosecution case, as the mob having come with lathis and bhalas, could not have taken to their heels when Shripati Mishra (appellant No. 3) was said to have come out of his house and chased the mob; (3) that it was equally improbable that the members of the said mob should have set on fire only the straw thatched baithaka of Jadubans Mishra (appellant No. 4) and not his residential house, if they really had any intention to cause any damage to him by fire; and (4) that the investigation made by the Sub-Inspector of Police did not lend any material support to the prosecution version of the alleged occurrence.

(4) Mr. R. J. Bahadur, the learned Counsel for the appellants, has raised two points: (1) that the judgment is not in accordance with law, and (2) that there is no finding to the effect that it was expedient in the interests of justice that an inquiry should be made into the offence which appeared to have been committed in or in relation to the said Sessions trial.

(5) By the first point, Mr. R. J. Bahadur means that the judgment under appeal is perfunctory and the findings given therein have been just borrowed from the judgment given in the original Sessions trial. I have personally gone through the entire judgment, and I do not find myself in agreement with the contention submitted in this connection. The learned Sessions Judge has given clear grounds of his own for holding that the allegations made in the saneha, which was the basis of the trial, and the evidence given in support thereof are false. Therefore, this point fails.

(6) The second point raised by Mr. Bahadur is, as stated above, that there is no finding to the effect that it was expedient in the interests of justice that an inquiry should be made into the offence which appeared to have been committed in or in relation to the said Sessions trial. S. 476, Criminal P. C. reads:

"When any Civil, Revenue or Criminal Court is, whether on an application made to it in this behalf or otherwise, of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in Seciton 195, Sub-section (1), Clause (b) or Clause (c), which appears to have been committed in or in relation to a proceeding in that Court, such Court may after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction....."

The section, therefore, lays down two conditions for its operation. Firstly, a preliminary inquiry, if necessary, shall be held and secondly, that the Court shall record a finding to the effect stated in the section. The idea underlying the inquiry, I think, is that the person or persons likely to be prosecuted should not be taken by surprise, but should be given an opportunity in order to explain their position in connection with the charge alleged against them and in order to place all the necessary evidence in support of the explanation they may like to submit. In this case, the Assistant Sessions Judge, on the 25th July 1950, issued notices to the appellants to show cause as to why the application should not be allowed. On the 29th August 1950, the order passed by the learned Sessions Judge is to the effect. "Petition to show cause filed, Call for the L. C. record and put up on 22-9-1950 for hearing." The case was finally taken up on the 22nd September 1950, when the order passed was to the effect:

"L. C., record received. The petitioner is represented by Mr. Suraj Pd. Sinha, Advocate and the O. Parties are represented by Mr. Lala Sheo Raj Pd. Sinha, Advocate. Arguments heard in full. Fix 29-9-1950 for judgment."

From this, it is apparent that the parties were given full opportunity to place their respective cases, and it was after the consideration of the entire facts on the record and the submissions made by the parties that the learned Sessions Judge came to the conclusion that:

"The application is, therefore, allowed and a complaint shall accordingly be filed before the S.D.O., Arrah Sadr., for the prosecution of Kailashpati Mishra (O. P. No. 1) under Sections 211 and 193 I.P.C., and of the O. P. Nos. 2 to 7 under Section 193, I.P.C."

(7) The next condition essential for the filing of the complaint is that the mind of the Court should be conscious to the consideration whether it is expedient in the interests of justice that an inquiry should be made into the offence, and should in fact give a finding to that effect. Technically, Mr. Bahadur is correct in his contention that there is no finding in the judgment of the learned Sessions Judge to that effect in the terms of the section. What the learned Sessions Judge has said in his judgment is:

"this, therefore, is a fit case in which Kailashpati Mishra (O. P. No. 1), should be prosecuted under section 211, I.P.C., for having lodged a deliberately false complaint against the petitioner and others at Arrah Muffasil, P.S., on 21-2-1950, and he along with O. P. Nos. 2 to 7 should also be prosecuted under Section 193, I.P.C., for having given deliberately false evidence in the aforesaid sessions case in support of the prosecution version of the alleged occurrence."

This, to my mind, is substantial compliance with the provision of the section. This finding does amount, in substance, to the conclusion that "it is expedient in the interests of justice that an enquiry should be made into the offence."

(8) Mr. Bahadur, in support of his contention, has relied on three cases. The first one is the case of 'In re: Rama Ramayya 56 Mad 157. In that case the sub-divisional Magistrate having passed an order of prosecution forwarded the records to the District Magistrate for taking action for filing a complaint under Section 476, Criminal Procedure Code, without recording a precise finding that it was expedient in the interest of justice that an inquiry should be made into the offence. In fact, in that case no proceeding under Section 476 had been started and no opportunity had been given to the other side to show cause, if any, in relation to the allegations made against him. Therefore, in that case, it could not be said that the mind of the Court was at all conscious to the compliance of the provision of law laid down under Section 476, Criminal Procedure Code. This cannot be said in the present case. Therefore, that case does not apply to the facts of the present case.

(9) The second case relied upon by Mr. Bahadur is 'Keramat Ali v. Emperor', 55 Cal 1312. From the facts stated in the report, it appears that in that case the Sessions Judge did not give the witness an opportunity of being heard before the sanction and prosecution. In the letter of complaint, the learned Judge simply set out three passages from the evidence and directed necessary steps to be taken in the matter. Rankin, C. J., observed:

"It does seem to me that to prosecute people, because they give evidence which is contradictory, merely on the basis of that contradiction, is a very doubtful procedure."

He further observed:

"I look in vain for any recorded finding to the effect that 'it is expedient in the interests of justice that an inquiry should be made' into the offence in this case. As the learned Sessions Judge has not recorded that finding I do not feel it incumbent on me to assume that he properly considered this matter and came to a right conclusion."

So, in that case, in the absence of any notice to the party complained against, there was practically no material for the Court to come to the conclusion that it was expedient in the interests of justice that an inquiry should be made. The complaint was based merely on the basis of a few contradictions made in the deposition. Here in this case the parties have been given full opportunity and all the materials for and against the allegation were before the learned Sessions Judge, and in the light of all those materials, he came to the conclusion that it was a fit case in which complaint should be filed. Therefore, I think that the facts of that case are entirely different and the observations made by Rankin, C. J., in the circumstances of that case are not applicable to the present case.

(10) The third case relied upon is that of 'Nand Lal v. Emperor', AIR (24) 1937 Lah 867. That is a decision of a Single Judge, Jai Lal, J. He has observed:

"It is the policy of the law, as appears from the amendment of the relevant sections of the Criminal Procedure Code, whereby such prosecutions have not now been left to private prosecutors but their conduct has been entrusted to the Coutrs, that in dealing with such matters the Court should see that the prosecution is undertaken in the interests of justice and not to satisfy the private grudge of a litigant."

The principle laid down in this observation is, no doubt, unassailable. There may be cases where offences like perjury complained of against a particular person may not be of a kind in which prosecution should be resorted to, because mere contradiction by itself in every case will not attract the operation of the provisions of Section 476, Criminal Procedure Code, but there may be cases where contradictions made in the depositions were conscious and deliberate in order to thwart the administration of justice, or to obstruct the Court in coming to a correct conclusion. In such cases the Court has to consider whether in the light of evidence before it, it is a fit case or that it is expedient in the interest of justice that an inquiry should be made into the offence. In the present case, the Court has found that it is a fit case in which Kailashpati Mishra (O. P. No. 1) and others should be prosecuted for the offences alleged against them. The expression "This is a fit case" amounts, substantially, to the expression that "it is expedient in the interests of justice", that an enquiry should be made into the offence", and, therefore, the provision of law has been substantially complied with in this case. Mr. Chakravarty, appearing for the State, has cited the case of 'Ram Prasad v. Maheshanand', AIR (35) 1948 Pat 5, wherein Reuben, J., has observed:

"and the main contention is that the Courts below committed a material irregularity by not considering, as required by S. 476, Criminal P.C., whether a prosecution was necessary in the interests of justice. It is well established that this point must be considered by the Court: 'Keramat Ali v. Emperor', 55 Cal 1312; Surendra Nath v. Kumeda Chandra', AIR (17) 1930 Cal 352, Nabani Nath v. Emperor', AIR (20) 1933 Cal 147; 'In re Rama Ramayya', 56 Mad 157 and 'Nand Kumar v. Emperor', AIR (24) 1937 Pat 534. The failure to come to an express finding on the point, however, does not necessarily render the order invalid. It is sufficient if the record shows that the Court applied its mind to the point: 'Satish Chandra v. Emperor', AIR (17) 1930 Cal 705 and 'Supdt. & Remembrancer of Legal Affairs, Bengal v. Ijjatulla Paikar', 58 Cal 1117, and in a case where a grave offence is alleged to have been committed, it has been held that it would be unreasonable for the Court to take the view that the point was not considered: 'Nawabali Khan v. Chandra Kanta', 58 Cal 965. In the last resort, the point may be considered by this Court in revision, if it does not appear to have been considered by the Courts below."

In this case, as stated above, it cannot be said that the Court has not applied its mind to the point I think that it is manifest that the point was considered by the Court below and the Court was conscious to it.

(11) I, therefore, find that there is no substance in the appeal and it is accordingly dismissed.

V.B.B. *Appeal dismissed.*

A. I. R. (39) 1952 Patna 72 [*C. N. 29*]

CHATTERJI, J.

Dulhin Suga Kuer and another, Petitioners v. Deorani Kuer and others, Opposite Party.

Civil Revision No. 113 of 1951, D/- 1-8-1951.

Civil P. C. (1908), Ss. 96 and 146 and O. 9, R. 13 — Ex parte decree — Defendant transferring land in suit — Defendant's application to set aside ex parte decree dismissed — Transferee can appeal against order.

A defendant against whom an ex parte decree had been passed transferred the land in suit to a third person but subsequently filed an application under O. 9, R. 13, Civil P. C., for setting aside the ex parte decree. The application was dismissed. The transferee appealed against the order.

'Held' that the transferee was a person vitally interested in setting aside the ex parte decree and was entitled to file an appeal against the order dismissing the application as he was affected by the order in question. AIR (24) 1937 Oudh 488, Ref. (*Para 6*)

Anno: C. P. C., S. 96, N. 6, Pt. 5. S. 146, N. 5, 7. O. 9, R. 13, N. 15, 16.

Brahmadeb Narain, for Petitioners; K. Rai and B. K. Sharma, for Opposite Party.

Case referred to:

('38) 13 Luck 554: (AIR (24) 1937 Oudh 488) (Pr 6)

ORDER.: This application in revision is directed against an order of the appellate Court setting aside an ex parte decree under Order IX, Rule 13 of the Code of Civil Procedure.

(2) The suit was for declaration of title and confirmation of possession in respect of the lands mentioned in the plaint. The suit was decreed ex parte on the 25th of October 1949. On the 24th of November 1949, defendant No. 1, Mt. Deorani Kuer filed an application under Order IX, Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree on the ground that there was fraudulent suppression of summons.

(3) The application was resisted by the plaintiffs who asserted that there was proper service of summons.

(4) The learned Munsiff held that the summonses were duly served. He accordingly rejected the application on the 30th of March 1950. Against this order an appeal was preferred to the District Court by two persons to whom defendant No. 1, Mt. Deorani Kuer transferred the disputed lands. This transfer appears to have been effected subsequent to the ex parte decree but before the filing of the application under Order IX, Rule 13, Civil Procedure Code.

(5) An objection was taken in the Court below that the appeal by the transferees was not maintainable, but the learned Additional Subordinate Judge who heard the appeal overruled that objection. On the merits, he held that the summons was fraudulently suppressed and was not served upon defendant No. 1. He accordingly allowed the appeal and set aside the ex parte decree. The plaintiffs, therefore have presented this application in revision.

(6) Mr. Brahmadeo Narain on behalf of the petitioners contends that the appeal in the Court below was not competent and the Court had, therefore, no jurisdiction to set aside the ex parte decree. The learned Additional Subordinate Judge held that under Section 146 of the Civil Procedure Code the transferees were competent to prefer the appeal. Section 146 provides:

"Save as otherwise provided by this Code or by any law for the time being in force, where any

proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

Mr. Brahmadeo Narain argues that Section 146 has no application because the transfer was effected prior to the initiation of the proceeding under Order IX, Rule 13. It is said that if the transfer had been made subsequent to the initiation of that proceeding the section might have been applicable. In support of his contention, reliance is placed on 'Beni Ram v. Rani D. R. Kunwar', 13 Luck 554, in which it was laid down that Section 146 of the Code of Civil Procedure contemplates a change of title after the decree. In that case the transfer was effected before the date of the suit. The true test, in my opinion, is whether the transferee is affected by the order or decree in question. Here, the transfer was subsequent to the ex parte decree. Therefore, the transferees were certainly ineterested in setting aside the ex parte decree. Mr. Brahmadeo Narain argues that it was open to them to file an application under Order IX, Rule 13. But defendant No. 1, herself filed an application under Order IX, Rule 13 and the transferees could certainly take the benefit of her application and it was not necessary for them to file a separate application. When the application was rejected, it was, of course, open to defendant No. 1 to file an appeal, but apparently she did not prefer any, because she had no longer any interest in the property. The transferees were vitally interested in setting aside the ex parte decree who were, in the circumstances, entitled to prefer an appeal.

(7) The application is dismissed with costs: hearing fee one gold mohur.

K.S. *Revision dismissed.*

A. I. R. (39) 1952 Patna 73 [C. N 30.]

LAKSHMIKANTA JHA, C. J., AND NARAYAN, J.

Sheobachan Pandey and another, Appellants v. Madho Saran Choubey and others, Respondents.

A. F. A. D. No. 206 of 1948, D/- 18-9-1951.

(a) *Civil P. C. (1908), O. 8, R. 6 — Set off and counter claim — Legal and equitable set off — Distinction.*

A cross claim may be set up as a shield or as a sword. When it is set up as a shield it is a defensive weapon and may be pleaded by the defendant to reduce the liability against him even to the full extent of the plaintiff's claim. A counter-claim in the shape of a defensive measure is what is technically known as a set-off. A set off may either be legal or equitable. There is a statutory provision in the Code of Civil Procedure regarding a legal set-off. If the amount claimed be an ascertained sum, it may be awarded by way of a legal set-off under O. 8, R. 6, Civil P.C., if legally recoverable. But if the claim be for unliquidated damages for any alleged breach of contract or legal obligation, the amount that may ultimately be ascertained may be claimed as an equitable set-off, but not under the provision of the Code. The statutory provision of O. 8, R. 6, does not preclude what is called an equitable set-off. Therefore, the defendant may claim an equitable set-off provided his cross-demand arises out of the same transaction as the plaintiff's claim or transactions so connected in their nature and circumstances as to make it inequitable that the plaintiffs should recover and the defendants should be driven to a cross suit. (Para 12)

Anno: C. P. C. O. 8, R. 6, N . 2, 4, 5 and 15

(b) *Civil P. C. (1908), O. 8, R. 6 — Suit must be one for recovery of money — Suit for redemption of usufructuary mortgage — Defendant if can claim set-off.*

In a suit for redemption of a mortgage pure and simple the defendant is not entitled to claim any relief either by way of legal or equitable set-off in respect of any loss on account of dispossession from the mortgaged property by a stranger. In the first place the plaintiff does not claim any sum of money due by the defendant nor does he ask for account and therefore the question of reduction of the defendant's liability does not arise. Secondly, the claim of the defendant regarding dispossession by stranger does not arise out of the same transaction of mortgage or connected transactions. (Para 12)

Anno: C. P. C., O. 8, R 6, N 3, 5

(c) *Registration Act (1908), Ss. 17 and 49 — Unregistered deed creating further charge on mortgaged property — Oral evidence of terms of document — Admissibility — Evidence Act (1872), S. 91 — T. P. Act (1882), S. 100.*

Where the terms of an 'ekrarnama' provides that at the time of redemption of a usufructuary mortgage the mortgagor shall pay, on adjustment of accounts, a sum of Rs. 1, 100 with interest thereon which the mortgagee had to spend for obtaining possession of the mortgaged property and the damages for the number of days on and the area of land from which the mortgagee was out of possession and that the mortgagee would not be entitled to demand payment of the same before redemption is sought, the 'ekrarnama' creates a further charge on the mortgaged property and, therefore, requires registration. If such a document is not registered neither the document nor oral evidence of its contents is admissible in evidence. AIR (17) 1930 P C 176, Applied. (Paras 14, 15)

Anno: Registration Act S. 17, N. 79. S. 49, N. 6, 42, Evidence Act S. 91, N. 13. T. P. Act S. 100 N. 16.

(d) *Civil P. C. (1908), O. 8, R. 6 — Legally recoverable by him from plaintiff — Onus of proof that set-off or counter claim was barred by limitation lies on plaintiff.*

When a set off is pleaded the plaintiff in order to establish his plea of limitation must prove that the set-off was barred when the plaintiff commenced his action. In the case, however, of a counter-claim as a weapon of offence, it is enough for the plaintiff to prove that it was barred when it was pleaded. AIR (7) 1920 Mad 819 and AIR (10) 1923 Bom 113. Rel. on. (Para 16)

Anno: C. P. C., O. 8, R. 6, N. 6

(e) *Contract Act (1872), S. 25 (3) — Debt. meaning of.*

A promise to pay an unascertained sum is not a promise to pay a "debt" within the meaning of S. 25 (3) Contract Act. AIR (5) 1918 Mad 1145 (FB) Rel. on. (Para 17)

Anno: Contract Act S. 25, N. 7.

(f) *Limitation Act (1908) — Acknowledgment of time-barred debt.*

An acknowledgment of liability when the debt has become time-barred cannot revive the liability. (Para 18)

Anno: Limitation Act, S. 19, N. 12.

(g) *Limitation Act (1908), S. 19 and Art. 116 — Effect of acknowledgment — Promise to pay at certain time — Limitation not extended till 'that time — Usufructuary mortgage — Suit for redemption — Claim for set-off of compensation for loss of possession based on agreement under which mortgagor plaintiff expressly agreed to pay at time of redemption. — Set-off if legally recoverable — Civil P. C. (1908), O. 8, R. 6.*

In a suit for redemption of a usufructuary mortgage brought in 1944 the defendant put forward a claim for compensation for loss of possession on

account of breach of covenant for title and quiet enjoyment contained in the mortgage. He relied for his claim on an 'ekrarnama' executed by the mortgagor in 1923, that is, within six years from the date of dispossession, under which the mortgagor had expressly covenanted to pay damages for the period of dispossession at the time of redemption.

'Held' that the effect of acknowledgment of liability contained in the 'ekrarnama' was only to extend the period of limitation for a further period of six years under Art. 116, Limitation Act, within which the defendant could claim the compensation. The period could not be extended beyond 1929 merely because the plaintiff expressly agreed to pay damages at the time of redemption. 5 Moo Ind App 43 (PC) and AIR (4) 1917 Pat 132 Ref. (*Para 16*)

'Held' further that the defendant's claim was not legally recoverable as it was clearly barred as a set-off on the date of the suit. (*Para 16*)

Anno: Lim. Act S. 19 N. 37; Art. 116 N. 22, C.P.C. O. 8, R. 6 N. 6.

S. K. Mitra and Mrs. Dharmashila Lall, for Appellants; G. P. Das and Harinandan Singh, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foeign cases referred to comes after the Indian Cases.)

(1851-54) 5 Moo Ind App 43: (1 Sar 794 PC) (Pr 16)
(1854-57) 6 Moo Ind App 393: (18 W R 81 PC) (Pr 14)
('30) 57 Ind App 173: (AIR (17) 1930 PC 176) (Prs 14, 15)
('08) 32 Bom 386: (10 Bom L R 575) (Pr 14)
('24) 77 Ind Cas 943: (AIR (10) 1923 Bom 113) (Prs 11, 16)
('04) 8 Cal W N 174 (Pr 12)
('13) 17 Cal W N 1060: (19 Ind Cas 901) (Pr 12)
('17) 40 Mad 31: (AIR (5) 1918 Mad 1145 FB) (Pr 17)
('19) 42 Mad 873: (AIR (7) 1920 Mad 819) (Pr 16)
('18) 3 Pat L J 132: (AIR (4) 1917 Pat 132) (Pr 16)
('43) 22 Pat 5: (AIR (30) 1943 Pat 152) (Prs 11, 12)

LAKSHMIKANTA JHA, C. J.: The plaintiffs are the appellants. The appeal arises out of a suit for redemption of a usufructuary mortgage in which the mortgagee set up a cross-claim. The trial Court decreed the suit with mesne profits and allowed the claim of the defendant in part by passing a separate decree in his favour. The defendant thereupon preferred an appeal and the plaintiffs filed a cross-objection. The Court of appeal below allowed the appeal in part and dismissed the plaintiffs' cross-objection.

(2) One Dhautal Pandey had three sons, Amrit, Sakhi and Mewa. Amrit died leaving four sons, Mahangu, Chanarman, Gena and Bhagwat. Sakhi died leaving a widow, Mehesha Kuer. The case of the plaintiffs is that Sakhi and Mewa died in a state of jointness as members of a joint Mitakshara family and that the family is still joint. Gena died leaving a son Rambachan, who is plaintiff No. 2, and Bhagwat died leaving a son Sheobachan, who is plaintiff No. 1.

(3) Mahangu, Gena and Mt. Mahesha Kuer executed a mortgage bond in favour of one Gauri Shanker Chaube, defendant No. 1 (referred to in this judgment as the defendant) on the 3rd February, 1916, for a sum of Rs. 4,606/-, the due date of payment being 30th Jeth, 1325 Fasli (24th June 1918.) Khatas Nos. 63 and 70 of village Manjhauli, having an area 17 B fully set out in Schedule A to the plaint were given in usufructuary mortgage. On the 11th April 1944, plaintiff No. 1, executed three rehan deeds of Rs. 2,000/- each in favour of one Ramrichh Chaubey, giving him in usufructuary mortgage 10 bighas (set out in Schedule C to the plaint) out of the 17 bighas which was in rehan with the defendant, and left with him Rs. 4,606/- to satisfy the defendant's mortgage. Rambrichh was impleaded as defendant No. 2, but later on he was transposed to the category of the plaintiffs. He died during the pendency of the suit and on his death his sons were substituted in his place. The case of the plaintiffs is that the money due under the mortgage bond in suits was tendered to the defendant by Rambrichh and on his refusal to accept the money he deposited it in Court under Section 83 of the Transfer of Property Act on the 25th April 1944, and got a notice of the deposit served in him (the defendant). The defendant having refused to withdraw the money the present suit was instituted for redemption claiming mense profits from the date of service of notice of deposit till recovery of possession.

(4) It appears that before the execution of the mortgage bond in suit khata No. 63, which includes Plot No. 862, had been purchased by the Maharaja of Dumraon in execution of a money decree and delivery of possession thereof had been taken by him through Court. The plaintiffs' case is that the sale was fraudulent and surreptitious and he continued in possession; but in order to purchase peace the plaintiff No. 1, obtained settlement of the land (fully set out in Schedule B to the plaint) from the Maharaja under a patta dated the 20th September 1923, on payment of Rs. 1,1000/- as 'nazrana.' The allegation of the plaintiffs is that the mortgagee was duly put in possession of the land in spite of the sale and the delivery of possession taken by the Maharaja of the land set out in Schedule B.

(5) The defendant contested the suit. He denied the plaintiffs' story of tender of the mortgage money and service of notice of the deposit under Section 83 of the Transfer of Property Act. He also claimed Rs. 1,100/- with interest amounting to Rs. 248/12/- on the allegation that he paid the 'nazrana' money to the Maharaja on behalf of the plaintiffs on the 22nd December 1919, for settlement of Schedule B land. The defendant also claimed Rs. 3,651/- and odd, by way of damages for the loss of possession of 10 bighas of land of schedule B and payment of excess rent in respect of the rehan land. Thus he set up a cross-claim for a total sum of Rs. 5,000/- over and above the mortgage money and paid Court-fee on the same. His case is that the plaintiffs are not entitled to redeem unless the amount claimed as damages is also paid.

(6) The plaintiffs filed a rejoinder to the cross-claim, denying their liability for Rs. 5,000/- as claimed by the defendant. The learned Subordinate Judge found the story of tender of the mortgage money and service of notice of the deposit to be true. He, however, held that the defendant's claim for damages for loss of possession was barred by limitation and that the plaintiffs failed to prove their case of excess payment of rent in respect of the rehan land, but he passed a separate decree in favour of the defendant for a sum of Rs. 1,100/- principal and Rs. 248/- and odd interest against plaintiff No. 1 on a finding that the amount had been advanced by the defendant to plaintiff No. 1 for payment of the 'nazrana' money to the Maharaja. On these findings he decreed the suit for redemption with mesne profits as already stated from the date of service of the notice under Section 83 of the Transfer of Property Act till delivery of possession.

(7) The defendant thereupon appealed against the decree for redemption and also challenged the decree dismissing his cross-claim for Rs. 3,651. Plaintiffs Nos. 1 and 2 also filed a cross-objection challenging the decree passed against them for Rs. 1,348/- and odd, for which a separate decree had been passed against plaintiff No. 1.

(8) On appeal, the learned Additional District Judge held, in agreement with the trial Court, that the mortgage money was tendered and notice of deposit thereof duly served on the defendant. He, therefore, confirmed the decree of the trial Court for redemption, and mesne profits but he allowed the appeal in part and varied the decree of the trial Court to this extent that the defendant was allowed damages for three years, that is, for the years 1917 to 1919. In the view that he took he dismissed the cross-objection of the plaintiff. The plaintiffs have now come up in second appeal to this Court.

(9) The points for decision are: (1) whether the defendant is entitled to claim damages by setting up a cross-claim in the mortgagor's suit for redemption, (2) if so, what is the extent of the plaintiffs' liability.

(10) According to the plaintiffs, the defendant got possession of the entire mortgaged land, including plot No. 862, on the execution of the mortgage bond in suit on the 3rd February, 1916, whereas according to the case of the defendant he was not put in possession of Khata No. 63 including plot No. 862, at the time of the execution of the mortgage bond in suit — his allegation being that he got possession of this khata after a registered patta was executed by the Maharaja of Dumraon on the 20th September, 1923, in respect of the land. The Courts below have, however, concurrently found that the defendant never lost possession of plot No. 862 and that he lost possession only of the remaining area of Khata No. 63 after one year of the date of mortgage and remained out of possession of it for three years, that is, for the years 1917 to 1919.

(11) In the present suit, the defendant has set up a cross-claim for Rs. 5,000/-. The grounds on which he claimed this amount are fully set out in paragraphs 13 and 14 of his written statement which are as follows:

"13. After the execution of the aforesaid patta, this defendant asked Mahangu Pandey and plaintiff No. 1 who were the managers of their respective joint family to pay Rs. 1,100/- with interest and damages caused to this defendant after making an account of the same, but as they had no money with them they expressed their liability to pay it and they executed an ekrarnama dated 29-9-1923 as managers of their respective joint family in favour of this defendant. Mahangu Pandey signed it for self and on behalf of plaintiff No. 1 by his own pen and plaintiff No. 1 gave his thumb impression on it and it was agreed upon that at the time of redemption, all the amount found due by accounting and payable to this defendant will be paid to him in full and that this defendant cannot claim for his dues earlier."

14. In law and equity and also according to the ekrarnama so long as the plaintiffs (do) do not pay Rs. 1,100/-, the principal and Rs. 248-8/- the interest i.e., Rs. 1,348/8/- in all, besides Rs. 4606/- as mentioned in the ekrarnama and also damages on account of dispossession at the rate mentioned below, their claim for redemption is not proper. Because this defendant had no right to claim for his dues before redemption, hence this defendant prays that this written statement may be considered as a cross suit or cross-claim and a decree for Rs. 5,000/- with cost may be awarded to this defendant at the time of redemption and may be got realized from the plaintiffs."

This it is clear that the defendant's prayer was that the written statement may be considered as a cross suit or cross-claim for Rs. 5,000/-. The Court of appeal below, relying upon a decision of this Court in 'Shiva Prasad Singh v. Lalit Kishore', 22 Pat 5, allowed the defendant's cross-claim for loss of possession of the mortgaged land for a period of three years as an equitable set-off, although on the pleading of the defendant the question of set-off did not arise. The fact that the defendant had not pleaded a set-off does not preclude him from taking the plea at a subsequent stage 'Najan Ahmad Haji Ali v. Salemahomed Peer Mohamed', 77 Ind Cas 943 (Bom). I would, therefore, treat the cross-claim partly as a set-off and partly as a counter-claim and examine the position in law as to whether a claim by way of a set-off is maintainable in a suit for redemption.

(12) A cross-claim may be set up as a shield or as a sword. When it is set up as a shield it is a defensive weapon and may be pleaded by the defendant to reduce the liability against him even to the full extent of the plaintiffs' claim. A counter-claim in the shape of a defensive measure is what is technically known as a set-off. A set-off may either be legal or equitable. There is a statutory provision in the Code of Civil Procedure regarding a legal set-off. If the amount claimed be an ascertained sum, it may be awarded by way of a legal set-off under Order 8, Rule 6, Code of Civil Procedure if legally recoverable. But if the claim be for unliquidated damages for any alleged breach of contract or legal obligation, the amount that may ultimately be ascertained may be claimed as an equitable set-off, but not under the provision of the Code. The statutory provision of Order 8, Rule 6, does not preclude what is called an equitable set-of. Therefore, the defendant may claim an equitable set-off provided his cross-demand arises out of the same transaction as the plaintiffs' claim or transactions so connected in their nature and circumstances as to make it inequitable that the plaintiffs should recover and the defendants should be driven to a cross suit. In 'Shiva Prasad Singh v. Lalit Kishore', 22 Patna 5 at p. 18 the law is summarised thus:

"It is well settled that the provisions of Order 8, Rule 6 of the Code of Civil Procedure are not exhaustive because, apart from a legal set-off which is expressly provided in the Civil Procedure Code in regard to an ascertained sum of money legally recoverable by the defendant from the plaintiff, an equitable set-off may be pleaded in the Indian Courts if the defendant's claim is shown to have arisen from the same transaction as the plaintiff's claim."

In 'Kalanund Singh v. Gir Prosad Das', 17 Cal WN 1060 at p. 1061, Mookerjee, J., stated the law thus:

"The provisions of the Civil Procedure Code do not take away from parties any right to set-off whether legal or equitable, which they would have independently of that Code: and that such right exists, not only in cases of mutual debts and credits, but also where cross-demands arise out of the same transaction or are so connected in their nature and circumstances as to make it inequitable that the plaintiffs should recover and the defendants should be driven to a cross-suit."

But in the present suit, which is one for redemption pure and simple even an equitable set-off cannot be claimed by the defendant because the question of reduction of the defendant's liability does not arise; nor has the claim of the defendant arisen out of the same or connected transactions. In my opinion, in this suit for redemption there is no

scope for the application of the doctrine of set-off, whether legal or equitable, for two reasons. In the first place, the plaintiffs have not advanced any claim for money due by the defendant nor have they asked for accounts. Secondly, the circumstances under which the defendant was dispossessed are wholly unconnected with the mortgage transaction because the defendant was dispossessed by a stranger, namely, the Maharaja of Dumraon. Therefore, the plea of set-off is not available to the defendant. In 'Fakir Chandra v. Messrs Gisborne and Co.', 8 Cal W N 174 at p. 177, which was a case of a usufructuary mortgage, Banerjee, J., observed:

"The suit is not one for recovery of money but is only one for the enforcement of a mortgage security, the right to sue for a personal decree being barred by limitation when the suit was brought. That being so, the case does not come under Section 111 of the Code of Civil Procedure; and if the claim is to be regarded as one for equitable set-off, it is clearly open to the objection that it does not arise out of the same transaction as that upon which the present suit is based."

Thus it is clear that the defendant is not entitled to claim any relief either by way of legal or equitable set-off. The view of the learned Additional District Judge is therefore wrong.

(13) Whatever may be the nature of the defendant's cross claim, there is no legal evidence to support his case. He relies upon the terms of the 'ekrarnama' dated the 29th September 1923, to prove his cross-demand and not upon the covenant in the mortgage bond. Therefore, the defendant cannot succeed without referring to the terms of the 'ekrarnama.' The relevant portions of this ekrarnama are as follows:

"At the time we redeem the rehan we shall pay, on adjustment of accounts, the damages for the number of days on and the area of land from which the rehandars have already been out of possession as also the sum of Rs. 1,100/- together with interest thereon. Therefore we..... do hereby declare and give it in writing that at the time we shall make repayment of the aforesaid rehan money we shall simultaneously and along with that pay-off to Gouri Shankar Chaubey the sum of Rs. 1,100/- and interest thereon as also the amount of damages, without interest, that will be found due by us for the period of dispossession. Prior to that the creditor shall not be entitled to demand payment of an realise the amount nor shall we the executants be liable to pay the same."

Thus the agreement between the parties under the 'ekrarnama' was that at the time of redemption the mortgagors shall pay, on adjustment of accounts, besides Rs. 1,100/- with interest thereon, the damages for the number of days on and the area of land from which the mortgagee was out of possession, and that the defendant would not be entitled to demand payment before redemption is sought. The mortgagors, according to him, bound themselves to make simultaneous payment to mortgage money and the damages, including the sum of Rs. 1,100/- with interest thereon.

(14) The 'ekrarnama' is an unregistered document and was not duly stamped. It was, however, impounded and proper stamp realised and then admitted in evidence. A perusal of the terms of the 'ekrarnama' clearly shows that a charge was created. Therefore, the document required registration, and in the absence of registration the terms of the document cannot be referred to. The case before us is similar to the case of 'Adit Prasad v. Ram Ratan Lal', 57 Ind App 173. The facts of that case were shortly these: In July 1881, a usufructuary mortgage of a village was executed to secure a sum of Rs. 5,500/-; redemption was to be in fifteen years not before. In November 1881, the mortgagor executed a document which, after referring to the mortgage and stating that he had borrowed from the mortgagee a further sum of Rs. 2,500/-, provided:

"I shall first pay up this debt, including principal and interest, and thereafter I can redeem the mortgaged village, having paid up the mortgage money. Without the payment of this debt I cannot redeem the mortgaged village."

Referring to this recital their Lordships held:

"It appears to them clear when the subsequent deed is looked at that the parties intended that the original village should remain in the possession of the mortgagees until the second debt was paid off, and intended, therefore, that the property should be security for the debt."

Applying the same principle to the present case, I am clearly of the opinion that the intention of the parties was that the mortgaged property shall be security for the sum of Rs. 1,100/- and the unliquidated damages for the period during which the mortgagee remained out of possession. The document tnough in form an agreement, if liberally construed is in substance a deed creating a charge. In 'Hunoomanpersaud Pandey v. Mt. Babooee Munraj Koonweree', 6 Moo Ind App 393, at p. 411, it was observed by their Lordships of the Judicial Committee:

"Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses."

This principle was applied by Sir Lawrence Jenkins in 'Janardan Vishnu v. Anant Lakshmanshet', 32 Bom 386, and the Judicial Committee in 'Aditya Prasad v. Ram Ratan Lal', 57 Ind App 173, affirmed this principle .

(15) 'Aditya Prasad v. Ram Ratan Lal', 57 Ind App 173, it may be stated, is not governed by the Transfer of Property Act, but the principle is still applicable and no change in law has been introduced after the enactment of the Transfer of Property Act. Therefore, the 'ekrarnama' being an unregistered instrument, no evidence can be given in proof of the terms of the agreement except the document itself under Section 91 of the Evidence Act and as such oral evidence is inadmissible; and if the document is bad for want of registration, its terms cannot be referred to and the defendant's claim must accordingly fail.

(16) The damages are also not legally recoverable because the claim is barred by the statute of limitation either as a set-off or as a counter-claim. It is well settled that when a set-off is pleaded th plaintiff in order to establish his plea of limitatio must prove that the set-off was barred when th plaintiff commenced his action. In the case, how ever, of a counter-claim as a weapon of offence, i is enough for the plaintiff to prove that It wa barred when it was pleaded 'Narasimha Rao v Zamindar of Tiruvur', 42 Mad 873, 'Najan Ahmed Haji Ali v. Salemahomed Peer Mohamed 77 I C 943 at p. 949 (Bom.) Therefore, the defendant's claim was not legally recoverable because it was clearly barred as a set-off on the 20th November 1944, when the suit was instituted, and as a counter-claim on the 6th February 1945, when the written statement was filed. The defendant remained out of possession for three years, from 1917 to 1919. He had, therefore, six years under Article 116 of the Limi-

tation Act to commence his action for compensation for the breach of the contract under the mortgage bond in suit which provided:

"Should, in consequence of any act done by us the executants or our heirs and representatives or due to want of title on our part the said creditor be dispossessed in any way from the property given in rehan hereby the said creditor is and shall be competent to realise the rehan money and damages by sale of the rehan property and from our person and other properties by seeking proper redress."

An acknowledgment of liability under the 'ekrarnama' was made on the 29th September 1923. Therefore, the defendant had another six years from this date within which he could claim compensation by a suit. By an acknowledgment in the 'ekrarnama' the period could not be extended beyond 1929. If the right to sue was barred in 1929, it could not be revived by an admission in the 'ekrarnama' under which the plaintiffs covenanted to pay damages for the period of dispossession at the time of redemption. If any authority be needed in support of this view, I could refer to the case of the 'East India Co. v. Oditchurn Paul', 5 Moo Ind App 43 at p. 69. In that case it was held by the Judicial Committee that when limitation once begins to run nothing could stop it. In 'Midnapur Zamindary Co. v. The Deputy Commr. of Manbhum', 3 Pat L J 132 at p. 136, Chamier, C. J., observed:

"It was settled many years ago that limitation could not be extended even by express agreement and it certainly could not be extended by an agreement to be implied from circumstances."

Therefore, the plaintiffs' claim for mesne profits must be ruled out. There is no doubt hardship on the defendant in that he loses his usufruct, but hard cases do not make bad law.

(17) The learned Additional District Judge has, however, relying on Section 25 (3) of the Indian Contract Act, held that the defendant's right to claim compensation for the period of dispossession was not barred on the date of the suit inasmuch as Mahangu, one of the mortgagors, and plaintiff No. 1 promised under the 'ekrarnama' to compensate the defendant at the time of redemption. In my opinion, the view of the learned Judge is not correct. Section 25 (3) of the Indian Contract Act provides:

"An agreement made without consideration is void, unless it is a promise, made in writing, and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits."

The question for consideration is whether there was any promise by the mortgagors to pay wholly or in part "a debt." The promise under the ekrarnama was that "at the time we redeem the rehan we shall pay, on adjustment of accounts, the damages for the number of days on and the area of land from which the rehandars have already been out of possession." Thus the recital in the ekrarnama shows that the mortgagors promised to pay an amount which may be found due on taking accounts, that is, an unascertained sum. But, in my view, a promise to pay an unascertained sum is not a promise to pay a "debt" within the meaning of S. 25 (3) of the Indian Contract Act. This is also the view of a Full Bench of the Madras High Court in 'Doraisami Padayachi v. Vaithilinga Padayachi', 40 Mad 31. The claim for Rs. 4,606/- must, therefore, be ruled out.

(18) The claim for the recovery of Rs. 1,100/- with interest thereon is also time-barred. According to the findings of the Courts below, the defendant advanced Rs. 1,100/- to the plaintiffs for payment of 'nazrana' to the Maharaja of Dumraon. The payment of the loan was made on the 22nd December 1919. Therefore, the defendant could recover this amount within three years from that date. But the 'ekrarnama' was executed on the 29th September 1923, when his claim had already become barred. Therefore, the acknowledgment of liability when the debt had become barred could not revive the liability. This sum is also not legally recoverable even if there was a promise on the part of the mortgagors to pay a barred debt, because the only evidence in support of the claim is the 'ekrarnama' which I have already held to be inadmissible. The claim for Rs. 1,100/- must also therefore, fail.

(19) I would, therefore, allow the appeal, set aside the decree in favour of the defendant and confirm the decree of the trial Court in favour of the plaintiffs for redemption and recovery of possession with mesne profits. Under the circumstances of the case the parties must bear their own costs throughout.

(20) There is also a cross-objection, but it has not been pressed. It is accordingly dismissed without costs.

(21) NARAYAN, J.: I agree.

K.S. *Appeal allowed.*

A. I. R. (39) 1952 Patna 77 *[C. N. 31.]*

IMAM J.

Awadh Prasad, Petitioner v. The State.

Criminal Revn. No. 1513 of 1950, D/- 9-5-1951.

Criminal P. C. (1898), S. 237 — Charge only under S. 3 Bihar and Orissa Prevention of Adulteration Act — No particulars of offence under S. 273 Penal Code explained — Accused cannot be convicted under S. 273 Penal Code — Bihar and Orissa Prevention of Adulteration Act (II (2) of 1919), S. 3 — Penal Code (1860), S. 273.

The accused was summoned to answer a charge under S. 3, Bihar and Orissa Prevention of Adulteration Act but was convicted under S. 273 Penal Code. No particulars of the offence under S. 273 Penal Code were stated to him nor was he asked to show cause as to why he could not be convicted of it.

'Held' that the conviction under S. 273, Penal Code was illegal. The reason is that under S. 3 Bihar and Orissa Prevention of Adulteration Act the question of accused's knowledge or having reason to believe that the food is not genuine does not arise while under S. 273, Penal Code it is material and the accused must be given an opportunity to show that he neither knew nor had reason to believe that the food was noxious. (*Para 2*)

Anno: Criminal P. C. S. 237 N. 2; Penal Code S. 273, N.1.

J. C. Sanyal, for Petitioner; Raghunath Jha, for the State.

ORDER: The petitioner has been sentenced to one month's rigorous imprisonment and a fine of Rs. 200, in default to undergo further rigorous imprisonment for one month under S. 273 of the Indian Penal Code. The allegation against the petitioner was that he had kept some mustard oil in his shop which was adulterated with agrimony oil for the purpose of sale to the public for consumption. A sample of this oil was taken and sent to the chemical examiner, who found that it was adulterated with agrimony oil. The petitioner was then, on a complaint lodged, summoned under S. 3 of the Bihar and Orissa Food Adulteration Act. The particulars of the offence were then ex-

plained to him and he pleaded not guilty. The procedure adopted by the magistrate was that for a summons case. The magistrate, finding that it had not been established by the prosecution that the Bihar and Orissa Food Adulteration Act had been made applicable to village Ramgarhwa, acquitted the petitioner of the offence under S. 3 of the Bihar and Orissa Food Adulteration Act. The magistrate, however, convicted the petitioner under S. 273 of the Indian Penal Code.

(2) The lower appellate Court appears to have been under a misapprehension that the petitioner was also summoned under S. 273 of the Indian Penal Code. The order-sheet of the magistrate, which I find on the record, shows that the petitioner was summoned only under S. 3 of the Bihar and Orissa Food Adulteration Act. Of that offence the petitioner has been acquitted, as it had not been established that the said Act had been made applicable to village Ramgarhwa. The order-sheet of the magistrate is entirely silent as to whether it was ever explained to the petitioner the particulars of the offence punishable under S. 273 of the Indian Penal Code. In a summons case, when the accused is brought before the magistrate, the particulars of the offence of which he is accused shall be stated to him and he shall be asked if he has any cause to show why he should not be convicted of it. The particulars of the offence which had been stated to the petitioner when he was brought before the magistrate concerned were particulars of offence punishable under S. 3 of the Bihar and Orissa, Food Adulteration Act. No particulars of the offence punishable under S. 273 of the Indian Penal Code were stated to him nor was he asked to show cause as to why he should not be convicted for it. Under S. 3 of the Bihar and Orissa Food Adulteration Act, whoever sells or offers for sale or exposes for sale or manufactures for sale any food which is not genuine, is liable to be punished. That is to say, the question of knowledge or having reason to believe that the food is not genuine does not arise. On the other hand, under S. 273 of the Indian Penal Code, whoever sells or offers or exposes for sale as food or drink any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, is liable to be punished. In this case, therefore, it was absolutely necessary to explain the particulars of the offence under S. 273 of the Indian Penal Code to the petitioner in order that he may have an opportunity of showing to the Court that whatever the condition of the oil may have been in his shop, the circumstances disclosed by him would establish that he neither knew or had reason to believe the same to be noxious as food. In my opinion, the procedure adopted by the Courts below in convicting the petitioner under S. 273 of the Indian Penal Code in the circumstances of the present case was entirely illegal.

(3) The application, therefore, must be allowed and the conviction and sentence is set aside.

K.S. *Conviction and sentence set aside.*

A. I. R. (39) 1952 Patna 78 *[C. N. 32.]*

DAS AND SARJOO PROSAD, JJ.

Bala Prasad Matani, Appellant v. Ajodhya Prasad and another; Respondents.

A. F. O. O. No. 351 of 1948, D/- 4-9-1951

(a) Civil P. C. (1908), S. 60 (n) — Right to future maintenance — If attachable and transferable — Gift of entire property with obligation on donee to pay a monthly sum to donor as maintenance for his life — T. P. Act (1882), S. 6 (dd).

'A' executed a deed of gift in favour of his mother, 'E' divesting himself of his entire property. It was stipulated in the deed that 'D' should pay a monthly sum of Rs. 125 to 'A', the executant, till his death and after 'A's' death to his wife during her life time for the purpose of maintenance and worship, etc., and which will continue to be the prior charge on the entire properties given in gift. The amount of maintenance was subsequently reduced to Rs. 40 by an award of arbitrators and the right to enjoy the maintenance was restricted personally to 'A' and no right in any particular property was given to 'A.'

'Held' that the allowance payable to 'A' being a personal obligation was neither salary nor annuity nor could it be considered as 'reservation of his own property.' It was a mere right to future maintenance and was not liable to attachment under S. 60 (n), Civil P.C., nor could such right be transferred by reason of S. 6 (dd), T. P. Act. 12 Cal LJ 146; AIR (20) 1933 Bom 350; AIR (4) 1917 Mad 79 (2) and AIR (29) 1942 Cal 241, Ref. *(Para 6)*

Anno: C P C S 60 N 22; T P Act S 6 N 13

(b) Civil P. C. (1908), S. 60 — Who can claim exemption under section.

Though an exemption under S. 60, Civil P.C., can only be claimed by the judgment-debtor and he can waive his right to exemption, where the decree-holder in execution of his decree wants to attach a maintenance allowance payable to the judgment-debtor by obtaining an order like a garnishee order against the person who is liable to pay the maintenance, it is open to such a person to raise an objection that the allowance is not really a debt due to him but is a mere right to future maintenance not liable to attachment under S. 60 (n). *(Para 7)*

Anno: C P C S 60, N 23, 24.

Prem Lall, for Appellant; T. Nath, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('33) 57 Bom 507: (AIR (20) 1933 Bom 350) (Pr 5)

('10) 12 Cal L J 146: (7 Ind Cas 80) (Pr 5)

('42) AIR (29) 1942 Cal 241: (ILR (1942) 1 Cal 427) (Pr 5)

('33) AIR (20) 1933 Lah 251: (145 Ind Cas 169) (Pr 7)

('39) AIR (26) 1939 Lah 316: (42 Pun L R 398) (Pr 7)

('17) 40 Mad 302: (AIR (4) 1917 Mad 79 (2)) (Pr 5)

('29) 52 Mad 465: (AIR (15) 1928 Mad 1201) (Pr 5)

('35) AIR (22) 1935 Mad 815: (158 Ind Cas 170) (Pr 5)

DAS, J.: This appeal arises out of an order of the learned Subordinate Judge of Motihari, dated the 10th of April 1948, in Execution Case No. 218 of 1947. The facts are these: The appellant, who is the decree-holder, obtained a decree for Rs. 6,400/- plus costs, etc., in Money Suit No. 75 of 1934. The decree was obtained on the 8th of January 1946, against Ajodhya Prasad, son of Bhagwan Prasad, deceased, and Sat Narain Prasad, minor son of Ajodhya Prasad, under the guardianship of Mt. Dhano Kuer, his grandmother. The suit was brought against all the three persons mentioned above, but as against Mt. Dhan Kuer, the suit was dismissed. This decree was put in execution Case No. 218 of 1947. Satnarain Prasad was dead by the time, and the decree-holder made a

prayer which indicates the mode in which he desired to levy execution. I am quoting below the prayer portion of his execution petition:

"The judgment-debtor has made a wakf of all his property to his mother Mt. Dhano Kuer widow of Bhagwan Prasad deceased, and it has been stipulated in the deed of wakf that the judgment-debtor should be paid a sum of Rs. 125/ a month by way of salary for his expenses, and as covenanted in the deed of wakf, the judgment-debtor has been receiving the salary. That there is no property standing in the name of the judgment-debtor other than this (salary) and the property covered by the deed of wakf. The decree-holder, therefore, prays that this execution petition may be registered and after service of necessary processes, half the salary of the judgment-debtor may be attached, and Mt. Dhano Kuer, widow of Bhagwan Prasad deceased, resident of Purani-godown, Bettiah, tappa Khada, thana Bettiah may be directed to deposit half the salary of the judgment-debtor in this Court every month in any manner deemed proper till satisfaction of the entire decretal amount together with costs and costs of this execution so that the grievances of the decree-holder applicant may be redressed."

(2) Apparently, a notice was issued to Mt. Dhano Kuer, who filed an objection under Section 47 and Section 60 of the Code of Civil Procedure. Her objection, in substance, was that by reason of an award dated the 5th of June 1934, made by certain arbitrators who had been appointed to settle the disputes between Mt. Dhano Kuer and her son Adhya Prasad, the maintenance allowance of Ajodhya Prasad was reduced from Rs. 125/- to Rs. 40/- and this amount was not liable to attachment under Section 60 of the Code of Civil Procedure. On behalf of the decree-holder, it was contended that the award was neither genuine nor effective in law, not having been filed in Court, and that the allowance of Ajodhya Prasad fixed at Rs. 125/- was in the nature of a salary or annuity, and was, therefore, liable to attachment. The learned Subordinate Judge heard the evidence of the parties and came to the following findings: (1) the award dated the 5th of June 1934, was genuine and valid in law; (2) by the said award the maintenance allowance of Ajodhya Prasad was cut down to Rs. 40/- per month; and (3) this allowance is not liable to attachment under Section 60 of the Code of Civil Procedure. The learned Subordinate Judge accordingly allowed the objection and dismissed the execution case. It is against this order of the learned Subordinate Judge that the present appeal is directed.

(3) Mr. Prem Lall, appearing on behalf of the decree-holder appellant, has urged the following two points before us. Firstly, he has contended that the allowance payable to Ajodhya Prasad by his mother Mt. Dhano Kuer is in the nature of an annuity or salary, and is not, therefore, hit by Section 6 (dd) of the Transfer of Property Act, nor by Section 60 (n) of the Code of Civil Procedure. Secondly, he has contended that even if Section 60, Code of Civil Procedure, has any application, the only person who can claim the exemption under that section is the judgment-debtor, Ajodhya Prasad and Mt. Dhano Kuer, his mother, who is not a judgment-debtor, is not entitled to raise any objection under Section 60 of the Code of Civil Procedure.

(4) It is necessary first to determine the nature of the payment which has to be made to Ajodhya Prasad by his mother Mt. Dhano Kuer. The first document on the question is a deed of gift. Ex. 1, dated the 4th April 1923. This document shows that Ajodhya Prasad completely divested himself of all his right in the properties which he had after the death of his father, and made a gift of the same to his mother. He said in the document:

"Hence, I, the executant, have of my own accord and free will, in a sound state of body and mind, without any coercion, pressure on the part of any body else, given in gift, the whole and entire properties specified below..... to Mt. Dhano Kuer, widow of Bhagwan Prasad."

The document then recited:

'Mt. Dhano Kuer, the said claimant shall have to pay a monthly sum of Rs. 125/- half of which comes to Rs. 62/8/- to me, the executant till my death, and after my death to my wife during her life time for the purpose of maintenance and worship, etc., on obtaining a receipt thereof which will continue to be the prior charge on the entire properties given in gift."

This was in 1923. Thereafter certain disputes arose between Mt. Dhano and her son, and on the 22nd of February 1934, a deed of agreement was executed by both parties by which five persons were appointed as punches or arbitrators to settle the disputes. It was agreed to by the parties that whatever decision was given by the arbitrators would be binding on the parties. Then, on the 5th of June 1934, the arbitrators made their award on the several points of dispute. We are concerned with issue no. 1, and under that issue, the arbitrators stated as follows:

"No doubt, by virtue of a deed of gift executed by the 2nd party in favour of the 1st party, Rs. 125/- was affixed as monthly maintenance allowance for the 2nd party. But at present the business of the Firm Chhotelal Bhagwan Prasad is altogether dull, it is not in a position like the past, and the income has been reduced. Accordingly, from the statement of the parties and from the enquiry, we the arbitrators have come to the conclusion that at present the annual income of the estate of Chhotelal Bhagwan Prasad is not more than Rs. 1500/- out of which all expenses are to be met with. Hence, in the opinion of us the arbitrators, we do not see any reason to allow more than Rs. 40/- a month as maintenance allowance and salary for the 2nd party. Hence, we, the arbitrators, fix Rs. 40/- a month as the maintenance allowance for the 2nd party. Out of this amount, the 2nd party shall have to meet the maintenance expenses of himself and of those whom he will keep with him. He shall not be entitled to claim for extra maintenance allowance."

It appears that the arbitrators separated the maintenance allowance payable to Ajodhya Prasad from the maintenance allowance payable to Ajodhya Prasad's wife, Ramdulari Kuer. No particular property was charged with the maintenance payable to Ajodhya Pd. or his wife Ramdulari Kuer. The agreement to appoint arbitrators and the award made by the arbitrators were done without the intervention of the Court. I have no doubt in my mind that the agreement to appoint arbitrators and the award made by the arbitrators are both genuine and effective in law. Nothing has been shown to us which would lead us to think that those transactions were colourable transactions to defeat or delay creditors.

(5) It is equally clear that the maintenance allowance payable to Ajodhya Prasad was a personal right the enjoyment of which was restricted to himself; and it was neither salary nor annuity. An annuity usually owes its origin to the bounty of the testator or grantor. In the case before us, Ajodhya Prasad made a complete gift in favour of his

mother, and then stipulated that his mother would pay a certain sum to him by way of maintenance allowance. This maintenance allowance was subsequently reduced to Rs. 40/- only by the arbitrators. It is obvious that for some reason or other Ajodhya Prasad was incapable of managing the properties or even maintaining his wife. Therefore, the properties were given to his mother, and the mother agreed to maintain the son by payment of a certain sum of money to cover the boarding, lodging, clothing and other necessaries of life. It seems to me that the obligation was a personal obligation and, in that view of the matter, was neither a salary nor an annuity. Mr. Prem Lall has drawn our attention to a single Judge decision of the Madras High Court in 'Sivaji Govinda Rao v. N. N. C. T. C. V. Firm', A I R (22) 1935 Mad 815, where the view expressed was that where the right was created for the first time by contract, it was always alienable and subject to attachment. On behalf of the respondents, Mr. Tarkeshwar Nath has drawn our attention to a number of decisions which have held that a mere right to future maintenance, howsoever the right may arise, is not liable to attachment. The decisions are 'Tara Sundari Debi v. Saroda Charan', 12 Cal L J 146; 'Secy. State v. Bai Some', 57 Bom 507 and 'Palikandy Mammad v. Chingpron Keloth Valia Appa', 40 Mad 302. There has been some discussion before us if the allowance payable to Ajodhya Prasad can be considered to be a "reservation of his own property", as was held in the 'Raja of Ramnad v. Subramaniam Chettiar', 52 Mad 465. Having examined the relevant documents on the point, I am of the opinion that the allowance payable to Ajodhya Prasad cannot be considered to be "reservation of his own property". There has also been some discussion before us as to what should be the test in determining whether the right to recover future maintenance allowance is alienable or not. Our attention has been drawn to some decisions where the test laid down is not whether a charge has been created for the maintenance allowance but the true intention of the parties: namely, if the right was restricted in its enjoyment to the owner personally or it was a right in property. In my opinion, it is unnecessary to discuss that question in detail in the present case, and for two reasons; firstly, the award made by the arbitrators altered the position, and the right to enjoy the maintenance was restricted personally to Ajodhya Prasad, and no right in any particular property was given to Ajodhya Prasad; secondly, S. 6(dd) of the T. P. Act, as introduced by the amending Act of 1929, has made it quite clear that a right to future maintenance in whatsoever manner arising, secured or determined, cannot be transferred. Before the amendment, there was some conflict of opinion on the question. That conflict seems to have been resolved. Commenting on the amendment, the learned commentator of Sir D. F. Mulla's T. P. Act has said:

> "The words 'in whatsoever manner arising, secured or determined' are very comprehensive; and it is submitted they overrule cases in which when the right has been created by a deed of transfer it was held that the question whether or not the right was alienable depends upon the intention of the parties as expressed in the deed."

In 'Anirudha Mitra v. Official Receiver', A I R (29) 1942 Cal 241, their Lordships of the Calcutta High Court had to consider the words of S. 6(dd) of the T. P. Act, with particular reference to the view expressed in some of the Madras decisions that where the allowance is given as a matter of favour and is the result of a contractual agreement between the parties the allowance is liable to attachment. Their Lordships said that this would be attaching a very much restricted meaning to the plain words of the section. Their Lordships then said:

> "The policy of the law undoubtedly is to interdict alienation, of what is intended to be given for the personal enjoyment of the grantee. It is not proper that in such cases the grantee should starve whereas the property which was intended to be enjoyed by him personally should be held by a stranger."

Their Lordships further expressed the view that whatever doubts might have existed on this point previously were removed by the clear words of S. 6(dd) of the T. P. Act.

(6) From a consideration of the case law on the subject, I am of the view that the allowance payable to Ajodhya Prasad by his mother is a mere right to future maintenance and is not liable to attachment under S. 60(n) of the Code of Civil Procedure, nor can such a right be transferred by reason of S. 6(dd) of the T. P. Act.

(7) The other contention of Mr. Prem Lall that it is open to the judgment-debtor to waive his right of exemption under S. 60 of the Code of Civil Procedure and that Mt. Dhano Kuer is not entitled to raise an objection under that section, seems to me to be equally untenable. In this case, though the judgment-debtor was Ajodhya Prasad, the appellant decree-holder really wished to levy execution against Mt. Dhano Kuer. The prayer portion of the execution petition which I quoted earlier in this judgment, shows that clearly enough. What the decree-holder was really trying to do was to obtain an order like a garnishee order and attach the alleged debt which, it was stated, Mt. Dhano Kuer owed to her son by reason of the provision of maintenance allowance in the deed of gift of 1923. In such circumstances, it was, I think open to Mt. Dhano Kuer to raise the objection that the maintenance allowance was not really a debt which she owed to her son, but was a right the enjoyment of which was restricted personally to her (sic), and this right was not liable to attachment under S. 60(n) of the Code of Civil Procedure. It appears that the learned Subordinate Judge thought that the amount payable to Ajodhya Prasad was in the nature of a salary, and the amount being Rs. 40/- only was not liable to attachment. That I do not think is the correct view of the matter. The correct view is that the right which the decree-holder is seeking to attach is a mere right to future maintenance, and is not, therefore, liable to attachment under S. 60(n) Code of Civil Procedure. It was, I think, open to Mt. Dhano Kuer against whom the order of attachment was sought, to raise the objection which she did. Mr. Prem Lall has referred us to several decisions of the Lahore High Court to the effect that an exemption under S. 60, Code of Civil Procedure, can only be claimed by the judgment-debtor 'Bhagu v. Batna Singh', A I R (20) 1933 Lah 251 and 'Natha Singh v. Bhag Mal', A I R (26) 1939 Lah 316. He has also referred to some decisions of this Court in which it has been held that the judgment-debtor can waive his right to exemption under S. 60 C. P. Code. That may be so. It is true that Ajodhya Prasad himself has not raised any objection in the present case. But in view of the fact that it was really against Mt. Dhano Kuer that execution was sought, it is, I think, open to Mt. Dhano Kuer to deny the existence of any debt which she is stated to owe to her son, and to raise the plea that the right which her son has, is a mere right to future maintenance which is not liable to attachment. The contention of Mr. Prem Lall that Mt. Dhano Kuer cannot raise the objection must, I think, be overruled.

(8) It is unfortunate that in this case the decree holder finds nimself unable to realise his dues for such a long period. We made an effort in this case to bring the parties to a compromise, but without success. While not oblivious of the hardship which is caused to the decree-holder, I am of opinion that it will be wrong in principle to make bad law on account of hard cases.

(9) For the reasons given above, I hold that the learned Subordinate Judge was right in refusing to attach the mere right to future maintenance of Ajodhya Prasad. The appeal fails and is dismissed; but in the circumstances, there will be no order for costs.

(10) SARJOO PROSAD, J.: I entirely agree, and I feel that I have nothing to add to this very lucid pronouncement of my learned brother.

K.S. *Appeal dismissed.*

A. I. R. (39) 1952 Patna 81 *[C. N. 33]*

MANOHAR LALL AND RAY, JJ.

Hriday Narain and another, Appellants v. Haricharan Tiwari and others, Respondents.

A. F. O. D. No. 94 of 1944, D/- 5-3-1948.

Contract Act (1872), S. 69 — Mortgage of four properties — Mortgage suit — Mortgagee seeking to recover dues only from property No. 2, other properties having been already sold in execution of rent decrees of previous mortgage-decrees — D contesting suit and claiming salvage lien to extent of Rs. 2,000 — D contending that property No. 2 had already been sold in execution of rent decree but before sale could be confirmed he (D) advanced Rs. 2,000 to mortgagor on his executing a conditional sale-deed of property in his (D's) favour, and that the mortgagor deposited amount to the credit of landlord auction-purchaser whereupon the sale had been set aside: Held that the principle of salvage lien did not apply because D had no interest in property before he paid the money; that the matter would have been different if D were in possession or had any interest in the property which he was thus seeking to save: that the position of D was that of person who had acquired interest in equity of redemption and that D acquired lien against equity of redemption in hands of mortgagor which by contract between parties was converted into security — T. P. Act (1882) S. 91: (1883) 23 Ch D 552: (1887) 34 Ch D 234; 11 Moo Ind App 241 (P C) and 1 Cal L R 152, Rel. on; 21 Cal 142 (P C), Considered; A I R (26) 1939 Pat 467 and 38 Cal 1, Disting. (*Prs 6, 11, 13*)

Anno: Contract Act, S. 69 N, 3 and 9; T. P. Act, S. 91 N. 8.

Dr. D. N. Mitter, D. L. Nandkeolyar and K. P. Sukul, for Appellants; Rai Parasnath and Satyanand Kumar, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('67) 11 Moo Ind App 241: (8 W R 17 P C) (Pr 10)
('93) 20 Ind App 160: (21 Cal 142 P C) (Pr 7)
('72) 18 W R 404 (Pr 10)
('74) 22 W R 411: (14 Beng L R 155) (Pr 10)
('78) 1 Cal L R 152 (Pr 10)
('11) 38 Cal 1: (6 Ind Cas 810) (Pr 5)
('39) A I R (26) 1939 Pat 467: (18 Pat 279) (Pr 5)
(1857) 23 Beav 172: (26 L J Ch 699) (Pr 12)
(1878) 7 Ch D 825: (47 L J Ch 338) (Pr 11)
(1883) 23 Ch D 552 (Prs 11, 12)
(1887) 34 Ch D 234: (56 L J Ch 707) (Pr 11)
(1869) 8 Eq 127: (38 L J Ch 721) (Pr 12)
(1852) 2 Sm & G 578: (65 E R 533) (Pr 11)

MANOHAR LALL, J.: This is an appeal by the defendant 4th party who is aggrieved by the decision of the learned Subordinate Judge of Bhagalpur, dated the 16th February 1944, by which he has decreed the suit of the plaintiffs respondents. The only question for decision is whether the appellant is entitled to claim a lien to the extent of Rs. 2000 on the principle of salvage.

(2) The facts are these: On 24th May 1929 the ancestor of defendant first party executed a mortgage bond for Rs. 4,363 in favour of the plaintiffs, who had instituted the suit giving rise to this appeal on the 24th April 1942 for enforcement of this mortgage bond — four properties were given in mortgage out of which we are informed that the 1st, 3rd and 4th properties have already been sold in execution of either a rent decree or a decree obtained by previous mortgagees, so that the plaintiffs seek to recover their dues only from sale of property No. 2. The only contesting defendant out of the second party defendant was defendant No. 4, who contested the suit on the allegation that the mortgage bond in suit was not genuine or for consideration and that it was a farzi document. The learned Subordinate Judge has answered these two issues in favour of the plaintiffs, and these findings were not seriously challenged before us. The evidence in support of the mortgage bond being genuine and for consideration, is overwhelming and also in support of the finding that the bond was not a farzi document. The learned Subordinate Judge's findings on these two issues must, therefore, be affirmed.

(3) The serious contention advanced, however, was that defendant No. 4 is entitled to salvage lien to the extent of Rs. 2,000 in these circumstances. It was pleaded that property No. 2 had already been sold in execution of a rent decree obtained by the Banaili Raj on the 4th March 1929. But before this could be confirmed the judgment-debtors, namely, the mortgagors made an application to have the sale set aside; these proceedings, however, were compromised between the judgment-debtors and the Banaili Raj on the decree-holder auction purchaser's agreeing to accept Rs. 2000/- to be paid by the judgment-debtors within certain time, and then the sale would be set aside. The appellant's case is that in order to set aside the sale he advanced Rs. 2000/- to the mortgagors on their executing a deed of conditional sale in favour of the defendant 2nd party on the 14th February 1930. It is, therefore, claimed that to the extent of Rs. 2000 together with interest thereon the appellant should be granted a lien, as the amount Rs. 2000/- had been advanced by him to save property No. 2 to the mortgagors and also to the plaintiff mortgagee of 1929.

(4) The learned Subordinate Judge has overruled this contention because in his view the payment of Rs. 2000 did not go to save the property, as it was not in danger of being destroyed, and also because this amount was not advanced for saving the interest of the plaintiffs. Hence, the appeal to this Court.

(5) It is argued strenuously by Dr. D. N. Mitter that the case attracts the operation of the principle upon which salvage lien is enforced, and he relies upon 'Sourendra Mohan v. Jogendra Narain', A I R (26) 1939 Pat 467 and 'Suchand Ghosal v. Balaram Mardana', 38 Cal 1.

(6) In my opinion, the principle of salvage lien cannot apply in this case, because the appellant had no interest in the properties before he made this advance of Rs. 2000/- indeed his interest in the property accrued because he paid the consideration for the conditional sale deed, of which Rs. 2000 was a part. The matter would have been

different if the appellant was in possession or had any interest in the property which he was thus seeking to save. It may also be looked upon as a payment not by the appellant but by the mortgagor himself, who had received this Rs. 2000 as a part of the sale price by which he conveyed to the appellant his equity of redemption in property No. 2 and his rights in other properties not covered by the mortgage bond of the plaintiffs.

(7) The only Privy Council case which I have been able to discover in which the principle of salvage lien was applied is the case of 'Dakshina Mohun Roy v. Saroda Mohan', 20 Ind App 160. Their Lordships observed at page 163 that it seemed to them

> "to be common justice that when a properietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents. .....The claim is in the nature of salvage; and it is to be observed that the law relating to sales for arrears of Government revenue recognises an equity to repayment in the case of a person who not being properitor pays the Government revenue in good faith to protect a claim which afterwards turns out to be unfounded."

In the present case the appellant did not make the payment to save the property, while he had any interest therein or when he bona fide believed that he had some interest in the property. As I have stated above, his interest in the property arose only after he obtained a sale deed from the mortgagors, and Rs. 2000 was a part of the consideration for that sale deed. I am also unable to discover any equity in favour of the appellant. He has purchased with eyes open the property which is subject to the mortgage of the plaintiffs and he has also purchased a number of other properties of his vendor which are not subject to the mortgage of the plaintiffs.

(8) The Calcutta case relied upon by Dr. Mitter was a case decided under S. 70 of the Contract Act. In that case the deposit was made by co-tenant who was not a party to the decree which had been obtained by the landlord for arrears of rent, in execution of which the entire tenure was sold; a tenant who was not a party to the rent suit deposited the amount and the sale was set aside. It was found that he made the deposit with the approval of the Court and lawfully with the object of protecting his own interest in the holding. On these facts no doubt, equity arose in his favour, that is to say, he made the payment in order to protect his interest and also this resulted to the benefit of the other defendants who were thus liable to be sued to contribute ratably to the persons who made the payment. This case is of no assistance to the appellant.

(9) In the Patna case the question arose in an administration proceeding, and it was held that a Court while administering an estate through a receiver has power to order that the priority of the mortgages already created on the estate may be altered in favour of a debt incurred by the receiver under its orders, if such a person has advanced the money for the protection of the estate itself so that the advances have resulted in the benefit of the prior mortgagees as well, and an instance was given, where the money advanced was to pay the government revenue or the rent due to the superior landlord which, if not paid, will entail forfeiture of the property free from encumbrances of the prior mortgagees. This principle has no application to the present case, because the present case does not arise out of any administration proceedings, and in the case before the learned Judges the property was in the hands of the receiver and the estate was being administered. The Court had, no doubt, power to pay the debts in any order which appeared reasonable, just and equitable to that Court. This case also has no application in the present case.

(10) Rai Paras Nath has drawn our attention to the old Calcutta case of 'Hurri Mohun v. Girish Chunder'. 1 Cal L R 152, where it was held that a person who advanced money to another for the purpose of saving a mehal of the latter from sale for arrears of rent has no lien on the property for the amount so advanced. The facts in that case are almost identical with the facts of the present case. In that case there was a prior mortgage and the property was about to be sold for arrears of rent when the plaintiffs advanced to the son of the mortgagor a sum of Rs. 3000 with interest, and the amount was actually applied for the payment of rent which was then due in respect of the property given in mortgage, so that the sale of the property was prevented — it was clear that this was the intention of the parties who entered into the loan transaction. In these circumstances, the learned Judges refused to extend the principle, which was sought to be found in 'Baboo Dutt Jha v. Pearee Kaunt', 18 W R 404 and 'Syud Enayet Hossein v. Muddun Moone Shahoon', 22 W R 411, to a case where a person, having no interest in the matter, comes forward to discharge a burden upon the property. The learned Judges pointed out that the case would have been different where the plaintiff had some interest in the property which he saved, e.g. a co-sharer who advanced the money in order to pay the Government revenue due upon the property. I respectfully agree with the decision of this early Calcutta case, and that is in accordance with the view which I have expressed above. I may also refer to 'Nugender Chunder Ghose v. Kaminee Dossee', 11 Moo Ind App 241, where their Lordships at page 258 observed as follows:

> "Considering that the payment of the revenue by the mortgagee will prevent the talook from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the talook as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the talook, as against all persons interested therein, for the amount of the money so paid."

The result is that I would dismiss the appeal with costs.

(11) RAY, J.: I am of the same opinion. I expressed myself, in course of the argument, that the appellant who advanced the money in lieu of a subsequent mortgage in his favour in order to discharge the liability which the mortgagor had undertaken to the auction-purchaser for securing a release of the property was no better than the mortgagor himself with reference to his claim for recognition of a lien as against the prior mortgagee in respect of the sum advanced by him. I am further strengthened in my view on reading the judgment of my learned brother. As the question is of some importance and the applicability of the doctrine of salvage lien is a question of doubtful simplicity and as it owes its origin to English maritime law and has been extended to cases in relation to other properties, I have taken some time to consider the same. I am thoroughly convinced that the appellant has no case. I will refer to two decisions of the English Courts in support of my view. In the case of

'Falcke v. Scottish Imperial Insurance Co.', (1887) 34 Ch D 234 E mortgaged a policy of life assurance to F., and later filed a petition in bankruptcy for liquidation. He ultimately obtained his discharge. The policy mortgaged was not affected by the proceeding in bankruptcy. After discharge E entered into an agreement with D who professed to be F.'s (mortgagee's) agent for the purchase of F.'s interest in the policy, but no such purchase was ever carried out and there was no evidence in the case that D had any authority to enter into any agreement on behalf of F. E persuaded by D paid the premiums in order to keep the policy on foot. On F's death Mrs. F. brought an action to enforce her security and the policy was sold for much less than the amount of the mortgage debt. E claimed a lien on the sale proceeds and wanted to be repaid therefrom, the residue only being due to Mrs. F. Bacon V. C. held E entitled to be repaid out of the proceeds of sale the premiums which he had paid, and that the residue only must be paid to Mrs. F. On appeal, it was held that the whole proceeds of sale must be paid to Mrs. F. without deducting the premium, and that the maritime doctrine of salvage lien had no application to the payment. Cotton, L. J. has made some observations in course of the judgment which, in my view, will make the position clear as to applicability of the doctrine of salvage lien. He says at page 241:

> "Now let us see what the general law is. It is not disputed that if a stranger pays a premium on a policy that payment gives him no lien on the policy. A man by making a payment in respect of property belonging to another, if he does so without request, is not entitled to any lien or charge on that property for such payment.....If here there had been circumstances to lead to the conclusion that there was a request by Falcke that this premium should be paid by Emanuel, then there would be a claim against Falcke or his representative for the money, and I do not say that there might not be a lien on the policy..... An express request is not suggested. Was there an implied request? I think that in a case of this sort, when money is paid in order to keep alive property which belongs to another, a request to make that payment might be implied from slight circumstances, but in my opinion there is no circumstance here in evidence from which such a request can be implied."

Coming to the facts of the present case, the lien is sought to operate as against the prior mortgagee's interest and under the circumstances there having been absolutely no privity as between him and the appellant, no circumstances could be quoted in this case from which an implied request proceeding from him (prior mortgagee) could be deduced. The Lord Justice has also said:

> "It would be strange indeed if a mortgagor expending money on the mortgaged property could establish a charge in respect of that expenditure in priority to the mortgage....It must be considered, in my opinion, that he paid it not so as to get any claim in priority to the incumbrancer, but in order to retain the benefit of the interest which would come to him if the property proved sufficient to pay off the previous incumbrancers."

There is no reason why the interest that the subsequent mortgagee (the appellant) was intending to save was not identically the same "as the benefit of the interest" referred to in the aforesaid passage. Referring to Lord Justice Fry's view in 'Saunders v. Duman', (1878) 7 Ch D 825 at p. 829 while interpreting the decision as based upon a different consideration, the Lord Justice said:

> "if the Master of the Rolls meant to express an opinion that a person having no interest in a policy can by payment of the premiums acquire a lien on the policy, I am bound to say that I differ from that view."

Bowan, L. J. who was of the same opinion as Cotton, L. J. has made some very weighty observations with regard to extension of the doctrine of salvage lien to other cases. Those observations are worth quoting:

> "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.
>
> There is an exception to this proposition in the maritime law. I mention it because the word 'salvage' has been used from time to time throughout the argument, and some analogy is sought to be established between salvage, general average, and contribution, the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea."

This Lord Justice in another part of his opinion says:

> "The cases in equity were examined by Lord Justice Fry in 'In re Leslie', (1883) 23 Ch D 552 and the general rule is the same in equity as at law....Does the mere fact that the owner of the equity of redemption paid premium to keep live the policy give him a right against the mortgagees to have the moneys which he so expended paid in priority to their debt? He had paid in his own interest: he did not pay in the interest of the mortgagees."

Lord Justice Fry was also a party to this judgment. I could not resist the temptation of quoting a passage from the concluding portion of his Lordship's judgment at page 254:

> "With regard to salvage in the case of ships and maritime perils we know its meaning. It appears that the expression 'salvage money' as we are informed by one of the learned counsel for the appellant, and I dare say he is quite right, first occurs in the report of the case of 'In re Tharp', (1852) 2 Sm & G. 578, which was before Lord St. Leonards in 1852, where he seems to have used the expression as one familiar to the Irish Courts in certain cases. I certainly wish that the expression had remained on the other side of the channel where it seems to have arisen. I doubt whether any doctrine which is expressed by the word 'salvage' applies to cases of this description."

(12) In the case of 'In re Leslie v. French', (1883) 23 Ch D 552 which has mostly been accepted as a leading authority on the subject, there is a comprehensive summary of the cases to which the doctrine of lien can apply. It is at page 560 of the report:

"In my opinion a lien may be created upon the moneys secured by a policy by payment of premiums in the following cases:

First. By contract with a beneficial owner of the policy.

Secondly. By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation.

Thirdly. By subrogation to this right of trustees of some person who may at their request have advanced money for the preservation of the property.

Fourthly. By reason of the right vested in mortgagees or other persons having a charge upon the policy, to add to their charge any moneys which have been paid by them to preserve the property."

Besides the above summary, I should like to quote another passage occurring at page 563 of the report as the reasons given therein apply mutatis mutandis to the facts of the present case:

"In the next place, with regard to payments made by a part owner, it appears to me that, except by contract such payments give no title to the person making them against the other part owner or part owners of a policy. That payments made by a mortgagor, who is in equity a part owner with the mortgagee, create no lien as against the mortgagee, was determined by Lord Romilly, M. R., in the case of 'Norris v. Saledonian Insurance Co.', (1869) 8 Eq. 127. And, generally speaking, it is clear that money laid out by a tenant for life in improvements on the estate creates no lien against the remainderman. Again, in 'Pennell v. Millar', (1857) 23 Beav 172, Lord Romilly, M. R., had to deal with a case in which A, the owner of policies, had, as part of a transaction voidable for fraud, assigned them to B and had covenanted to keep them up. B claiming under this assignment, had paid premiums. A instituted a suit to set aside the transaction on the ground of fraud, and the Master of the Rolls determined that the assignment was a valid security for the moneys actually advanced and not for the premiums paid by B, his payment being a voluntary payment. In this case it is evident that, until the transaction was avoided, A and B were both possessed of interests in the policies, and yet the payment by one of the persons so interested was held to create no lien as against the other."

In the case just cited, right to lien was also claimed as justifiably based upon right to contribution. This was also abnegated with the following observation:

"In the next place, it is plain that the right to contribution is a personal right and the remedy is a personal remedy, and that there is no lien for the amount of the moneys in respect of which the right to contribution arises."

(13) It is clear from the facts of this case that the appellant was a stranger to this property when he made the advances except if he be considered to be the subsequent mortgagee by virtue of this payment. Even if it be assumed that he is a man having interest to save the property from auction sale, his very acceptance of a subsequent mortgage is destructive of any lien which he should have otherwise been entitled to. The law in this connection has been well summarised in Halsbury's Laws of England, Vol. 20, page 584:

"If security be taken for payment at a future date of a debt for which the creditor has a lien upon property of the debtor, the lien is in some cases destroyed. The mere taking of a security does not necessarily destroy the lien; there must be something in the facts of the case or in the nature of the security taken which is inconsistent with, and destructive of the lien."

Applying the principle to the facts of the present case, the appellant by accepting the position of a subsequent mortgagee, under the provisions of the T. P. Act, postponed his lien assuming that he had acquired one to the prior charge in favour of the prior mortgagee. The circumstances in which a subsequent mortgagee can acquire a position in priority to the prior mortgagee have been defined in the Act. To allow the subsequent mortgagee to enforce a lien, in the circumstances of this case, against the prior mortgagee would be acting in the face of the statute. This is not a payment to save his interest as subsequent mortgagee but to acquire an interest as a subsequent mortgagee. He, if at all, acquired a lien against the equity of redemption in the hands of the mortgagor which by contract between the parties was converted into a security. To this transaction the prior mortgagee cannot be charged either with acquiescence or standing by.

(14) With these observations, I agree that the appeal should be dismissed with costs.

R.G.D. *Appeal dismissed*

A. I. R. (39) 1952 Patna 84 *[C. N. 34.]*

DAS J.

Ram Pearilal Khandelwal, Appellant v. Surajmal Khandelwal and others, Respondents.

A. F. A. D. No. 472 of 1948, D/- 7-9-1949

Civil P. C. (1908), O. 23, R. 1 — Suit for ejectment of tenant — Defendant raising question of title which Court had no jurisdiction to decide — Suit dismissed as relationship of landlord and tenant not found to exist — Plaintiff allowed to withdraw suit at stage of second appeal with permission to file properly constituted suit in competent Court on payment of entire costs of defendant.

In a suit for ejectment of a tenant on notice to quit framed as one under S. 7 (XI) (cc), Court-fees Act, the defendant raised a question of title to the house. The Court even though it had no pecuniary jurisdiction to decide the question of title came to the conclusion that there was no relationship of landlord and tenant and therefore dismissed the suit. In second appeal the plaintiff prayed for withdrawal of the suit with permission to bring a properly constituted suit in a Court of competent jurisdiction for declaration of his title to the house and for possession.

'Held' that in the peculiar circumstances of the case that the question of title can be more satisfactorily decided in a properly constituted suit before a competent Court and therefore the permission prayed for could be allowed on payment of the entire costs of the defendant in all the Courts.

(Para 3)

Anno: C. P. C., O. 23 R. 1, N. 11, 26 and 31.

S. C. Majumdar, for Appellant; Kedarnath Sahay and Ray Parasnath, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('20) 24 Cal W N 151: (A I R (7) 1920 Cal 205) (Pr 3)

('29) 33 Cal W N 769: (A I R (17) 1930 Cal 42) (Pr 3)

('14) 27 Mad L J 475: (A I R (2) 1915 Mad 654) (Pr 3)

JUDGMENT: This is a second appeal by the plaintiff from a decision of the learned Subordinate Judge of Dhanabad, dated the 23rd of January, 1948, affirming a decision of the learned Munsif of Dhanbad, dated the 26th of April, 1947, in a suit for ejectment of a tenant of on a notice to quit. The suit was framed as one under S. 7, Cl. (XI) (cc) of the Court-fees Act, and Court-fees were paid on the annual rental plus the amount of arrears claimed. The case of the appellant was that his father had purchased a house in Dhanbad from the father of defendants 1 to 3 and two other persons by a registered sale deed dated the 9th of October, 1922. It was alleged that defendants 1 to 3 and their father took the house as monthly tenants on a rent of Rs. 16/- per month. Defendants 1 to 3 did not pay rent in spite of demand, and on the 6th of January, 1945 a notice to quit was served on defendants 1 to 3. The appellant then brought the suit for ejectment and for recovery of arrears of rent for 35 months plus interest. The total claim was laid at Rs. 600/- and Court-fees were paid on that claim plus the annual rental of the house. The defence of defendants 1 to 3 was a denial of the appellant's title. It was alleged that the father of defendants 1 to 3 and his two nephews used to carry on business jointly and had business transactions with the appellant's father. As the father of defendants 1 to 3 and his nephews were heavily indebted a bogus or benami sale deed was executed in the name of the appellant's father in order to save the house from creditors. It was further alleged that defendants 1 to 3 always remained in possession as owners and never parted with possession. On separation the house fell to the share of defendants 1 to 3 who alleged that they were full owners of the house.

(2) The learned Munsif who dealt with the suit in the first instance decided only one issue, namely, the issue as to the alleged 'benami' nature of the sale deed of the 9th of October, 1922. The learned Munsif found that the sale deed was benami and without consideration. On that finding he dismissed the suit. The learned Subordinate Judge, on appeal, affirmed that finding, and held that there was no relationship of landlord and tenant between the appellant on one side and defendants 1 to 3 on the other.

(3) Learned Counsel for the appellant has raised several points before me. His principal point is that the learned Munsif, in whose Court the suit was filed, had no jurisdiction to decide the question of title. Therefore, permission should be given to the appellant to withdraw from the suit with liberty to bring a properly constituted suit for a declaration of title and recovery of possession. Learned Counsel has placed reliance on the decision in 'Pramatha Nath v. Amiraddi', 24 Cal W N 151 where a similar course was adopted. It was there pointed out as follows:

"As for the other two defendants, it has been found that there was no relationship of landlord and tenant between them and the plaintiff. The suit, therefore, cannot proceed without a prayer for declaration of title and the suit is not framed accordingly. In these circumstances, the learned pleader for the appellant applies for permission to withdraw the suit so far as the defendants Nos. 2 and 3 are concerned with liberty to bring a fresh suit. The plaintiffs are accordingly permitted to withdraw from the suit with liberty to bring a fresh suit with respect to the same subject matter as against defendants Nos. 2 and 3."

Learned Counsel for the respondents has relied on two decisions 'Govind Kumar v. Mohini Mohan', 33 Cal W N 769 and 'Balasidhantam v. Perumal Chetti', 27 Mad L J 475. In Madras case it was observed that in a suit brought under S. 7, Cl. (XI) (cc) of the Court-fees Act, the question of the title of the plaintiff need not be gone into. In the Calcutta case it was observed that in a suit brought under S. 7, Cl. (XI) (cc), a Court cannot enter into the question of title and give a decree on the basis thereof; what the Court is entitled to do under that clause is to find if there was relationship of landlord and tenant between the plaintiff and the defendant and if the defendant's tenancy has been validly terminated. It is observed that if the Court finds any of these elements non-existent, the suit must be dismissed, and if any question of title is raised in the suit, it can only be gone into for the purpose of determining the main question in the suit about the relationship between the plaintiff and the defendant. The difficulty in the case before me is that the learned Munsif would have no pecuniary jurisdiction to decide the question of title between the parties, the house having been purchased for Rs. 5000/-. The Courts below were right in dismissing the action when there was no relationship of landlord and tenant; but in the peculiar circumstances of this case, the question of title can be more satisfactorily decided in a properly constituted suit before a competent Court. The appellant was ill-advised in framing the suit under S. 7, Cl. (XI)(cc) of the Court-fees Act, probably with a view to save Court-fees. In the circumstances of this case, I would accept the prayer of the appellant, and allow him to withdraw from the suit with permission to bring a properly constituted suit in a Court of competent jurisdiction for the adjudication of his title to the house. But such permission is conditional on the appellant paying the entire costs of defendants 1 to 3 in all Courts including this Court.

(4) In view of the above permission, it is unncessary to discuss the other points raised. It has been contended before me that the Courts below did not consider carefully the elements of a 'benami' transaction, and that the onus of proving the payment of consideration was wrongly thrown on the appellant. It was also contended that the Court of Appeal below wrongly held that exhibits 2 and 2(b) were inadmissible in evidence. I do not think these points need any consideration in view of the permission given to withdraw the suit.

K.S. *Appeal allowed.*

A. I. R. (39) 1952 Patna 85 [*C. N. 35.*]

AGARWALA C. J.

Singhasan Rai and others, Petitioners v. The King.

Criminal Revn. No. 1360 of 1949, D/- 17-11-1949.

Penal Code (1860), S. 186 — Omission to prove writ under which public servant was acting — Propriety of conviction.

Conviction under S. 186 cannot be sustained where the prosecution entirely omits to prove the writ under which the public servant was acting and, therefore, it is impossible to say what his functions were in the discharge of which he was obstructed. (*Para 1*)

Anno: Penal Code, S. 186 N. 3, 5.

K. D. Chatterjee, for Petitioners; G. P. Shahi and B. K. Sharma, for the Crown.

ORDER: The convictions in this case must be set aside on a very simple ground. The petitioners have been convicted and sentenced under S. 186 of the Penal Code, that is to say, for obstructing a public servant in the discharge of his functions. The public servant concerned is a

pleader commissioner appointed by the Court to remove certain obstructions, which, under the decree of the Court, are said to have been ordered to be removed. The petitioners are not parties to the decree. Unfortunately, the prosecution have entirely omitted to prove the writ under which the Commissioner was acting, and so it is impossible to say what his public functions were, and, therefore, it is impossible to say that there has been any obstruction to the commissioner in the discharge of his public function. This is only typical of the manner in which prosecutions are conducted in this province, where so many important cases entirely fail because of the carelessness displayed in proving the matters which ought to be proved. The convictions and sentences are set aside.

G.M.J. *Convictions and sentences set aside.*

A. I. R (39) 1952 Patna 86 *[C. N. 36.]*

B. P. SINHA AND RAMASWAMI, JJ.

Gajadhar Singh, Appellant v. Radha Prasad Singh and others, Respondents.

A. F. O. D. No. 116 of 1947, D/- 8-4-1949.

(*a*) *Pre-emption — Ceremonies — Talab-i-ishtishhad — Property in respect of which pre-emptor is proclaiming his right should be specified — Simply saying that he is demanding pre-emption of "whatever properties have been purchased," is not enough. AIR (30) 1943 Pat 96, Rel. on.* (*Para 10*)

(*b*) *Deed — Construction — Sale deed — Words plain and unambiguous — What was intended to be conveyed and what was conveyed, must be determined from deed itself — No extraneous consideration can be admissible to construe words — Evidence Act (1872), S. 91.* (*Para 6*)

Anno: Evidence Act, S. 91, N. 8.

P.R. Das, Lalnarayan Sinha, K. K. Sinha, Janak Kishore, M. P. Singh and U. C. Sharma, for Appellant.

L. K. Jha, B. C. De, D. C. Varma, G. N. Prasad and Nakuleshwar Prasad, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('67) 11 Moo Ind App 468: (9 W R 9 P C) (Pr 11)
('20) 47 Ind App 255: (A I R (8) 1921 P C 50) (Pr 11)
('48) 75 Ind App 147: (A I R (35) 1948 P C 100) (Pr 11)
('16) 43 Cal 95: (A I R (4) 1917 Cal 841) (Pr 11)
('18) 22 Cal W N 104: (A I R (5) 1918 Cal 294) (Pr 11)
('18) 22 Cal W N 611: (A I R (6) 1919 Cal 904) (Pr 11)
('22) 26 Cal W N 73: (A I R (9) 1922 Cal 255) (Pr 11)
('42) 21 Pat 799: (A I R (30) 1943 Pat 96) (Pr 9)
(1887) 19 Q B D 394: (56 L J Q B 621) (Pr 11)

B. P. SINHA J.: This is an appeal by the defendant 1 from the decision of the learned Subordinate Judge of Begusarai, dated the 28th of February, 1947, decreeing the plaintiff's suit for pre-emption in respect of certain properties, which along with others, were the subject-matter of a sale-deed dated the 18th November, 1943, executed by Mt. Jugeshwari Kuar alias Jageshwari Kuar, widow of Ganga Pd. Singh and others.

(2) The plaintiff-respondent alleged that on the 2nd of January, 1944, in the forenoon he learnt from Jadunath Singh (P. W. 8) that the defendants second and third parties had sold the properties entered in Sch. B of the plaint along with other properties to the first defendant; that the plaintiff at once completed the formality of 'Talab-e-mowasbat' in the presence of Jagdambi Prasad Singh (P. W. 2) Narain Pd. Singh and several other persons; that thereafter he, along with the said Jagadambi and others, went to mauza Majhaul, Tauzi No. 1130 and completed the formality of Talab-e-Ishteshhad; that from there the plaintiff with his witnesses Jadunath Singh (P. W. 8) and Bindeshwari Singh (P. W. 8) went to the residence of the first defendant at Matihani on the 3rd of January, 1944 and again performed the ceremony of "Talab-e-Ishtishhad' and the same day along with those witnesses, the plaintiff went to the place of the defendants second and third parties and there also performed the ceremony of 'Talab-e-Ishtishhad'; that the plaintiff believed that the first defendant had purchased the properties comprised in the sale deed, aforesaid, for a consideration of Rs. 6,000/- only, but had dishonestly and fraudulently got the amount of Rs. 25,000/- mentioned as the consideration money and, after making a show of payment of Rs. 21,000/- before the Sub-Registrar in cash, took back Rs. 19,000 from the vendors, so that the sum of Rs. 6,000/- only was the real consideration that passed between the parties to the sale deed; that though the parties are Hindus, by the custom and usage of the Province, the plaintiff had a right of pre-emption in respect of some of the properties sold; that the properties comprised in the sale deed are set out in Sch. E of the plaint, out of which the right of pre-emption was claimed only in respect of those set out in Sch. B of the plaint, the price whereof the plaintiff assessed at Rs. 4200/-. The plaintiff, therefore, claimed a decree for pre-emption in respect of the disputed properties entered in Sch. B of the plaint.

(3) The suit was contested by the first defendant only, and apart from the formal pleas in bar of the suit, he contended that the real purchasers of the property by virtue of the sale deed impugned in this case were Babu Lachhmi Prasad Singh and the other members of his family and that the defendant was a mere name-lender; that the plaintiff and other members of his family had full knowledge and information as regards the negotiation, agreement of sale and execution of the sale deed in favour of Babu Lachhmi Prasad Singh and others in the name of this defendant; that the plaintiff's allegations about his performing the formalities of 'Tlab-e-mowasbat' and 'Talab-e-Ishtishhad' were entirely wrong and unfounded; that the witnesses named in the plaint as the persons in whose presence those ceremonies were performed were the creatures, relatives and friends of the plaintiff; that Rs. 4,000/- had been paid to the defendant second party on the 15th of November, 1943, when the deed of agreement was executed, and the remaining consideration money amounting to Rs. 21,000/- had been paid in cash before the Sub-Registrar at the time of registration; that the plaintiff's allegation that the consideration fixed for the sale was only Rs. 6,000/- was entirely without foundation; that when the negotiation for the sale of the properties owned and possessed by the defendant second party started, the plaintiff was also one of the intending purchasers, but he was out-bid by the actual purchasers, aforesaid, with the result that the deed of agreement and eventually the sale-deed were executed in favour of this defendant as benamidar for the said Babu Lachhmi Prasad Singh and others; that the sale deed covered the entire eight annas five 'gandas' and odd share in Tauzi No. 1130 of Mauza Majhaul and not only four annas five 'gandas', as wrongly alleged in the plaint; that as a matter of fact the plaintiff and the members of his family were all along aware of the negotiation for sale and of the

ultimate execution of the sale deed in question; that it was discovered that after the registration of the sale deed a forgery had been perpetrated in respect of the extent of the share in Tauzi No. 1130, as a result of conspiracy between the plaintiff and the defendants second and third parties; that after the forgery aforesaid had been committed in the Registration Office, the plaintiff got a sale deed executed by the defendant second party in favour of his brother-in-law Singheshwar Singh. It was finally contended that the plaintiff had deliberately under-valued his plaint by falsely alleging that the properties in respect of which the right of pre-emption was sought to be exercised were valued at only Rs. 4,200/- and that as a matter of fact, the properties were worth about Rs. 25,000/-.

(4) The defendant's written statement was filed on the 7th of September, 1944. On the 29th of August, 1945, an application for amendment of the plaint was filed by the plaintiff. By this application, the plaintiff sought the addition of one alternative relief, which was allowed by the Court by its order dated the 3rd January, 1947. It should be noted that the plaintiff did not seek to amend any of the material allegations in the plaint, but only obtained an order for the addition of an alternative relief. This order of amendment of the plaint has been seriously challenged by learned counsel for the appellant in this Court as will presently appear. A number of issues were raised at the trial. The learned Subordinate Judge held that there was no defect in frame of the suit, that it was not bad for defect of parties that the suit was not barred by estoppel and acquiescence; that the sale deed in question was tampered with by somebody after it had been registered on the 23rd of November, 1943, while the document was in the custody of the Registration Office by substituting "four annas" for "eight annas" so that though eight annas and odd share of Tauzi No. 1130 had actually been conveyed by the sale deed, it was made to appear that only four annas and odd had been so conveyed; that the real purchasers were Lachhmi Singh and others and that the first defendant was a mere 'farzidar'; that the real consideration for the sale deed was Rs. 25,000/- and not 6,000/- as alleged by the plaintiff; that the ceremonies of 'Talab-e-mowasbat' and 'Talab-e-Ishtishhad had been duly performed by the plaintiff. The Court below, therefore, granted a decree for pre-emption in respect of four items of properties, the most important of which acording to the parties, is the first item, namely, eight annas and odd share in Tauzi No. 1130. The Court directed that the plaintiff should deposit in Court, to the credit of the first defendant, a sum of Rs. 20,000/- by the 30th June, 1947, in default of which the suit shall stand dismissed with costs. But if the plaintiff made the deposit aforesaid, his suit would stand decreed with costs against the first defendant. A question has also been raised at the trial, though no specific issue had been raised, as to whether only the principal village Majhaul, had been conveyed, as claimed by the plaintiff, or that village, along with its dependencies, had been conveyed, as claimed by the defendant. The Court below decided this controversy in favour of the plaintiff.

(5) The learned Counsel for the appellant has contended: (1) That the order of the Court below allowing the amendment of the plaint by addition of relief 1 (a) to the plaint was wrong and highly prejudicial to the defendant, and that at any rate, it was no real amendment of the plaint, and, therefore, the suit was bad, being in respect of only a portion of the properties conveyed by the sale deed in question; (2) that the ceremonies required under the Law of Pre-emption had not been performed at all, and the evidence in support of the same was unreliable and that at any rate, the ceremonies said to have been performed were not in strict compliance with the requirements of the law; (3) that the 'dakhili' villages along with the main village Majhaul, had really been conveyed by the deed impugned and that being so, the suit was bad as it was in respect of a portion of the properties conveyed, and (4) that the plaintiff and the real purchasers, as found by the learned Subordinate Judge, being residents of the same village, were really competing for the purchase of the properties, and that the plaintiff was cognizant of all the developments beginning from the negotiation stage and ending with the execution of the sale deed in question.

(6) It is not necessary to trace the history of the title to the property in question. It is enough to point out that such a question is foreign to the scope of suit for pre-emption. Furthermore, it was not contested at the bar on either side that the second defendant was the owner of the property which she was competent to convey. Learned counsel for the respondent has not also questioned the finding of the trial Court that the sale price was really 25,000/- rupees, which was actually paid by the real purchasers, namely Lachhmi Prasad Singh and others, who happened to be related to the first defendant. He has also not challenged the finding of the Court below that there was a tampering with the sale deed changing eight annas into four annas in respect of the first item of the property sold. The Court below was not in a position to find out as to who was responsible for this apparent forgery. We have looked into the original document, and there is no doubt that originally the entire eight annas and odd share in that village was comprised in the sale deed and a dishonest attempt was made, apparently in the interest of the vendor and full advantage was taken of that forgery by the plaintiff by taking a sale deed in respect of the alleged remaining four annas share in that village in the name of his wife's brother, Singeheshwar Singh. There is no doubt that the other suit for pre-emption by the plaintiff as against his wife's brother Singeheshwar was a mere conclusive suit, to put up a show that Singheshwar was the real purchaser. It has not been seriously contended that really Singeheshwar was the purchaser of the property and, as will presently appear, the second defendant had nothing to convey as she purported to do by the deed of sale executed in favour of Singheshwar on the 24th of January, 1944. It is convenient, therefore, at this stage to discuss the question of whether only the principal village Majhaul was sold by the deed in question in this suit or the dakhili villages also. It is common ground that apart from the asli village, there are four 'dakhili' village appertaining to this estate bearing tauzi No. 1130. These dakhili villages have different khewat nos. and thana numbers as recited in the judgment of the Court below. The most important thing to remember in this connection is that the description of the property sold under item No. 1 is the whole and entire eight annas five gandas and odd out of sixteen annas takhta, partitioned by Collectorate, bearing tauzi No. 1130 and the Sadar Jama of Rs. 61/12/0 original with dependencies. There are no words of exception in respect of the Dakhili villages. What has been excluded from the operation of the sale, is land let out permanently with one Dinanath Prasad, covered by survey plots 4037 and 4038. Hence on a proper construction of the plain words of the deed, it would appear that the entire estate paying a revenue of Rs. 61/12/-

bearing tauzi No. 1130 was conveyed, that is to say, whatever interest the vendor had in that village. But the learned Subordinate Judge has come to the contrary conclusion by remarking that the words 'asli mai dakhili" occurring at the end of the paragraph describing the first item of the property sold was only a set formula used by the scribe without attaching any special significance to those words. In my opinion, that is an entirely erroneous way of construing a document of title. The learned Subordinate Judge has further made reference to the agreement (Exhibit A) to show that those critical words were not there. Again, in my opinion, the learned Subordinate Judge has misdirected himself. What was intended to be conveyed and what was actually conveyed must be determined with reference to the words used in the sale deed itself and those words being plain and unambiguous, no extraneous consideration can be admissible to construe those words. The learned Subordinate Judge has also remarked that while describing the Tauzi Number 1130 only thana number 191 and khewat number 18 are given and not the separate thana numbers and khewat numbers of the dakhili villages. But it must be remembered that after giving the description of the principal village the correct tauzi number, Sadar Jama Khewat Number and thana number, the critical words "asli and dakhili" happened to be there. As the dakhili villages are not specifically named in the deed, it was not necessary to give their separate khewat numbers or their separate thana numbers. But as already indicated, there are no words of limitation cutting down the extent of the entire estate represented by tauzi no. 1130. It is manifest that what was intended to be sold was the entire estate with the principal village and its dependencies. Before us no attempt was made by learned Counsel for the respondent to support this finding of the learned Subordinate Judge and, in my opinion, it is perfectly plain that the entire estate was intended to be conveyed including the dakhili villages. As to whether the non-inclusion of the dakhili villages in the schedule to the plaint is or is not fatal to the suit is quite a different matter and will be discussed at its proper place.

(7) The real question in controversy between the parties or the merits of the case is whether or not the plaintiff performed the necessary ceremonies in connection with the exercise of his right of pre-emption. The plaintiff has stated in the plaint and in his evidence that for the first time he came to know of the execution of the sale deed on the 2nd of January, 1944, from Jadunath Singh (Plaintiff's witness no. 8) and immediately performed the ceremonies of Talab-e-mowasbat and Talab-e-Ishtishhad at the several properties in question as also at the house of the first defendant and that of the second defendant. Hence, on the plaintiff's case, it was Jadunath who set the ball rolling. (After considering the evidence His Lordship continued:) In my opinion, the evidence of Gajadhar and Satya the defendants to the effect that the plaintiff was competing with Satya's family in the matter of the purchase of the properties in question, is more acceptable than the plaintiff's case and the plaintiff's evidence that he came to know for the first time on the 2nd of January, 1944, about the alleged sale. Hence, it would appear that the whole basis for the plaintiff's claim that he performed the ceremonies of Talab-e-mowasibat and Talab-e-Ishtishhad on the 2nd and 3rd of January, 1944, is without substance.

(8) Let us examine the evidence bearing on the performance of the ceremonies. Though the plaint mentions the name of the several witnesses in whose presence the ceremonies aforesaid, were performed, at several places, the exact words used by the plaintiff while performing those ceremonies are not there. At the trial and even by the defendant's written statement it was brought home to the plaintiff that there were several controversies between the parties as regards the exact extent of the interest conveyed by the deed impugned. It was seriously alleged by the plaintiff that only four annas and odd interest had been conveyed in tauzi no. 1130, the main property in dispute in this case. He also contended that only the main village Majhaul, and not the dakhili villages had been conveyed. Hence, in order to obviate those difficulties every vague formula was evolved and the plaintiff and his witnesses said that while performing the ceremony of Talab-e-Ishtishhad the plaintiff uttered that whatever properties had been purchased by Gajadhar from the second defendant were the subject-matter of the ceremony. It had got to be an omnibus formula which could apply to any sale deed without reference to the items of the properties sold. The plaintiff claims to have performed the ceremonies at several places apparently with a view to showing that he was out to perform the ceremonies on lands of different items of property besides performing those ceremonies at the respective houses of the defendants 1 and 2. But if the plaintiff's case is true that he came to know of the sale for the first time on the 2nd of January, 1944, when Jadunath did not inform him about the details of the subject matter of the sale deed, it is a little difficult to appreciate as to how the plaintiff performed the ceremonies at the several places. It is also a little difficult to believe that the plaintiff would remember to use the words "Talab-e-mowasbat and Talab-e-Ishtishhad" at the spur of the moment without any consultation with a lawyer as to the ceremonies necessary to be performed. It is true that more than thirty years ago the plaintiff had unsuccessfully fought out a case of pre-emption, but that hardly could enable him to remember the necessary formulae in connection with the ceremonies. All the witnesses examined by the plaintiff in support of his claim of having performed the ceremonies of Talab-e-mowasbat and Talab-e-Ishtishhad parrot like repeated practically the same words including the word "Talab-e-mowasbat". In my opinion, the plaintiff's witnesses are all tutored ones who have been prepared to repeat the exact words even though they had no previous occasion of knowing those words which are of very uncommon use. Plaintiff's witness No. 2 has stated that Jadunath told the plaintiff that the second defendant had sold her property in Majhaul to the first defendant. If that is so, it is a little difficult to understand how they went to Buzurgabad or to the other items of property to perform the ceremonies if they ever did so. Either the plaintiff was aware of the contents of the sale deed before the 2nd of January, 1944, or he did not perform the ceremonies at those several places. This witness (P. W. 2) has spoken about specific dates, namely, the 1st of January, and the 2nd of January, 1944. But he had to admit in his cross-examination that he had no written note about those dates. He was further questioned as regards matters in which he was personally interested and he pleaded want of recollection. It does not appear therefore, that he had a particularly good memory so as to remember the critical date, the 2nd of January, 1944. The same criticism applies with equal force to the evidence of P. Ws. 3, 4, 5, and 7. The witnesses examined by the plaintiff in support of his having performed the ceremonies in connection with the right of pre-emption are not reliable. I would,

therefore, hold that the plaintiff has failed to prove that he came to know of the sale in question for the first time on the 2nd of January, 1944, or that he performed the ceremonies on that date.

(9) Apart from those considerations, the evidence taken at its face value does not, in my opinion, fulfil the requirements of the law. The following observations in the judgment of Mr. Justice Chatterjee, who delivered the judgment of the Division Bench of this Court in the case of 'Medni Proshad v. Suresh Chandra', 21 Pat 799 at pages 805 and 806, summarised the legal position.

"In the Hedaya (Hamilton's translation, Grady's edition, page 550) it is stated: 'The right of Shaffa is but a feeble right, as it is the disseizing another of his property merely in order to prevent apprehended inconveniences' Mr. Ameer Ali in his treatise on Mohammadan Law (4th edition, Vol. 1 at page 724) says 'as the right of pre-emption is strictissimi juris (strict rule of law), failure to perform the 'demands' in accordance with the requirements of law would defeat the claim'. Again at page 726 he states 'The law requires that the performance of the ceremonies must be strictly established'. The ceremonies referred to here are the talab-i-mowasbat and the Talab-e-istishhad.

In the Hedaya (Hamilton's translation, Grady's edition, page 551) Talab-i-Ishtishad is spoken of as a "Claim by affirmation and taking to witness' and then follows the statement; 'and this also is requisite because evidence is wanted in order to establish proof before the magistrate, and it is probable that the claimant cannot have witnesses to the Talab-i-Mowasbat as that is expressed immediately on intimation being received of the sale. It is, therefore, necessary to make the Talab-i-shadwa Takreer, which is done by the Shafee taking some person to witness, either against the seller, if the ground sold be still in his possession, or against the purchaser, or upon the spot regarding which the dispute has arisen, and upon the Shafee thus taking some person to witness his right of Shaffa is fully established and confirmed.' Then at the end of the same paragraph the manner in which the claimant should make the demand is indicated in the following illustration; 'Such a person has bought such a house, of which I am the Shafee; I have already claimed my prievilege of Shaffa and now again claim it; be therefore witness thereof' Similar illustrations are given in Fatawa-i-Alamgiri and Durul-Mukhtar to show how the second demand is to be made, and there also words like "Bear ye to this" are used. In Ameer Ali's Mohammadan Law (4th edition, volume I page 725) it is stated that in the presence of the witnesses the pre-emptor must say to the following effect. "Such a person bought such a property (sufficiently indicating the same) of which I am the Shafee; I have already claimed my right of Shaffa and now again claim it, be ye therefore witness thereof."

(10) It would appear that it is essential to the performance of the ceremonies connected with pre-emption that the pre-emptor while performing the ceremony of Talab-i-ishtishhad' should specify the property in respect of which he is proclaiming his right of pre-emption. Simply his saying that he was demanding pre-emption of whatever properties have been purchased by the defendant will not be enough compliance with the requirements of the law. On this ground also, in my opinion, it must be held that the plaintiff has failed to prove that the words used by him at the time of making the second demand of Talab-i-Istishhad were sufficient to draw the attention of the witnesses to the specific property in respect of which he was demanding his right of pre-emption. On this ground alone, therefore, the suit is liable to be dismissed.

(11) It remains to consider the first question raised by the learned Counsel for the appellant, namely, whether the amendment allowed by the Court below had been properly allowed and whether the amendment really amounted to an amendment of the plaint. It was contended by the learned Counsel for the appellant that the amendment was only in respect of the relief sought by the plaintiff. It did not seek to make any amendment in the material facts constituting the plaintiff's cause of action and that, therefore, the material facts alleged in the plaint did not entitle the plaintiff to the relief sought. It was contended that paragraph 3 of the plaint read with schedule B showed the properties in respect of which pre-emption was sought. That first item in schedule B mentioned only four annas five gandas, and odd and tauzi no. 1130. Paragraph 3 read with Schedule B were not amended. Hence the suit, so far as tauzi No. 1130 was concerned, continued even after the amendment to relate to only four annas and odd of tauzi No. 1130. Hence the main amendment by way of addition of Cl. 1 (a) in the relief portion of the plaint in substance was no amendment which could entitle the plaintiff to relief in respect of the entire eight annas and odd share which has been found by the Court below to have been conveyed by the sale deed in question. It was also contended that if the suit were treated as relating to eight annas and odd of Tauzi No. 1130, the defendant had been deprived of a valuable right of pleading limitation as regards the four annas share in tauzi No. 1130 as the amendment was sought on the 29th of August, 1945, that is to say, more than one year after the registration of the sale deed. Reliance was placed on behalf of the appellant on the following decisions 'Weldon v. Neal', (1887) 19 Q B D 394; 'Bhagwanji Morarji Gokuldas v. Alembic Chemical Works Co. Ltd', 75 Ind App 147; 'Janardan Kishore v. Shib Prasad Ram', 43 Cal 95; 'Kali Das v. Draupadi Sundari Dassi', 22 Cal W N 104; 'Upendra Narain v. Janaki Nath', 22 Cal W N 611 and 'Gyanendra Nath v. Paresh Nath', 26 Cal W N 73. On behalf of the respondent reliance was placed upon two decisions of their Lordships of the Judicial Committee, in the case of 'Mahummud Zahoor Ali Khan v. Mt. Thakooranee Rutta Kuer', 11 Moo Ind App 468 and in the case of 'Charan Das v. Amir Khan', 47 Ind App 255 in support of the contention that in special circumstances even where the proposed amendment would deprive the defendant of the plea of limitation, it was open to the Courts to grant leave to amend. Though there is a good deal of substance in the contention raised on behalf of the appellant, I would not rest my judgment on this point alone as contended streneously on behalf of the appellant.

(12) Similarly there is a good deal of substance in the appellant's contention that the suit related to only a portion of the property conveyed to the contesting defendant both by reason of the fact that the dakhili villages of tauzi No. 1130 had not been included in the schedule to the plaint as also by reason of four annas of that property not being the subject-matter of the suit, as originally framed. This plea, strictly speaking is not available to the defendant, as he did not specifically raise the question of maintainability of the suit on these accounts.

(13) For the reasons stated above, I would allow this appeal, set aside the decision of the learned

Subordinate Judge, and dismiss the suit with costs here and in the Court below.

(14) RAMASWAMI, J.: I agree.

R.G.D. *Appeal allowed.*

A. I. R. (39) 1952 Patna 90 *[C. N. 37.]*

AGARWALA C. J. AND MEREDITH J.

Province of Bihar, Petitioner v. The Proprietors of Ram Nagar Estate, Opposite-Party.

Misc. Appeal No. 128 of 1947, D/- 14-9-1948.

(a) Bihar Agricultural Income-tax Act (7 (VII) of 1938), S. 44 — Income-tax authorities have no power to demand cess valuation papers.

The income-tax authorities are not entitled to demand for the purpose of ascertaining the income cess valuation papers from the assessee. (Para 10)

(b) Bihar Agricultural Income-tax Act (7 (VII) of 1938), S. 7(1) — Option of assessee under S. 7 (1) is unqualified — Assessee selecting multiple system cannot be deprived of option merely because he cannot give cess valuation on bakasht basis.

For the purpose of the option under S. 7 (1) the law contemplates all land under 'Khas' cultivation as falling into two classes — land assessed to rent, and land not assessed to rent. If it is assessed to rent, the multiple taken is to be a multiple of the rent. If it is not assessed to rent, it is to be taken as a multiple of the cess valuation. No third alternative is provided for. The law does not contemplate land which is not assessed to rent and not assessed to cess, the reason being that there can be no such land. If any land is not assessed to cess on the basis of 'Khas' cultivation, then it is assessed in the cess valuation papers as rent-paying land at a lesser figure, it seems apparent that in the case of land which was tenanted land at the time of the last cess valuation and has since become 'bakasht' the Income-tax authorities will have to value it under S. 7(1) either as a multiple of the cess valuation arrived at as rent-paying land, or as a multiple of the rent of the land which it carried when tenanted land. But because a 'Zamindar' shows such lands in his return, in regard to which he cannot give a cess valuation, on a 'bakasht' basis, he be refused the exercise of the option. (Para 15)

The wording of S. 7(1) does not qualify the option in any way, and the option is given subject to no conditions whatever. Therefore, the assessee, having exercised his option, cannot be deprived of it merely because certain information is not furnished. (Para 16)

No doubt where information called for is not supplied, the Income-tax Officer under S. 18 (4) may make the assessment to the best of his judgment. But reading the two sections taken together he must make it to the best of his judgment in accordance with the option previously exercised and which is expressed in S. 7 as an option free from any qualifications or conditions whatsoever, much less the supply of any particular papers. (Para 17)

There is no provision in S. 7 requiring the assessee to establish what area has been actually cultivated as 'bakasht' before he can be allowed to exercise the option under S. 7(1). Apart from that when the assessee originally makes his option in sending in his return, he must mean that he selects that method for whatever area may eventually be accepted as 'bakasht'. No doubt if the Income-tax Officer holds that there is no 'khas' cultivation, he may refuse the option on the ground that there is no land in respect of which it can be exercised. But if he holds that any particular area is actually under 'khas' cultivation, he must surely give effect to the option in regard to that area. It is for the Income Tax Officer to decide the area of 'bakasht' if he does not accept the assessee's figure. But whatever figure he decides upon, the income must be assessed in accordance with the option which has been made. (Para 20)

Hence, where the assessee selects the multiple system under S. 7(1) (a), the assessing officer is legally bound to adopt the multiple system selected for making the assessment although he has not produced reliable evidence to prove what lands were actually held by them as 'Zerat' and 'Bakasht" and what was the cess valuation of these lands. (Para 21)

Advocate-General, for Petitioner; Baldeva Sahay, S. C. Mukherjee and S. K. Mazumdar, for Opposite-party.

MEREDITH, J.: This is a case stated by the Board of Agricultural Income-tax. Bihar, at the instance of six assessees, the individual proprietors of the Ram Nagar Estate, who formerly formed members of a Hindu undivided family in which partition took place in 1944, since when the members have been individually assessed.

(2) The question referred to us as a point of law is:

"Whether in the circumstances of this particular case the Assessing Officer was legally bound to accept the assessees' applications for the multiple system of assessment under S. 7(1)(a) of the Bihar Agricultural Income-tax Act, 1938 (Bihar Act VII of 1938)."

(3) The assessment in question is in respect of the accounting year 1351 Fasli and for the financial year 1944-45. The assessment orders upon the six assessees, so far as material, may be summarised as follows. The assessees all chose to be assessed on the multiple basis. They made returns for their 'zerat' and 'bakasht' lands, copying the area from the cess revaluation papers of the last cess revaluation which took place in 1920, and from this they deducted areas said to have been settled with 'raiyats' subsequent to the cess revaluation. This return, in the opinion of the Income-tax Officer, did not correctly give the present area of lands directly cultivated because it was just possible that the area of 'bakasht' land had increased on account of the acquirement of lands abandoned by 'raiyats' and acquired in execution of rent decrees. Accordingly the assessees were asked to produce papers showing the present area of 'bakasht' and 'zerat' lands under their possession, but they could not produce any such papers, saying that there were none such in their possession. This he regarded as incredible, and he thought that they were deliberately suppressing papers to evade payment of tax. The highest area of 'bakasht' returned by any of the assessees was 1287 acres in the return of one of them. He accordingly took this figure of 1287 acres as the 'bakasht' area for each of them upon the assumption that in the recent partition the 'bakasht' lands had been equally divided. Without saying anything further about the option or giving his reasons for refusing to allow it, he proceeded to assess the income for this area for each assessee at Rs. 34/- per acre, accordingly taking a net assessment for 'bakasht' income at Rs. 43,758/-.

(4) From this all six appealed, more or less in the same terms. The assessees stated that they had duly made a return under S. 17 of the Act, and had complied with all the terms of the notice served on them under S. 18(2). The 'bakasht' lands had not been equally divided, and there was no justification for taking an area of 1287 acres.

The Act gave the assessees the option to be assessed either on multiple basis or on produce basis, and they had chosen to be assessed on the multiple basis, and the Income Tax Officer had no jurisdiction to change the basis of the assessment. The rate of Rs. 34/- per acre was, in any event, arbitrary and too high. They had filed all the papers in their possession.

(5) The Appellate Commissioner dealt with all the appeals in two judgments. He (Mr. W. G. Lacey) noted that the areas of 'bakasht' given had been arrived at by referring to the cess revaluation records of the year 1920, deducting all lands which were said to have been settled with the 'raiyats' during the subsequent 25 years, but including no land which had come in 'khas' possession during that period. The assessees were asked by the Income Tax Officer to produce papers and accounts showing the actual area of 'bakasht' and 'zerat' cultivated during 1351 Fasli. He was told that there were no such papers in existence, and rightly characterised that as incredible. He accordingly took 1287 for each, and it was difficult to see what else he could have done. The Income Tax authorities had not insisted on any particulars about acreage when the estate had been jointly assessed to income tax in previous years. He thought the Income Tax Officer was justified in what he did.

(6) With regard to the rejection of the multiple system, he said necessary materials for employing it were not before the Agricultural Income Tax Officer, and he had no option but to make the assessment on produce basis. He said that the assessees had produced no papers whatever to show what the cess valuation of the lands was. 'Chalans' for the payment of cess had been produced, and, it was argued before him that the Income Tax Officer could have calculated the cess valuation from the data given, but no such request had been made to the Income Tax Officer, and the law did not require or expect him to make good the default of the assessee by having recourse to roundabout methods of arriving at the cess valuation. If the assessee claimed to have his income assessed on the multiple basis, it was his duty to produce papers showing what the cess valuation of the land was. Should he fail to do so, he could not exercise the option. In his opinion the Income Tax Officer was right in making the assessment on produce basis.

(7) The assessees then went in revision to the Board. They said that when the assessees chose to be assessed on the multiple basis on the cess valuation, only relevant evidence for the purpose of the determination of the agricultural income was the cess valuation, and assessees had been denied their statutory right. The Appellate Commissioner had ignored the fact that the cess valuation papers, the only relevant material and evidence had been actually produced. (It should be mentioned here that the list of papers shown as filed in the orders of the Income Tax Officer includes cess valuation papers.) The Board heard all the applications together, and as the assessees claimed that they still held in 'khas' possession exactly the same lands which they held at the time of the cess revaluation, the Board directed an enquiry into whether that contention was correct. The Income Tax Officer then made a comparison of the areas shown by the six assessees as 'bakasht' with the areas shown as such in the cess revaluation papers and said that they did not correspond, and gave a number of instances where they had shown 'bakasht' lands in villages where the cess revaluation papers showed no 'bakasht' lands, and said that it was clear that they did not hold exactly the same lands that they held at the time of the cess revaluation. (Incidentally this is quite inconsistent with the statements made by the Agricultural Income Tax authorities that the areas were shown in accordance with the cess valuation papers, with deductions only).

(8) On receipt of this report the Board said:

"It appears that the contention of the assessee petitioners that they hold as 'bakasht' exactly the same lands that they held at the time of the cess revaluation was incorrect."

The Board, therefore, considered that the Assessing Officer was justified in refusing to adopt the multiple system of assessment and dismissed the motion. The petitioners pressed for a reference which has been accordingly made.

(9) In the statement of the case the Board said:

"But because they could not produce the cess valuation papers in respect of all the lands shown in their respective returns, the Agricultural Income Tax Officer rejected their claim to be assessed on the basis of the multiple system. It was contended before the Commissioner that the Assessing Officer might have arrived at the cess valuation figures by making certain calculations from the known data furnished by them, but the Commissioner was unable to accept this contention because no such request had been made, and the law did not either require or expect the Assessing Officer to make good the default of the assessees by having recourse to roundabout methods for arriving at the cess valuation figures. In his opinion, should the assessees, claim to have their agricultural income assessed on the multiple basis, it was their duty to produce papers showing what the cess valuation of the lands was, and, should they fail to do so, they could not exercise that option."

As the enquiry made showed that the 'bakasht' areas were not the same as in 1920, the Board considered the Assessing Officer was justified in refusing to adopt the multiple system. In the opinion of the Board, the assessees could not legally exercise the option given under S. 7(1)(a) unless they produced papers and good and reliable evidence to prove what lands were actually held by them as 'zerat' and 'bakasht' and what was the cess valuation of those lands.

(9) In my considered opinion the Appellate Commissioner and the Board were wrong in both fact and law. With regard to the facts, there has been considerable argument before us as to whether the assessees had actually filed the cess valuation roll or not. It seems to me apparent from the facts and orders I have set out above that they did do so. What really happened was that the Income Tax Authorities refused to be satisfied with the cess valuation papers of 1920 and wanted something more, which did not in fact exist. Mr. Baldeva Sahay, who has appeared for the assessees, has produced some of the cess valuation papers, which, he says, were filed, and, as it contains the Collector's valuation, it is clear that it is not a 'chalan' or even merely a return, but is the actual cess valuation roll.

(10) Even, however, if it be assumed for the sake of argument that the cess revaluation rolls were not produced, that makes no difference. The Income Tax authorities were not entitled to demand any such papers from the assessees; and it is apparent that they did not demand any such papers under S. 18, Sub-ss. (2) and (3).

(11) That they were not entitled to demand any such papers is clear from S. 44 of the Act which runs as follows:

"Nothing in this Act shall be deemed to authorise any of the income-tax authorities mentioned in S. 16 to call for any papers or documents for the purpose of ascertaining agricultural income or for any other purpose under this Act except the papers noted below:

1. Papers showing the amount of rent which accrued due in the previous year;
2. Papers showing the actual receipt of agricultural income by an assessee in the previous year;
3. Letters showing the actual expenditure incurred for which a deduction or exemption is claimed under this Act; and
4. Original vouchers supporting the items of expenditure referred to in Cl. (3)."

Under this section four classes of papers alone can be demanded. Cess valuation papers do not come under any of the four headings.

(12) That they did not demand them is equally apparent. What they alone demanded under S. 18 was materials regarding the actual area of 'bakasht' and 'zerat' under cultivation in the year 1351. There is nothing to suggest that any demand for cess valuation papers was made and refused. On the other hand, the enquiry report of the Income Tax Officer made at the instance of the Board plainly shows that he had all the cess valuation papers before him, and he was able to make full comparison between the cess valuation papers and the returns of areas shown as 'bakasht'.

(13) It is no doubt apparent from that report that certain areas shown in the returns as 'bakasht' were not shown as 'bakasht' and assessed to cess accordingly at the cess valuation in 1920. The assessees could not, therefore, be expected or called upon to show a cess valuation of such lands on a 'bakasht' basis. It was not for them to make a hypothetical cess valuation themselves, nor does the law require it.

(14) Section 7 (1) is as follows:

"(1) The agricultural income mentioned in Sub-cl. (2) of Cl. (a) of S. 2 shall, at the option of the assessee,

(a) be deemed, for the purposes of assessment to agricultural income-tax, to be a multiple,

(i) in the case of land assessed to rent, of the rent of such land,

(ii) in the case of land not assessed to rent, of the cess valuaton of such land; or

(b) be assessed on the net amounts of such income determined in the prescribed manner."

(15) It is apparent that for the purposes of the option, the law contemplates all land under 'khas' cultivation as falling into two classes — land assessed to rent and land not assessed to rent. If it is assessed to rent, the multiple taken is to be a multiple of the rent. If it is not assessed to rent, it is to be taken as a multiple of the cess valuation. No third alternative is provided for. The law does not contemplate land which is not assessed to rent and not assessed to cess, the reason being that there can be no such land. If any land is not assessed to cess on the basis of 'khas' cultivation, then it is assessed in the cess valuation papers as rent-paying land at a lesser figure, and it seems to me apparent that in the case of land which was tenanted land at the time of the last cess valuation and has since become 'bakasht' the Income Tax authorities will have to value it under S. 7(1) either as a multiple of the cess valuation arrived at as rent-paying land, or as a multiple of the rent of the land which it carried when tenanted land. But, it is an amazing proposition that because a 'Zamindar' shows such lands in his return, in regard to which he cannot give a cess valuation, on a 'bakasht' basis, he is, therefore, to be refused the exercise of the option.

(16) The wording of S. 7(1) does not qualify the option in any way. and the option is given subject to no conditions whatever. It seems to me, therefore, an entirely incorrect proposition that the assessee, having exercised his option, can be deprived of it merely because certain information is not furnished.

(17) No doubt where information called for is not supplied the Income-Tax Officer under S. 18(4) may make the assessment to the best of his judgment. But, as I read the two sections taken together he must make it to the best of his judgment in accordance with the option previously exercised, and which is expressed in S. 7 as an option free from any qualifications or conditions whatsoever, much less the suppiy of any particular papers.

(18) The present case does not depend solely upon this wide proposition because, as I have said, there was no demand, and no failure to comply with any demand, for papers required in connection with the option selected. The demand and failure were in connection with papers relevant to proceedings for assessment under S. 7 (1) (b), the alternative procedure adopted against.

(19) There was a failure to supply papers called for necessary for the fixation of the area of 'bakasht' lands under cultivation. That undoubtedly gave the Income Tax Officer the power to use his own judgment in fixing the area of the 'bakasht' lands. Having done so, however, at 1287 acres, he must clearly proceed to assess the income from the 1287 acres in accordance with the option previously selected. He was not entitled to call for cess valuation papers, but he had access to them, and there was nothing to stop him from making the calculation. I feel it necessary expressly to dissent from the statement of the Board that it is the assessee's duty to produce papers showing what the cess valuation of the lands is, and, should he fail to do so, he cannot exercise the option under S. 7(1).

(20) The learned Advocate General strongly urged that before the assessee can be allowed to exercise the option he must establish what area has been actually cultivated as 'bakasht'. I do not find any such provision in S. 7. Apart from that it seems to me that when the assessee originally makes his option in sending in his return, he must mean that he selects that method for whatever area may eventually be accepted as 'bakasht.' No doubt if the Income-tax Officer holds that there is no 'khas' cultivation, he may refuse the option on the ground that there is no land in respect of which it can be exercised. But if he holds that any particular area is actually under 'khas' cultivation, he must surely give effect to the option in regard to that area. It is for the Income Tax Officer to decide the area of 'bakasht' if he does not accept the assessee's figure. But whatever figure he decides upon, the income must be assessed in accordance with the option which has been made.

(21) In the case of the assessees before us the area is now finally settled at 1287 acres in each case. The income from this land must be assessed upon the multiple basis. Mr. Baldeva Sahay, in order to save the income-tax authorities trouble, makes before us the concession that he is willing to pay, if necessary, upon a multiple of the cess valuation of the entire village in each case, treating the entire village as 'bakasht'. That may be resorted to if any difficulty is found in making the assessment upon the 1287 acres, but I do not my-

self see what difficulty there can be since the entire cess valuation papers are available or, if not available, can be obtained by the Income-tax authorities from the Collector's office. My answer to the question posed is that the circumstances do not appear to be exactly those stated by the Board, but, even if they were, the Assessing Officer was legally bound to adopt the multiple system selected for making the assessment.

(22) As the assessees succeed, they are entitled to their costs, and, as the reference covers six different cases, I would assess these costs at Rs. 100/- which has been deposited in each case which should now be returned plus a consolidated hearing fee of Rs. 150/-.

(23) AGARWALA, C. J.: I agree.

V.B.B. *Reference answered.*

A. I. R. (39) 1952 Patna 93 *[C. N. 38.]*

B. P. SINHA AND RAMASWAMI JJ.

Damodar Jha, Appellant v. Mahangu Jha and others, Respondents.

A. F. A. D. No. 1397 of 1946, D/- 16-8-1948.

Tenancy Laws — Bihar Tenancy Act (VIII (8) of 1885), S. 26-B, proviso — Private sale of holding in 1921 — Landlord obtaining rent decree against original tenant without impleading transferee before 1935 — Holding sold in execution on 5-6-1936 — No notice of execution given to transferee — Held as result of operation of S. 26-N execution sale did not pass holding itself but affected judgment-debtor's right; title and interest.

A purchased in 1921 a holding from the original tenant B. The landlord obtained a rent decree against B before 1935 without impleading A. In execution of the rent decree the holding was sold on 5-6-1936. A had no notice of the execution proceedings.

'Held' that as a result of the operation of S. 26N (which has now been, with some modifications, incorporated in S. 26B proviso) which came into force on 10-6-1935 A became 'raiyat' of the holding. As A had no notice of the execution proceedings, the execution proceedings taken against B had not the effect of passing the holding itself and could affect only the right title and interest of judgment-debtor B. 'Case law discussed.' (Para 4)

A. B. Jha, for Appellant — R. K. Chaudhury and S. P. Srivastava, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('14) 41 Ind App 91: 41 Cal 926: (AIR (1) 1914 PC 111) (Pr 4)

('19) 23 Cal W N 654: (AIR (6) 1919 Cal 342) (Pr 4)

('32) 59 Cal 1202: (AIR (19) 1932 Cal 321 S B) (Pr 4)

('38) AIR (25) 1938 Pat 591: (177 Ind Cas 338) (Pr 4)

('43) 22 Pat 370: (AIR (30) 1943 Pat 189 F B) (Pr 4)

B. P. SINHA, J.: This a second appeal on behalf of the defendant-fourth-party from the decision of the learned Additional Subordinate Judge of Darbhanga modifying that of the Munsif of Madhubani in a suit in ejectment.

(2) The plaintiff-respondents claimed the disputed lands, about 11 kathas and odd in area, by virtue of their several purchases between the years 1913 and 1921 from the family of the original tenants represented by the defendant-third-party. They alleged that the sale held on the 5th of June, 1936, in execution of a decree for rent obtained by the landlord-defendant, did not affect their interest, as they were not represented in the execution proceedings, and that, therefore, the auction sale only affected the right, title and interest of the judgment-debtors. The defendant-appellant, who is a settlee from the landlord, who was the auction-purchaser in execution of the decree and sale impugned in this case, alleged that the sale deeds relied upon by the plaintiffs were fraudulent and fictitious which did not convey any title to the plaintiffs; nor they obtained possession thereunder. They also alleged that the decree for rent obtained by the Raj Darbhanga, defendant-second-party, was a good rent decree, and the execution sale passed the holding itself. Hence, on these pleadings, only two questions arose for decision: first, whether the plaintiffs had acquired a good title by virtue of their sale deeds executed between the years 1913 and 1921 in respect of parcels of the holding of 11 kathas and odd held by the family of the defendant-third-party; and, secondly, whether the rent decree and the execution sale following thereupon had the effect of passing the holding itself or only the right, title and interest of the judgment-debtors.

(3) The trial Court held that the sale deeds relied upon by the plaintiffs were genuine and real transactions which conveyed good title and possession as between the parties to those transactions; but it was admitted on behalf of the plaintiffs that there was another son of Sewak Ram named Lalji who did not figure as the vendor in the sale deeds relied upon by the plaintiffs, and his interest, being one fourth share, did not pass by those sales. The trial Court further held that, as a result of the amendment of S. 26 of the Bihar Tenancy Act, which came into force on the 10th of June, 1935, the plaintiffs' purchase must be deemed to have been recognised by the landlord, and, consequently, as they were not parties to the execution proceedings, their interests were not affected by the execution sale held at the instance of the landlord-decree-holder. In that view of the matter, the trial Court decreed the suit in respect of three quarters of the lands in dispute. From its decision, there was an appeal by the defendant-fourth-party, and a cross-objection by the plaintiff-respondents in respect of the one-fourth share of the lands in dispute which was not decreed in their favour by the trial Court. The lower appellate Court has decreed the entire suit, that is to say, it dismissed the appeal, and allowed the cross-objection, holding that, the defendant not having challenged the plaintiffs' title to the entire property in dispute by virtue of the sale deeds alleged by them, they were entitled to recovery of possession in respect of the whole of the disputed lands. It also held, in agreement with the trial Court, that the amendment of the Bihar Tenancy Act, particularly S. 26N had the effect of making the plaintiffs 'raiyats' in respect of the disputed lands, and, as they were not parties to the execution proceedings, their interests could not have been affected by the execution sale in favour of the landlord, defendant-second-party. Hence this second appeal on behalf of the defendant-fourth-party who is at present interested in the holding as a settlee from the auction-purchaser, the Darbhanga Raj.

(4) Mr. Awadh Bihari Jha, on behalf of the appellant, has strenuously argued that the decision of the Courts below is erroneous in law in so far as they held that the auction sale held in favour of the landlord-decree-holder did not affect the plaintiffs' interest, in view of the provisions of

S. 26 N which has now been, with some modifications, incorporated in S. 26 B, proviso. Mr. Jha argued that, as the landlord had not recognised the transfer, the statutory recognition as laid down in the amended S. 26 N did not have the effect of rendering the execution proceedings null and void as against the transferees, the plaintiffs. In this connection, he relied upon the following observations in the Full Bench decision of this Court in the case of 'Chintaman Mandar v. Sia Ram Mandal', 22 Pat 370 at p. 377

"If the landlord had in fact recognised the plaintiff's purchase, he was bound to implead him in his rent suit, and the result of not impleading him would be that the decree obtained in the suit would not be a valid rent decree. But the effect of S. 26 N is that by fiction, as it were, the landlord shall be deemed to have recognised the plaintiff's purchase in 1913. Such fictional recognition does not necessarily carry all the consequences that would flow from actual recognition.'

From these observations, Mr. Jha would ask us to hold that the "fictional recognition" of the plaintiffs' purchase would not carry with it the legal result that the non-impleading the plaintiffs in the execution proceedings would render those proceedings null and void against them. In my opinion, there is no substance in this contention; nor do those observations of Chatterji, J., who delivered the leading judgment in that case, support him to the extent he would ask us to hold. That case dealt with a different set of facts altogether. In the case dealt with by the Full Bench, of which I happened to be a member, the rent decree had been obtained and the execution proceedings concluded with the sale before the amendment referred to above of S. 26 came into effect, and the Full Bench decision is authority only for this proposition that, if an interest has already been transferred as a result of an auction sale held in execution of a rent decree, that auction sale would not be affected by the coming into effect subsequently of the provisions of S. 26 N of the Bihar Tenancy Act. In the present case we do not know the exact date of the decree for rent; but we know this much that the auction sale was held on the 5th of June, 1936. Assuming for the purposes of this case that the decree for rent had been passed earlier than the 10th of June, 1935, it would be a good rent decree, and it could be executed as such, if all persons who became interested in the holding at the date of the sale had been impleaded as the judgment-debtors. In this case it is not disputed that the plaintiffs, who became 'raiyats' of the holding as a result of the operation of S. 26 N of the Bihar Tenancy Act, were not parties to the execution proceedings. Now, the question is—what is the effect of such an execution sale? It has been contended on behalf of the plaintiff-respondents in this Court, as it was done in the Courts below, that such an execution had the effect only of a money execution, inasmuch as the holding was not represented at all in the execution proceedings. When the auction sale took place on the 5th of June, 1936, the plaintiffs were the 'raiyats' in respect of the holding by operation of S. 26N of the Bihar Tenancy Act. It has been conceded that the plaintiffs had no notice of the execution proceedings. Hence, there is no sufficient reason to uphold the contention raised on behalf of the appellant that it was open to the plaintiffs to satisfy the decree under the provisions of Sub-s. (3) of S. 170 of the Bihar Tenancy Act. Can it be contended that the original tenants who were judgment-debtors in the decree for rent obtained by the defendant-second-party, represented the holding after the coming into effect of S. 26 N, as it then was, of the Bihar Tenancy Act? In my opinion, such a result would be absolutely against the policy of the legislature in enacting S. 26N of the Bihar Tenancy Act. That amendment was intended to confer a status on a transferee of a non-transferable occupancy holding which had been in possession of such a transferee for more than ten years before the enactment in question. The Privy Council in the case of 'A. H. Forbes v. Bahadur Singh', 41 Ind App 91 : 41 Cal 926 have laid it down that, in order to procure a sale of the holding itself, it is essential that the relationship of landlord and tenant should have continued until the decree was obtained which was the basis of the execution proceedings, and that principle has been extended by a Special Bench of the Calcutta High Court in the case of 'Krishnapada Chatterji v. Manadasundari Ghosh', 59 Cal 1202. That case is an authority for the proposition that, if the relationship of landlord and tenant has ceased at any time before the sale was held, such a sale has not the effect of passing the holding itself but only affects the right, title and interest of the persons who were impleaded as judgment-debtors. The position, therefore, is absolutely clear in law that the execution proceedings taken out by the decree-holder in the present case, after the coming into effect of S. 26 N of the Bihar Tenancy Act, against the original tenants of the holding had not the effect of passing the holding itself, and could affect only the right, title and interest of the judgment-debtors. In the case of 'Girish Chandra v. Narendra Nath', 23 Cal W N 654 a Bench of the Calcutta High Court has ruled that a sale held in execution of a decree for rent obtained against the original tenant, after the transferee of the non-transferable occupancy holding had been recognised by the decree-holder landlord, does not pass the holding itself, that is to say, does not affect the interest of the purchaser so recognised. The only difference between that case and the present case is that, whereas in that case the landlord himself had agreed to recognise the transfer after having obtained the decree against the original tenants, in the present case the provisions of S. 26N of the Bihar Tenancy Act, now replaced by the S. 26B proviso of the Act, make it clear that the landlord shall be deemed to have recognised the transfers in question. Reference was made by the learned Advocate for the appellant to the case of 'Sital Singh v. Ramjiprasad', A I R (25) 1938 Pat 591. But the facts of that case are entirely different from those of the present. In that case the mortgagee of a portion of a non-transferable occupancy holding had deposited the rent under the provisions of S. 171 of the Bihar Tenancy Act, and had taken possession of the holding as a statutory mortgagee. There was a transfer by way of sale of another portion of the same holding, not recognised by the landlord. That purchaser of the holding did not challenge the position of the mortgagee: it was the judgment-debtor himself, that is to say, the original 'raiyat', who challenged his position, and James, J. held that he could not challenge the mortgagee's deposit, as it was open to him to pay him out, and take possession of the holding. His Lordship expressly reserved his opinion on the position of the purchaser of the portion who had not come up to the Court to challenge the mortgagee's possession. Hence, that case has no bearing on the point in controversy in the present case.

(5) It was next contended that the lower appellate Court had misdirected itself in granting a decree for the entire disputed land in modification of the judgment and decree of the trial Court which had held that the interest of Lalji's branch in the holding had not been transferred to the plaintiffs. But, as rightly pointed out by the lower

appellate Court, nobody had even whispered in the pleadings, particularly the contesting defendant, that Lalji had any interest in that holding. There was no oral or documentary evidence to show that Lalji had an interest in the holding which was still outstanding after the purchases relied upon by the plaintiffs. But, in this Court, the appellant put in a certified copy of the entry in the record-of-rights in respect of the lands in dispute. That entry is of the year 1901. It has been found by both the Courts below that Lalji was a separated member, and, for aught we know, he may have partitioned the properties of the joint family, and taken his share from another block of lands belonging to the family. As this controversy had not been raised in the pleadings nor in the issues before the Courts below, naturally, there is paucity of evidence on that part of the case. This Court, sitting in second appeal, cannot admit the document adduced before us for the first time under the provisions of R. 27 of O. XLI of the Code of Civil Procedure, as there is no affidavit bringing the case within the purview of that rule. It is not stated in the affidavit filed in this Court that the appellant was not aware of the entry in the record-of-rights, or, being aware of those entries, had not the opportunity of adducing that document in evidence in the Courts below. It must, therefore, be held that no foundation has been laid for the reception of additional evidence at this late stage. The application, therefore, for reception of additional evidence must be rejected.

(6) In these circumstances, it must be held that the judgment and decree of the lower appellate Court are entirely correct. The appeal must be dismissed with costs.

(7) RAMASWAMI, J.: I agree.

D.H. *Appeal dismissed.*

A. I. R. (39) 1952 Patna 95 *[C. N. 39.]*

MANOHAR LALL AND RAY JJ.

Ramnath Ram, Appellant v. Jamuna Prasad and others, Respondents.

A. F. A. D. No. 1354 of 1946, D/- 5-4-1948.

Tenancy Laws — Bihar Tenancy Act (VIII (8) of 1885) S. 48A — Operates restrospectively on titles otherwise incomplete which are in existence accompanied with possession — Both title and possession of under-raiyat lawfully coming to end — S. 48A has no retrospective operation in such cases.

S. 48A operates retrospectively on titles otherwise incomplete which are either in existence accompanied with possession or which are under challenge being sub judice whether accompanied or not with possession. Where however both title and possession of the defendant under-raiyat have lawfully come to an end after surrender of under raiyati holding and during the year following the landlord had remained in khas occupation of the lands and later on settled the lands with the defendant, not meaning thereby to restore the previous holding of which he had sold one part and had appropriated for his own purpose another part and gave the defendant only the remainder for a term of years on condition that the defendant should vacate the same on its expiry, the new S. 48-A will have no operation in such a case so as to give the defendant any right of occupancy in the disputed lands. Case law reviewed. (*Para 12*)

R. S. Chatterji and A. N. Chatterji, for Appellant; Sarjoo Prasad, B. K. Sinha, and B. C. Ghosh, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('36) 17 Pat L T 25: (A I R (23) 1936 P C 49) (Pr 7)
('37) 18 Pat L T 345: (A I R (24) 1937 Pat 387) (Prs 7, 8)
('38) 17 Pat 333: (A I R (25) 1938 Pat 559) (Prs 8, 10)
('39) 1939 Pat W N 661 (Pr 11)
('40) 1940 Pat W N 272: (A I R (27) 1940 Pat 515) (Pr 9)
('41) 22 Pat L T 356: (A I R (28) 1941 Pat 413) (Pr 9)
('41) 22 Pat L T 505: (A I R (28) 1941 Pat 455) (Prs 10, 11)
('42) 1942 Pat W N 75 (Pr 9)
('43) 22 Pat 411: (A I R (30) 1943 Pat 206 F B) (Pr 9)

RAY, J.: This is a defendant's appeal in a suit in ejectment and for recovery of arrears of rent for the years 1347 to 1350. The plaintiff's father Raghunandan, had let out 2 bighas 3 kathas of kasht lands for the purpose of cultivation on a rental of Rs. 24/- to the defendant for a period of five years from 1346 to 1350 Fs. The defendant had executed a registered kabuliat on the 5-9-1938, to that effect. The defendant defaulted in payment of rent for the years in sit. Hence, the plaintiff instituted the suit for the reliefs already stated. The basis of the claim for ejectment is that defendant is an under-raiyat holding his interest for a term of years under a registered document, and hence liable to ejectment without any further notice to quit on expiry of the term of the written lease.

(2) The defendant, on the other hand, denies the aforesaid settlement of date 5-9-38, and claims to have been in possession as shikmidar since 1327 Fasli, and, as such, to have acquired a right of occupancy under S. 48-A of the Bihar Tenancy Act (inserted by an amending Act of 1938). The right to recover rent at the rate of Rs. 24/- is also challenged. According to the defendant, the kabuliat was obtained from him by the plaintiff through fraud.

(3) The facts found by both the Courts below are (1) that the defendant was in possession as 'shikmidar' of the disputed lands along with some other lands since 1328 to 1344; (2) that at the end of 1344 or beginning of 1345 the defendant surrendered possession of the under-raiyati holding and the plaintiff re-entered; (3) that thereafter the plaintiff sold a portion of those very lands and built a bungalow and sank a well on another portion and was in possession of the rest by khas cultivation throughout the year 1345; and (4) that thereafter the present settlement took place by virtue of which the defendant was inducted into the lands in suit in the year 1346 under a written lease for a term of 5 years (1346 to 1350 inclusive).

(4) Both the Courts below decreed the plaintiff's suit and negatived the defendant's claim of acquisition of occupancy right by virtue of the provisions of the Amended Tenancy Act. Hence, the second appeal.

(5) The contention in second appeal is that on account of retrospective operation of S. 48-A, the defendant shall be deemed to have acquired occupancy right by the year 1344 accruing from his continuous possession as under-raiyat for more than 12 years (1327 to 1344) wholly before the com-

mencement of the amending Act, and that, therefore, any contract which had the effect of bargaining the defendant out of his acquired occupancy rights was ineffective so as to deprive him of that right.

(6) In support of the above contention, based, as it is, upon the retrospective operation of the section, a number of authorities have been cited. Before I come to deal with them, I should observe that there is a very simple and clear answer to the contention of the learned Counsel. Assuming, though not deciding, that by the time of the Fasli year 1344 the defendant shall be deemed to have acquired occupancy right, it would have been quite open to him to surrender the same in favour of the landlord by giving up possession in his favour and allowing him to re-enter. Then the occupancy right shall cease and the lands would become bakasht lands of the landlord. Any subsequent settlement for a term of years under a written lease for less than the statutory period of 12 years would neither convey nor attract an occupancy right under the provisions of the new section. This, I think, is a complete answer to the defendant's case. Voluntary giving up of occupancy holding in favour of the landlord does not amount to contracting out of occupancy rights. It is optional with an occupancy raiyat either to continue holding the lands, or to give it up to the landlord though he cannot enter into a contract to the effect that he would be holding the lands as a raiyat but would not acquire any occupancy rights therein. Keeping this distinction in view, it is quite plain that the arrangement by which the defendant gave up the lands on to the possession of the plaintiff, be it for whatever short a period was a valid one and operated to extinguish the defendant's right of occupancy, if any

(7) But on discussion of the authorities which I am going to refer presently, I am of opinion that the new S. 48-A will have no operation in the present case so as to give the defendant any right of occupancy in the disputed lands. The basis of all the authorities, however, is the decision of the Privy Council in the case of 'K. C. Mukherjee v. Mt. Ramratan Kuer', 17 Pat L T 25. The decision involved a question of retrospective operation of S. 26-N of the amended Bihar Tenancy Act. The section reads as follows:

> "Every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift or will made before the first day of January 1923.....".

The material observations of their Lordships in the words of Sir Gorge Rankin are:

> "The object of this section can only be to quiet titles which are more than ten years old, and 'to ensure that if during these ten years the transferee has not been ejected he shall have the right to remain on the land'. Within this class the legislature has not thought fit to discriminate against tenants whose right is under challenge in a suit, a course which it may well have regarded as invidious or unnecessary. As substantive rights of landlords and their accrued causes of action were to be abrogated, respect for pending suits over old transfers cannot be assumed."

The dictum as expressed above manifests that retrospective operation of the section was not intended to revive the rights of transferees who had either been ejected to the complete extinguishment of their right by transfer, but could protect him whose right as transferee 'as against the landlord' was under challenge at the time the newly introduced section came into force. This decision was first followed in this Court in the case of 'Muhammad Shafait v. Nithali Ram', 18 Pat L T 345. As in the instant case, the contention there centred round the fact that the landlord had by the time the section came into force, in execution of a decree for arrears of rent obtained against the recorded tenants in disregard of the transferee, purchased the holding and had obtained possession thereof through Court, and that thus the holding had come to an end thereby excluding application of the section. This contention was met by Khwaja Mohammad Noor, J. in the following terms:

> "In this particular case the defendant landlord did not enter into possession of the holding in his capacity as landlord having treated it as an abandoned holding. He entered into it as the purchaser in execution of a simple money decree. Now when he is called upon to surrender its possession to the plaintiffs who have purchased it from the original raiyats and whose title has become complete by the operation of law, contends that he is entitled to remain on the land because he is the landlord. He cannot be allowed to do so, as there was no abandonment. He must be deemed to have given his consent to the transfer. I think the clear meaning of the section is that when the Act came into force, the plaintiffs' title to the land which they had purchased from the original raiyats became complete. There is no answer to the suit since then."

As the decision explains itself more clearly than I can do it in my own words, I should not hazard my comments thereon.

(8) The next case that has been brought to our notice in course of argument is the case of 'Thakur Rai v. Issardyal Prashad', 17 Pat 333. This was a decision upon retrospective application of S. 26-N. The contention advanced in that case was "the section is only retrospective to the extent of its relating to titles which have not been disturbed." Wort J. in his judgment amplifies this submission of the Counsel in the following words:

> "The argument is that the action of 1931 having been brought against all the recorded tenants, as the Judge in the Court below has found, he (the landlord) obtained a rent decree the result of which was that the plaintiff's title was brought to an end.... The words relied upon by the respondents (from the decision of Sir George Rankin in the Privy Council) are 'and to ensure that if during those ten years the transferee has not been ejected he shall have the right to remain on the land', and it is the contention of the respondents that the plaintiff has been ejected and therefore the decision of their Lordships of the Privy Council will have the limited effect which the words of Sir George Rankin indicate".

In answer to this contention his Lordship (Wort, J.) said:

> "But the answer to that is that the plaintiff has not been affected, he was not a party to the action, and if he can show that he has a title as well as that he was not affected by the decree of 1931, it would appear that his right of action is clearly established."

Later in course of the judgment his Lordship quoted with approval the decision of Khwaja Mohammad Noor, J. in '18 P L T 345."

(9) The decision in the case of 'Sadhu Sharan Singh v. Deonath Saran Rai', 22 Pat 411 is more or less directly in point, at least in the sense that it deals with retrospective application of the very S. 48-A with which we are to deal in the case before us. The short facts on which the decision of that case turned were that the landlord had served a notice to quit on the under-raiyat in accordance with the provisions of S. 49 of the Act. Thereafter he instituted a suit for ejectment. During the pendency thereof S. 48-A was enacted. The question that arose for decision was whether the under-tenancy had been terminated by service of notice to quit, and whether if it did so, the enactment of S. 48-A would still confer a right of occupancy to the under-raiyat for the time being so as to defeat the plaintiff-landlord's claim to eject and re-enter. His Lordship Chatterji, J. met the contention with the following words:

"This point, however, has been considered by this Court in the cases of 'Agin Singh v. Bhudeo Singh', 1940 Pat W N 272, 'Bhagwati Prasad v. Sahdeo Upadhya', 22 Pat L T 356 and Ram Charitar Sah v. Doma Mian', 1942 Pat W N 75, all of them decided by Division Bench. In all these cases it has been consistently held that by reason of the words 'shall be deemed to have acquired, on the expiration of that period a right of occupancy', S. 48-A is clearly retrospective and applies to all persons who have held as under-raiyats and who have not been ejected when the section came into force. The contention that the under-raiyati interest of Gaya Singh had already been determined by service of notice before the institution of the suit and therefore the rights of the parties could not be affected by S. 48-A, which came into force after such determination, is without any substance. The service of notice merely furnished a cause of action for the ejectment suit, because without it no suit would lie under S. 49. But the notice could not extinguish the under-raiyati interest of Gaya Singh. S. 89 of the Bihar Tenancy Act provides:

'No tenant shall be ejected from his tenure or holding except in execution of a decree.'

Until Gaya Singh was ejected in execution of a decree, his right could not be extinguished. S. 48-A is, by express terms, made retrospective, and it has been held in the said previous decisions of this Court that it would apply to a pending action. There is no reason to dissent from the view taken in these decisions."

I should further add that service of notice to quit does terminate a tenancy governed by the T. P. Act because the Act says so expressly, while there is no such provision in the Bihar Tenancy Act. S. 49 which provides for service of notice to quit is expressed in different terms, namely, that an under-raiyat shall not be ejected except only six months after service of a notice to quit etc. The ratio of the decision, however, is that until the under-raiyat has been ejected, he can have the benefit of the retrospective operation of the section.

(10) In the case of 'Raja Jha v. Ram Chandra Jha', 22 Pat L T 505 to which my learned brother was a party and which turned upon retrospective application of S. 26-N the accepted proposition as correctly summarised in the headnote was:

"Though S. 26-N, Bihar Tenancy Act, was expressly made retrospective it could not possibly affect rent decrees which had been obtained and which had been fully executed previous to the section coming into force. The section would apply to all cases which had not been the subject-matter of litigation or which were actually the subject-matter of litigation when the amending Act came into force, namely, on the 10th of June, 1935. The section can have no application whatsoever when the transferee had been lawfully ejected before the amending Act came into operation."

I should note, however, that on a certain point not material to the present case the decision in this case is in conflict with the decision in the case of 'Thakur Rai v. Issardeyal', 17 Pat 333 in which the tenancy had been sold in execution of a rent decree purchased by the landlord and had been taken possession of on ejecting the transferee, but it was held that the transferee could, on the strength of the newly added S. 26-N, recover possession. This position was almost directly negatived in the case of 'Raja Jha v. Ram Chandra Jha', 22 P L T 505. However, this conflict, if at all, has no reference to the question under consideration before us.

(11) The only other case cited was 'Chandrika Prasad v. Ram Lal', 1939 Pat W N 661. This decision related to interpretation of S. 26-N. An occupancy holding had been transferred in the year 1912 and the transferee continued in possession up till the time when litigation arose. It was held that notwithstanding that the holding had passed to the plaintiff-landlord by his auction-purchase in execution of a rent decree validly and lawfully obtained against the recorded tenants, he could not eject the transferee as by the time he brought the suit for the purpose, the transferee had acquired a right of occupancy by operation of the section. The distinguishing feature between this case and the case in "22 Pat L T 505' (both being judgments of Harries, C. J.) is that in the latter the transferee had been ejected by the auction-purchaser by virtue of his purchase in execution of a rent decree, while in the former '1939 Pat W N 661' there was auction sale of the occupancy holding in execution of the rent decree but the transferee continued to be in possession.

(12) The principle that emerges out of review of the above authorities is that the section operates retrospectively on titles otherwise incomplete which are either in existence accompanied with possession or which are under challenge being sub judice whether accompanied or not with possession. In the present case, however, both title and possession of the under-raiyat have lawfully come to an end, and during the year 1345 the landlord had remained in khas occupation of the lands. Later when he settled the disputed lands with the defendant he did not mean to restore the previous holding of which admittedly he had sold one part and had appropriated, for his own purpose another part and have the tenant only the remainder for a term of years on condition that the defendant should vacate the same on its expiry. As I hold that the defendant could not be deemed to have acquired occupancy right in the year 1946 when the new settlement was arrived at between him and the landlord, he cannot challenge the validity of the settlement on the ground that it contravenes the statutory prohibition in the Bihar Tenancy Act that no occupancy raiyat can contract himself out of his rights as such.

(13) Section 48-A runs as follows:

"Every person who, for a period of twelve years, whether wholly or partly before or after the commencement of the Bihar Tenancy (Amendment) Act, 1938, has continuously held land as an under-raiyat in any village, whether under a lease or otherwise, shall be deemed to have acquired, on the expiration of that period, a right of occupancy in the land which he has so held for the said period."

The learned Counsel for the appellant lays stress upon the words "shall be deemed to have acquired on the expiration of that period (of 12 years) a right of occupancy" and contends that in the circumstances of this case, the defendant shall be deemed to have acquired occupancy right by the end of the year 1344 when he is said to have given up the lands to the landlord on the footing that he was an under-raiyat. But the fallacy in this argument consists in over-looking the fact as to when he shall be so deemed. There can be no doubt that he shall be so deemed at the time when the section comes into operation but the right that he shall be deemed to have acquired must date back to the time when he completed 12 years' possession as under-raiyat. But if no under raiyati right is in existence either actually or even notionally at the date the section comes into force, there is no subject on which the section would operate and which may be so deemed within the purview of the section.

(14) In consideration of what I have said above, I have no hesitation in pronouncing that the appeal has no merit, and, is, therefore, dismissed with costs.

(15) MANOHAR LALL, J.: I agree. It is difficult for me to understand how the defendant can claim to be protected by the retrospective operation of Section 48-A of the Bihar Tenancy Act, because the defendant on the findings of fact had surrendered and given up possession of his holding to the landlord before this Act came into force and he was let into possession under a new arrangement between him and the landlord about one year after he gave up the possession of the land. It has also been found that the area of which he was put in possession was a different area from the area of the original holding.

R.G.D. *Appeal dismissed.*

A. I. R. (39) 1952 Patna 93 *[C. N. 40.]*

AGARWALA, C. J.

Baldeo Sahu and others, Appellants v. Sm. Dukhi Kuer and another, Respondents.

A. F. A. D. No. 2176 of 1948, D/- 12-12-1949.

Civil P. C. (1908), Ss. 100-101 — Registered sale-deed — Question as to when title passes.

In the case of a transfer by a registered sale-deed, what the intention of the parties was as to the passing of the title, is a question of fact. Where the Courts below have agreed, on a construction of the document and the surrounding circumstances, that the parties intended title should pass on the date the document was executed, the High Court in second appeal would refuse to interfere with the finding. (*Para 2*)

Anno: Civil P. C., S. 100-101, N. 29, 54.

Rajkishore Prasad, for Appellants. A.B.N. Sinha, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('20) AIR (7) 1920 Pat 774: (59 Ind Cas 171) (Pr 2)

('34) AIR (21) 1934 Pat 68: (147 Ind Cas 767) (Pr 2)

('47) AIR (34) 1947 Pat 1: (223 Ind Cas 126) (Pr 2)

('49) LPA No. 33 of 1947, D/- 2-8-1949 (Pat) (Pr 2)

JUDGMENT.: This is an appeal by the defendants from concurrent findings of the Courts below. The appeal arose out of a suit by the plaintiffs to recover possession of property covered by a sale-deed executed in favour by defendants 1 to 3 on the 28th of November 1943. The recitals stated that the subject-matter of the deed was being conveyed to the vendee for a consideration of Rs. 250/- and that the right, title and interest of the vendor vested in the vendee from the date of the execution of the sale-deed. It was also recited that the consideration money had passed to the vendor, and that the vendee had been put in possession. Nevertheless, on the 14th of January 1946, the vendor purported to cancel this deed on the ground that the consideration money had not been paid by the vendee, and that the latter had not been put in possession. On the following day the vendor executed another deed of sale in favour of defendant No. 4. On a construction of the deed, the Courts below have taken the view that it was the intention of the parties that title should pass to the vendee on the date the deed was executed.

(2) It is contended that in view of the recitals that consideration had passed and possession had been delivered, it should have been held by the Courts below that the intention of the parties was not that the title should pass on the date the sale-deed was executed but on the date when the consideration was paid. In a number of decisions in this and other Courts it has been held that, although normally in the case of a transfer by a registered deed, title passes on registration, yet if the language of the deed shows that it was the intention of the parties that title should pass at some other time, then mere registration does not suffice to pass the title. In all these cases, however, what the intention of the parties was, was regarded as a question of fact. Where it has not been possible to ascertain the intention of the parties from the document itself, and it was not possible either in the three cases cited before me by the defendants, appellant, this Court refused to interfere with the conclusion of the Courts below that it was not the intention of the parties that title should pass on registration but that it should pass on payment of the consideration. Those cases are: 'Raju Mahton v. Hossaini Mian', AIR (7) 1920 Pat 774; 'Abdullah v. Bichuk Gossain', AIR (21) 1934 Pat 68 and 'Pirtam Singh v. Jagannath Sarawgi', AIR (34) 1947 Pat 1. The only case I have come across in which this Court did upset the finding of the Court below with regard to the intention of the parties is L P A No. 33 of 1947. In that case Mukherji, J., sitting singly, reversed the decision of the Court below that it was the intention of the parties that title should pass only on payment of consideration. Mukherji J. held that the Court of appeal below was not entitled to go outside the terms of the document for the purpose of ascertaining the intention of the parties. He, therefore, reversed the decision of the Subordinate Judge and restored the decision of the Munsiff. In the 'Letters Patent Appeal' it was held that the Subordinate Judge, as a final Court of fact, was entitled to come to a decision with regard to the intention of the parties, and Mukherji, J., in Second Appeal was entitled to interfere with that finding. The result was that the decision of Mukherji, J., was set aside, and the decision of the lower appellate Court was restored. Here too the Courts below have agreed on a construction of the document and the surrounding circumstances that the parties intended title to pass on the date the document was executed.

(3) The appeal is dismissed with costs.

(4) The Court of appeal below gave the plaintiff a decree directing that the consideration money

of Rs. 250/- was to be paid within one month. If the money has not been paid or deposited in Court, the plaintiff will have one month from today to make the payment, failing that the suit will stand dismissed.

V.B.B. *Appeal dismissed.*

A. I. R. (39) 1952 Patna 99 *[C. N. 41.]*

IMAM AND DAS, JJ.

Dr. Parmanand Verma, Petitioner v. Satnarain Prasad and another, Opposite Party.

Civil Revision No. 520 of 1947, D/- 5-3-1948.

Tenancy Laws — Bihar Tenancy Act (VIII (8) of 1885), S. 174 — Application to set aside sale should contain a prayer to set aside sale and must accompany with deposit of decretal amount with compensation — Application not containing prayer — Court held was within jurisdiction to set aside sale. — Civil P. C., (1908), O. 21, R. 89.

While the Court must insist that application under S. 174 to set aside the sale must accompany the deposit and that a mere deposit without such an application would not entitle a Court to set aside the sale, a reasonable interpretation must be given to such an application. Where the judgment-debtor deposits the decretal amount with compensation without an express prayer to set aside the sale, the petition as a whole has to be considered and the prayer that justice may be done on the deposit being made, may be taken to amount to a prayer that the sale be set aside; otherwise there would be no reasonable meaning to such an application. In such a case the Court would not be acting without jurisdiction or with material irregularity in the exercise of its jurisdiction in setting aside the sale AIR (27) 1940 Pat 87; AIR (3) 1916 Pat 290; AIR (26) 1939 Cal 153, Rel. on. (*Para 4*)

Anno: Civil P. C., O. 21, R. 89, N. 17.

C. P. Sinha and Shambhu Nath; for Petitioner; Jagdish N. Varma, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('39) 43 Cal W N 252: (AIR (26) 1939 Cal 153) (Pr 4)

('33) AIR (20) 1933 Lah 210: (141 Ind Cas 421) (Pr 6)

('17) AIR (4) 1917 Mad 225: (32 Ind Cas 45) (Pr 6)

('28) AIR (15) 1928 Nag 111: (106 Ind Cas 333) Pr (6)

('16) 1 Pat LJ 459: (AIR (3) 1916 Pat 290) (Pr 4)

('23) AIR (10) 1923 Pat 159: (68 Ind Cas 629) (Pr 6)

('40) AIR (27) 1940 Pat 87: (18 Pat 210) (Prs 2, 4, 5)

IMAM, J.: This is an application by the auction purchaser against the order of the Munsiff, 2nd Court, Monghyr, who set aside a sale as the full decretal dues with compensation had been deposited. The sale was held on the 29th April 1947 in execution of a decree for rent and at that sale the petitioner was an auction-purchaser not being the decree-holder. On the 30th May 1947 the opposite party judgment-debtors filed a petition to be allowed to make the necessary deposits. The deposit was actually made on the 31st May 1947. The judgment-debtors had filed a petition supported by an affidavit that the deposit could not be made on the 30th May 1947, as it had already become late after undergoing the procedure of deposit and by the time it was complete, the Registrar had already left the Court. The Munsiff having believed the petition of the judgment-debtors was of the opinion that the deposit made would be considered to have been made on the 30th May 1947, as he had ordered that the money sought to be deposited be accepted.

(2) The petitioner, however, had taken an objection before the learned Munsiff to the effect that no formal application for setting aside the sale had been made and hence the sale could not be set aside. Reliance was placed on a decision of this Court in 'Dhari Jena v. Gaurang Charan', AIR (27) 1940 Pat 87. The learned Munsiff was of the opinion that the case cited was not applicable as the deposit in that case was one under Order 21, Rule 89, whereas the present application had been made under Section 174 of the Bihar Tenancy Act. He, therefore, thought that no formal application to set aside the sale was

> "necessary and the deposit of the purchase money with compensation itself for an application for setting aside the sale."

(3) Mr. C. P. Sinha had urged that the deposit was made beyond 30 days of the sale, therefore, the application was time-barred. The last day for deposit was the 29th May 1947. 29th of May 1947, however, was a holiday and it was conceded by the pleader for the decree-holder in the Court below that the deposit was good if it be found that it was made on the 30th May 1947, because the 30th day after the sale was a holiday. It appears that on the 30th May 1947, the judgment-debtors had applied to the executing Court to deposit the money and the Munsiff had ordered that it be accepted as would be evident from the chalan. In the circumstances as I have already stated he thought that the deposit must be regarded as having been made on the 30th May 1947, and not the 31st May 1947. I am in agreement with the Munsiff that so far as the deposit is concerned, having regard to the facts, that it must be treated as having been made on the 30th May 1947 and therefore within time. Mr. Sinha, however, had raised a further question in this Court, which apparently had not been raised in the Court below, to the effect that the deposit to be made must not only be the amount recoverable under the decree with costs, but there should be a further deposit of a sum equal to 5 per cent of the purchase money. While the chalan showing the deposit of the amount recovarable under the decree bears the signature of the Munsiff as well as the seal of the Court, there appears to be no signature of the Munsiff or the seal of the Court on the chalan with reference to the compensation money, that is to say, 5 per centum of the purchase money. I am not too sure whether in Civil Revision, for the first time, this submission on behalf of the petitioner can be entertained as the point ought to have been raised before the Munsiff where the facts could have been ascertained. It is, however, significant that in the chalan which bears the signature of the Munsiff and the seal of the Court, in one of the columns, it was originally stated that the chalan was for the amount recoverable under the decree as well as compensation. The word "compensation' then appears to have been cut out and another chalan for the compensation money was filled in. It is just possible that when the signature of the Munsiff was being obtained on the first chalan, the other chalan, through oversight, was not singed by the Munsiff. The entry in the first chalan, which was signed by the Munsiff, that the money to be deposited included compensation is a sufficient indication to mean that the judgment-debtors had at first thought that the amount re-

coverable under the decree as well as the compensation money could be deposited by means of a single chalan. As the question was not raised in the Court below and it had been conceded by the pleader for the decree-holder that the deposit was good, if it was to be treated as having been made on the 30th May 1947, the submission of Mr. Sinha now made ought not to be entertained.

(4) I think it may now be regarded as well settled, under Order 21, Rule 89, that a mere deposit of the decretal dues and compensation money would not be sufficient to set aside the sale unless it was accompanied by an application to set aside the sale. The decision of this Court in 'Dhari Jena v. Gauranga Charan', AIR (27) 1940 Pat 87, is in point. The learned Munsiff, however, thought that there was a distinction to be made as the application of the judgment-debtors was under Section 174 of the Bihar Tenancy Act. This section states:

"Where a tenure or holding or portion of a holding is sold for an arrear of rent due in respect of the tenure or holding then, at any time within thirty days from the date of sale, the judgment-debtor or any person whose interests are affected by the sale, other than a transferee of a holding from whom the landlord is entitled to receive the landlord's registration fee and who has neither paid the landlord's registration fee to the landlord nor deposited the same with the Collector, 'may apply to have the sale set aside', on his depositing in Court for payment to the decree-holder, the amount recoverable under the decree with costs, and, for payment to the purchaser, a sum equal to five per centum of the purchase money."

The words "may apply to have the sale set aside" in this section correspond to the words used in Order 21, Rule 89 of the Code of Civil Procedure and I think that no real distinction can be made as was held by the Munsiff. In this connection I would refer to the following observations of Atkinson and Jwala Prasad, JJ., in the case of 'Sarjoo Prasad v. Nannoo Rai', 1 Pat L J 459 at p. 462.

"But when we compare the two sections, Section 174 of the Bengal Tenancy Act and Order 21, Rule 89 of the new Code it requires a very subtle mind to distinguish any essential difference between the obligations imposed by both these sections. To my mind it is merely trifling with words to suggest as has been suggested, that there is any material difference between the two sections."

In the case before me when the deposit was made it was accompanied by an application and the following is the official translation of that petition:

"It is submitted that the decree-holder has obtained the decree surreptitiously. This petitioner has no knowledge whatever about it. All of a sudden yesterday the petitioner has learnt that the sale was to be confirmed today. Therefore this petition is filed and it is prayed that the entire decretal amount has been brought to Court. I herewith file the chalan along with this petition. The chalan may be passed in the name of Maulvi Mohammad Yusuf Vakil II and order may be passed to accept this amount today so that justice may be done."

It is true that the application does not state in so many words that the sale be set aside. The petition as a whole has to be considered and the prayer that justice may be done on the deposit being made amounts, in my opinion, to a prayer that the sale be set aside; otherwise there would be no reasonable meaning to such an application. While the Courts must insist, having regard to the authorities, that an application to set aside the sale must accompany the deposit and that a mere deposit without such an application would not entitle a Court to set aside the sale, I think that a reasonable interpretation must be given to such an application as was filed in this case. In this connection I would refer to the decision of Nasim Ali, J., in the case of 'Jyotish Chandra v. Surendra Nath', 43 Cal W N 252, where in the chalan itself the purpose of the deposit had been stated but no application for setting aside the sale had been filed. It was held by him that the Court had jurisdiction to set aside the sale. In my opinion, it cannot be said that the learned Munsiff acted without jurisdiction or with material irregularity in the exercise of his jurisdiction in setting aside the sale.

(5) The application must accordingly be dismissed with costs. Hearing fee one gold mohur.

(6) DAS, J.: I agree, and would like to add that in some decisions it has been observed that the application may be oral or written. There are decisions which have even gone to the extent of saying that the filing of a chalan with permission to deposit in Court the decree amount and a sum equal to 5 per cent. of the purchase money should by itself be treated as an application to set aside the sale. It is, however, not necessary to go to that extent in the present case, as it may be argued that the decision of this Court in 'Dhari Jena v. Gouranga Charan', AIR (27) 1940 Pat 87, is against that view; in that case the deposit was made by a chalan and was not accompanied by any application whatever. As my learned brother has pointed out, on a proper construction of the application filed in this case, it must be held that the applicant wanted the Court to set aside the sale, though no express prayer to set aside the sale was made. I do not think the absence of an express prayer to set aside the sale need necessarily invalidate the application (See 'Veettil Seethi v. Ambalath Veettil Kolathur Ahmad', AIR (4) 1917 Mad 225; 'Ranya v. Baliram', AIR (15) 1928 Nag 111, and 'Benarasi Das v. Ram Chander', AIR (20) 1933 Lah 210). Unless I am forced to take such a technical view by the terms of the rule or section, I shall be most reluctant to do so, and the rule or section does not say that the application must be in a particular form or contain a prayer in express words to set aside the sale. The decision in 'Ramshivendra Narayan v. Awadh Bihary', AIR (10) 1923 Pat 159 does not indicate that such a restricted view of the rule must be taken.

R.G.D. *Application dismissed.*

A. I. R. (39) 1952 Patna 100 *[C. N. 42.]*

AGARWALA, C. J.

Kasi Sao, Petitioner v. The King.

Criminal Revision No. 1204 of 1949, D/- 25-10-1949.

Essential Supplies (Temporary Powers) Act (1946), S. 11 — Report of public servant — Duty of prosecution.

S. 11 requires the prosecution to prove that a report has been made in writing by a public servant, and to take care to see that that report is on the record. It is the essential material to enable a Court to take cognizance of an offence under the Act, and, therefore, it must be on the judicial record of the case. (Para 1)

Baldeva Sahay and Ramanand Sinha, for Petitioner; Standing Counsel, for the Crown.

ORDER: The petitioner has been convicted of an offence under Section 7 of the Essential Supplies (Temporary Powers) Act, 1946. Section 11 of

that Act prohibits taking cognizance of any offence punishable under the Act except on a report in writing of the facts constituting such offence made by a person who is a public servant as defined in Secton 21 of the Indian Penal Code. Nobody can be under any doubt that this section requires the prosecution to prove that a report has been made in writing by a public servant, and to take care to see that that report is on the record. It is the essential material to enable a Court to take cognizance of an offence under the Act, and, therefore, it must be on the judicial record of the case.

(2) The facts alleged in the present case are that the Assistant Food Officer inspected the godown of the petitioner on the 21st of August 1947, and found 49 bags of rice. He weighed one of these bags and found an approximate weight of about 2½ maunds. The weight of the 49 bags, therefore, would be about 122 maunds which was far in excess of what the petitioner was entitled to have in storage without a license. The Assistant Food Officer neither seized these bags of rice nor took the precaution of putting them under lock and key so that they may not be tampered with. The next day the petitioner went to him and requested that re-weighment be made as it was possible that some of the bags contained considerably less than 2½ maunds. On this request 5 bags were selected at random and on calculation of their average weight, it was found that the weight of the 49 bags would be about 105 maunds which was still considerably in excess of what the petitioner was entitled to have in his possession without a license. It is alleged that while the search list was being prepared on the 22nd of August, the petitioner took from the Assistant Food Officer the search list which had been prepared on the previous day and tore it up. A report was made to the police and a final report was submitted stating that although an offence under Section 426 had been committed, there was no reliable evidence that an offence under the Essential Supplies Act has been committed. The Sub-Divisional Officer, however, considered that the offence committed was under Section 477 and summoned the accused to stand their trial on a charge under that section. The case was then transferred to Mr. Munim for disposal who was a Magistrate of the second class. Mr. Munim reported that he had no jurisdiction to try the offence under Section 477, and sent the record back to the Sub-Divisional Magistrate who then transferred it to Mr. Saran, a Magistrate of the first class. At the trial the petitioner was charged with an offence under Section 201 of the Penal Code, and also both he and his father were charged with an offence under Section 7 of the Essential Supplies Act although there was on the record no report of a public servant relating to the commission of an offence under the Essential Supplies Act The petitioner's father was acquitted. The petitioner was also acquitted on the charge under Section 201 but convicted on the charge under Section 7 of the Essential Supplies Act. Unfortunately the prosecution not having established that a public officer ever made a report of facts constituting an offence under that Act, the present conviction and sentence must be set aside.

(3) Let a copy of this order be sent to the Provincial Government as an illustration of the negligence which resulted in the failure of the prosecution.

V.R.B. *Conviction and sentence set aside.*

A. I. R. (39) 1952 Patna 101 *[C. N. 43.]*

SHEARER AND REUBEN, JJ.

Purna Chandra Tewari and others, Appellants v. Gobinda Mishra and others, Respondents.

A. F. A. D. No. 2248 of 1946, D/- 2-4-1948.

(a) *Transfer of Property Act (1882), S. 60 — Execution of mortgage decree for sale — Mortgage decree-holder purchasing mortgaged property — He acquires the rights of the mortgagor — Integrity of mortgage is broken up — Person interested in portion of mortgaged property not impleaded in suit — Suit for redemption by such person: Held that he was entitled only to partial redemption. 'Case law considered'* (*Paras 14 and 21*)

Annotation: T. P. Act S. 60, N. 44.

(b) *Civil P. C. (1908), O. 41, R. 23 — Appeal dismissed and case remanded for consideration of points raised in cross-objection — Effect stated.*

In appeal, plaintiffs asking that in place of partial redemption, they should be allowed to redeem active mortgage — Defendants in cross-objection asking that decree for partial redemption should be set aside altogether — Appeal dismissed and case remanded for rehearing in pursuance of cross-objection — Decision is final so far as appellate Court is concerned that plaintiff could not get anything more than decree for partial redemption — Question whether they were entitled to decree for redemption at all was left open to be decided on basis of rehearing on remand — Decree for partial redemption was not confirmed by dismissal of appeal. (*Para 6*)

Anno: Civil P. C., O. 41, R. 33 N. 27.

(c) *Civil P. C. (1908), O. 41, R. 25 — Proper order of remand stated — Lower Court should not be directed to dispose of suit on result of its investigation of issue referred.*

It is not a proper procedure to remand an issue to the lower Court with an order to reopen the suit and dispose of the suit on the result of its investigation of the issue referred to him, leaving it to any party that may be aggrieved by the fresh decision to file a fresh appeal. This procedure obviously causes unnecessary harassment to the parties. The proper procedure is provided by O. 41, R. 25 under which the appellate Court is empowered if necessary to frame issues and refer the same for trial to the Court from whose decree the appeal is preferred and it is directed that the lower Court shall proceed to try such issues, and shall return the evidence to the appellate Court together with its finding thereon and the reasons therefor. (*Para 12*)

Anno: Civil P. C., O. 41, R. 25 N. 8.

Jyotirmay Ghosh, for Appellants; S. C. Majumdar and S. K. Majumdar and Dr. D. N. Mitter, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('20) 47 Ind App 207: (AIR (8) 1921 P C 125) (Prs 18, 20)

('43) 47 Cal W N 1: (AIR (29) 1942 P C 50) (Prs 17, 20)

('09) 31 All 335: (1 Ind Cas 779) (Pr 14)

('17) 39 All 719: (AIR (4) 1917 All 401) (Prs 18, 19)

('07) 11 Cal W N 403: (5 Cal L J 315) (Pr 14)

('03) 30 Cal 755: (7 Cal W N 723) (Pr 14)

('19) AIR (6) 1919 Pat 399: (52 Ind Cas 512) (Pr 14)

('28) 8 Pat L T 81: (AIR (14) 1927 Pat 25) (Pr 20)

('30) 9 Pat 930: (AIR (17) 1930 Pat 579) (Prs 15, 20)
('34) AIR (21) 1934 Pat 648: (13 Pat 364) (Pr 16)
('40) AIR (27) 1940 Pat 45: (184 Ind Cas 124) (Pr 20)
('45) AIR (32) 1945 Pat 106: (23 Pat 648) (Pr 16)

REUBEN, J.: This appeal by the plaintiff is directed against a decision of the Additional Subordinate Judge of Purulia, dated the 25th July 1945, dismissing an appeal against decision of the Munsiff of Raghunathpur, dated the 24th March 1945. A cross-objection was filed in the lower appellate Court. This has been allowed and the suit has been remanded for a fresh decision on Issue No. 7 framed by the Munsiff and also on new issues directed to be framed by the Subordinate Judge. The appeal arises out of a suit for redemption.

(2) The mortgaged property consists of a one anna share in a 'Kheraj brahmottar' interest in mouza Mettala. The 'Kheraj brahmottar' interest to the extent of four annas was held by four brothers, Hari Lall Tewari, Madhu Lall Tewari, Thakur Lall Tewari and Jatan Lall Tewari, each of the brothers being entitled to an interest of one anna. The one anna interest of Madhu Lall Tewari was mortgaged by his grandson, Jasodanandan Tiwari (defendant No. 5), on the 26th May, 1921, to one Siva Narayan Mishra, father of defendants Nos. 1 to 3 and husband of defendant No. 4. Subsequent to this mortgage, on the 3rd November 1924, the Tewaris of the four branches executed an 'arpannama', dedicating some of the 'Kheraj brahmottar' interest to Sri Sri Durga Mata for the purpose of Durga Puja. This 'arpannama' included some of the mortgagee sued on the foot of his mortgage (Mortgage Suit No. 103 of 1934), and got a decree for sale. In this suit, the Diety was not impleaded. In execution of the decree, Kanai Lal Mudi (Defendant No. 6), purchased the mortgaged property on the 9th of December 1935, in full satisfaction of the decretal dues and got delivery of possession on the 3rd April 1936. Subsequently he sold his interest to defendants Nos. 8 and 9, who have themselves transferred a three pies share out of this interest to defendants Nos. 10 to 13. The present suit has been brought by the Diety, represented by plaintiffs Nos. 1 to 6 as 'sebaits', for redeeming the entire mortgage. They have impleaded as defendants, defendants Nos. 8 and 14, whom they describe as 'sebaits' of the Diety, alleging that they are unwilling to join as plaintiffs. According to the plaintiffs, two members of each branch of the family were appointed as 'sebaits' of the Diety, plaintiffs Nos. 1 and 2 representing the branch of Hari Lall, Plaintiffs Nos. 5 & 6 the branch of Madhu Lall, plaintiffs Nos. 3 and 4 the branch of Thakur Lall, and defendants 8 and 14 the branch of Jatan Lall.

(3) The defence substantially was that the 'debottar' grant was not valid, and that it was not acted upon, and, finally, that even if it was a valid and effective grant, the plaintiffs are entitled to redeem only the property governed by the grant and not the entire mortgaged property.

(4) The Munsiff, in a detailed and painstaking judgment, decided the first two points in favour of the plaintiffs. The third point he decided in favour of the defendants and decreed the suit accordingly.

(5) An appeal was filed against this decision by the plaintiffs. There was a cross-objection by the defendants. On the point regarding partial redemption, the Subordinate Judge agreed with the Munsiff and dismissed the appeal. As regards the validity of the grant, he considered that further investigation was necessary on certain points specified by him and directed the Munsiff to investigate them after giving the parties an opportunity of adducing fresh evidence thereon. He considered that the Munsiff had not properly discussed the evidence on the record as to whether the 'arpannama' had been acted upon. He, therefore, set aside the Munsiff's finding on the point and directed him to give a fresh finding on a reconsideration of the evidence "according to law."

(6) The first point urged by Mr. Ghosh on behalf of the appellants is that, by the dismissal of the appeal, the Subordinate Judge confirmed the decree for partial redemption and, therefore, the order remanding the case was without jurisdiction. It seems to me that the effect of the order dismissing the appeal must be considered in the light of all the circumstances of the case. Ordinarily, where there is only an appeal and no cross-objection, the effect of dismissing an appeal is to confirm the decree of the lower Court. Here, however, there was a cross-objection and that cross-objection was given effect to by the Subordinate Judge at the same time that he dismissed the appeal. We have, therefore, to consider exactly what relief was asked for by the appeal and by the cross-objection. In the appeal what the plaintiffs asked for was that, in place of partial redemption, they should be allowed to redeem the entire mortgage. In the cross-objection the defendants asked that the decree for partial redemption should be set aside altogether. When, therefore, the Subordinate Judge dismissed the appeal and remanded the case for rehearing in pursuance of the cross-objection, he decided finally so far as his Court was concerned that the plaintiffs could not get anything more than a decree for partial redemption. At the same time, however, he kept open the question as to whether they were entitled to a decree for redemption at all — a question to be decided on the basis of the rehearing directed by him. There is, therefore, no force in this contention of Mr. Ghosh.

(7) Next Mr. Ghosh urges that the validity of the 'arpannama' and the investigation as to whether it was acted upon raises questions of paramount title which ought not to be gone into in a mortgage suit. I do not think that there is any force in this contention. These issues directly relate to the title of the plaintiffs to redeem the property and to maintain this suit. Under the sale in execution of the mortgage decree in Suit No. 103 of 1934 and the subsequent sales mentioned above, the title to the one anna share of Madhu Lall Tewari has passed to the contesting defendants and they are entitled to challenge the validity and effect of the 'arpannama' so far as it relates to this property. It must be remembered, however, that the 'arpannama' was executed in 1924 and the challenge to the title of the deity has been raised in 1944. Supposing that effect was given to the 'arpannama', it seems very unlikely that there still survives in any one the right to challenge the title of the diety. Therefore, if in the rehearing by the lower Appellate Court which we propose to order, the learned Judge finds that the arpannama was acted upon, it will be necessary for him to consider further whether the right to challenge the title of the deity survives.

(8) The next contention of Mr. Ghosh is that there is sufficient evidence upon the record relating to the issues in respect of which the remand has been made and the Subordinate Judge was not justified in making the remand.

(9) This objection is in my opinion justified so far as the remand relates to the question whether the 'arpannama' was acted upon. An express issues was framed relating to this question and evidence was adduced by both the parties upon the point. The reason given for the remand on this point is that in the opinion of the Subordinate Judge the evidence had not been properly discussed by the Munsiff. He points out that the original 'arpannama' was produced before the Munsiff by one of the donors, and that an allegation was made on behalf of the defendants that the 'arpannama' had never been made over to the 'sebaits.' The Munsiff rejected this contention basing his decision on certain information obtained by him, otherwise than by evidence duly tendered in Court, regarding the practice in Registration Offices when documents are taken delivery of after the lapse of one month after registration. In the opinion of the Subordinate Judge, the Munsiff acted irregularly in not putting into the witness-box some officer of the Registration Office and giving the defendants an opportunity of cross-examination. Secondly, he considered that the Munsiff took a great risk upon himself by personally comparing the alleged signatures of some of the donors appearing in certain account books produced by the plaintiffs. It is not necessary for me at this stage to express any opinion as regards the correctness of the view taken by the Subordinate Judge regarding the procedure followed by the Munsiff. It is sufficient to say that the reasons given by the Subordinate Judge are not sufficient for setting aside the finding of the Munsiff and directing him to reconsider the evidence. It was obvious from a perusal of the Munsiff's judgment that he had taken considerable pains to deal with all the evidence in the case. There was, therefore, no point in compelling him to review the evidence again in the hope that, perhaps, he might come to a different finding on this point of fact. The Subordinate Judge himself was equally a Court of fact, the evidence was all before him, and he was entitled on that evidence to come to a contrary finding if in his opinion, the Munsiff's finding was wrong. So far as the remand has been ordered on this point, therefore, the direction of the Subordinate Judge must be set aside. This point must be decided by the lower appellate Court itself on a consideration of the evidence upon the record.

(10) As regards the fresh issues directed to be framed by the Subordinate Judge, it is necessary to refer to the plea of the plaintiffs and the finding of the Munsiff. In paragraph 3 of the plaint, it is alleged that the 'arpannama' was executed by "defendant No. 5 and all the other Tewari cosharers." The relevant issue on the point is, "was the deed of gift in question validly executed?" This is the issue upon which the parties went to trial. The finding of the Munsiff that the 'arpannama' was validly executed is based not upon the fact that it was executed by all the cosharers, as alleged in the plaint, but on two grounds: (1) that the persons executing that 'arpannama' did so with the consent of all the coparceners, and (2) that the dedication relates to an insignificant part of the joint family property, within the powers under the Mitakshara law of the 'Karta' of a joint family to make a dedication in favour of a Deity. Neither of these points having been raised by the pleadings or in the issues, the Subordinate Judge was perhaps justified in directing that they should be investigated after framing proper issues and giving the parties an opportunity of adducing fresh evidence thereon. Whether such an investigation is necessary will, however, depend upon whether the lower appellate Court finds that there still exists in the contesting defendants a right to challenge the title of the Deity.

(11) In addition to the above issues, the Subordinate Judge also directed issues to be framed as to

> "whether the grant was invalid by reason of the fact that some of the shebaits appointed, as also some of the donors, were minors, and whether the plaintiffs are entitled to maintain this suit under the terms of the grant."

It has been urged by Mr. Ghosh that these points were not raised in the Court of the Munsiff. They are obviously points which require consideration. The second of these issues seems to arise out of paragraph 4 of the plaint, where it is stated:

> "that it is mentioned in the 'arpannama' whatever shall be done by a majority of the 'sebaits' shall be legal. Hence the plaintiffs institute this suit, by making all the other co-sharers parties to the suit."

The Subordinate Judge had the 'arpannama' before him. A remand was, therefore, not necessary on this point. As to the other, the necessity of a remand would only arise if the right to challenge the title of the Diety is found to be still surviving.

(12) Mr. Ghosh is on a firmer ground when he attacks the form in which the investigation of these issues has been directed. What the Subordinate Judge has done has been to treat the cross-objection as disposed of, to re-open the suit, and to direct the Munsiff to dispose of the suit on the result of his investigation of the issues referred to him, leaving it to any party that may be aggrieved by the fresh decisions of the Munsiff to file a fresh appeal. This procedure obviously causes unnecessary harassment to the parties. The proper procedure is provided by Order XLI, Rule 25, under which the appellate Court is empowered, if necessary to frame issues and refer the same for trial to the Court from whose decree the appeal is preferred, and it is directed that the lower Court shall proceed to try such issues, and shall return the evidence to the appellate Court together with its findings thereon and the reasons therefor. If upon the rehearing the lower appellate Court finds a remand necessary, it should be made as provided in Order XLI, Rule 25.

(13) This brings me to the main point in the appeal, namely, whether the plaintiffs, if they are entitled to redeem the property, are entitled to redeem the entire mortgage and not merely the portion affecting the property dedicated to the Deity. For the purpose of this discussion, I will assume that the 'arpannama' was duly executed and has been acted upon, that is to say, that the plaintiffs are entitled to maintain this suit.

(14) It seems to me that the answer to this question is to be found in the last paragraph of Section 60 of the Transfer of Property Act, which provides:

> "Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees has or have acquired in whole or in part, the share of a mortgagor."

By the purchase at the sale in execution of the mortgage decree, the purchaser acquired not merely the rights of the mortgagor but also the rights of the mortgagee. The effect of the sale, therefore, was the same as it would have been if the purchase had been made by the mortgagee himself. In the sale, what was put up to be sold was the

equity of redemption in the property. That sale, when it was confirmed, became effective against all persons interested in the equity of redemption, except the Deity, who, not having been impleaded, retained her right to redeem. The result of the sale, therefore, was that the purchaser, who stood in the position of the mortgagee, acquired an interest in a part of the mortgaged property. This under the provisions of the last paragraph of Section 60 is sufficient to sever the integrity of the mortgage, and the plaintiffs can only sue for partial redemption. The principle has been explained by Das, J., in 'Sheo Narain Sahu v. Ram Nirekhan Ojha', AIR (6) 1919 Pat 399, where the mortgagee had purchased the mortgaged property in execution of a decree obtained on the foot of the mortgage without impleading a person interested in a portion of the mortgaged property.

"The general rule is, of course, based on the principle that a mortgage is one and indivisible, and that the property comprised in it is in its entirety security for the entire debt and for every part of it; but the general rule cannot obviously apply when the integrity of the mortgage is broken up. In the case before me the plaintiff, who is the mortgagee, has acquired the entire share of the mortgagor, except such share which passed to the defendant by his purchase. The equity of redemption is now in two different person, namely, the plaintiff and the defendant, with this result; that the integrity of the mortgage security is broken up.

In such circumstances, it is well settled that a purchaser of a portion of the equity of redemption is clearly entitled to claim partial redemption: See 'Hari Kissen v. Veliat Hossein', 30 Cal 755, 'Gangadas Bhatar v. Jogendra Nath', 11 Cal W N 403 and 'Hamida Bibi v. Ahmad Hussain', 31 All 335. In my opinion, whenever a person is entitled to claim partial redemption, he may also be compelled to redeem that portion of the mortgaged properties in which he may be interested. If this were not so it would require two litigations to work out the equities between the parties."

(15) In somewhat similar circumstances, in 'Mt. Azizunissa v. Komal Singh', 9 Pat 930, Kulwant Sahay, J., with whom Adami, J. agreed observed:

"The general principle of law is that the mortgage contract is indivisible and it is the right equally of the mortgagor and the mortgagee to keep it it indivisible. Where, however, there has been a severance of the security and the integrity of the mortgage has been broken, it is the right of the mortgagee as well as of the mortgagor, or the person having the equity of redemption, to insist on an apportionment of the mortgage debt upon the several mortgaged properties and on partial redemption. The purchaser of the mortgaged properties in execution of a mortgage decree acquires not only the interest of the mortgagee but also the equity of redemption of the mortgagor, and he is entitled to redeem other mortgagor. The defendant No. 1 as a purchaser of one of the mortgaged properties has acquired the equity of redemption of Jawad Hussain and can claim a right to redeem the entire mortgage of the plaintiffs inasmuch as she is not bound by the decree obtained by the plaintiffs in the suit on their mortgage as her predecessor-in-title was not made a party thereto. Upon such redemption by the defendant No. 1 the plaintiffs in their turn as purchasers of the equity of redemption of Jawad Hussain can similarly claim the right to redeem the defendant No. 1. The question in the present case is how are the equities between the parties to be worked out? In my opinion the view taken by the learned Subordinate Judge is correct and the defendant No. 1 can be allowed to redeem only mauza Jamuawan, Tauzi No. 7708."

(16) Another authority to the same effect is 'Bhekdhari Mahton v. Radhika Koer', AIR (21) 1934 Pat 648, in which Mohammad Noor, J., Agarwala, J., (as he then was) agreeing, on an examination of the above two cases along with some other decisions came to the conclusion that:

"If the mortgagee omits to implead persons interested in a portion of the mortgaged property and then brings about the property to sale and purchases it himself, he is bound to allow the redemption of the portion concerned on payment of the proportionate amount."

The facts were similar in 'Kamakshya Narain Singh v. Ramzan Ali', AIR (32) 1945 Pat 106, decided by me sitting with Chatterji, J. There, however, the suit had been brought by the mortgagee himself and that fact was relied on by Chatterji, J., who delivered the leading judgment, as taking the case out of the operation of Section 60. In my judgment I indicated, however, that the provisions of the last paragraph of Section 60 were applicable by reason that the plaintiff was seeking to allow redemption on the basis that after the redemption he, the mortgagee, would continue to own a portion of the mortgaged property.

(17) In that decision, we referred to a decision of the Judicial Committee of the Privy Council in 'Shah Ram Chand v. Parbhu Dayal', 47 Cal W N 1, a case which has also been cited at the Bar before us here. On the facts, that case is distinguishable, for the point which arose there for decision was whether a mortgagee, by permitting some of the mortgaged properties to be redeemed on payment of mortgage money, severs the integrity of the mortgage. Their Lordships held that it did not. In the course of their decision, their Lordships referred to the provisions of Section 60 of the Transfer of Property Act and made the following pertinent observation:

"That single exception mentioned — the case of his having acquired in whole or in part the share of a mortgagor — shows that subsequent transactions by him as to parts of the property are within the contemplation of the clause. Indeed part of the argument for piecemeal redemption is that a release of a portion of the land is equivalent to a purchase by the mortgagee. But the exception is made in the latter case, not on the footing that it is unjust that the full burden of the security should be imposed on the other parts of the property, but because their claim to contribution has now become a claim against the mortgagee or his interest in the equity of redemption. Circuity of action is thought to be avoided if partial redemption be permitted."

The position is exactly the same here. Supposing that the plaintiffs are permitted to redeem the entire mortgage, they would not thereby be entitled to recover and retain possession of the entire mortgaged property. All that they would be entitled to against the contesting defendants is a right to claim contribution. The equities between the parties, therefore, would have to be worked out in a subsequent suit, an eventuality which will be avoided by allowing only partial redemption.

(18) In support of his contentions, Mr. Ghosh has referred to the case of 'Mirza Yadalli Beg v. Tukaram', 47 Ind App 207 (PC) and 'Fakir Chand v. Babulal', 39 All 719. In the former case, the mortgagee had got a decree for foreclosure against the mortgaged property which consisted of nine fields. The transferee of the equity of redemption in one field who was not impleaded in the fore-

clousure suit, sought to redeem the mortgage. It is obvious on this statement of the facts that nothing has occurred to affect the integrity of the mortgage. It was, therefore, held that he was entitled to redeem the entire mortgaged property.

(19) In 'Fakir Chand v. Babu Lal', 39 All 719, there was a mortgage in favour of the plaintiff-appellant of a certain house by two joint owners of the same, each entitled to and in possession of a half share in the house. One of these mortgagors subsequently sold his half share to the respondent one Mt. Lachmi Kunwar, who thereupon deposited in Court, for payment under Section 83 of the Transfer of Property Act, what was found to have been the full amount due on the mortgage, both principal and interest. The mortgagee refused to accept this deposit but suggested that he would have no objection to allowing Mt. Lachmi Kunwar to redeem, upon payment of one-half of the mortgage debt, one-half of the house. In these circumstances, it was held that Mt. Lachmi Kunwar was entitled to redeem the whole mortgage. Here, again, it is clear from the recital of the facts that nothing had occurred to sever the integrity of the mortgage.

(20) The contention of Mr. Ghosh finds some support in the following passage occurring in the judgment of Chatterji, J. ((Rowland, J. agreeing) in 'Mir Wajid Ali v. Alidad Khan', AIR (27) 1940 Pat 45:

> "Where the mortgagee brings a suit omitting a necessary party and obtained a decree and purchases the mortgaged property in execution thereof the mortgage decree and the execution sale are of no effect as against the person who was not impleaded in the mortgage suit, and he is entitled to treat the entire mortgage as subsisting and can therefore ask for its redemption in its entirety. The position is quite different where the equity of redemption of some of the mortgagors has been effectively sold and purchased by the mortgagee himself, at a private sale or in execution of a money decree."

The facts in that case were that the mortgagee at a private sale had purchased a share in the equity of redemption and had thus severed the integrity of the mortgage. On the facts, therefore, it was rightly held in that case that the plaintiff was entitled to redeem in part. The passage relied on by Mr. Ghosh is merely an 'obiter dictum.' It lays down the proposition very broadly and is stated to be based on the cases of 'Mirza Yadalli Beg v. Tukaram', 47 Ind App 207 and 'Pramatha Nath v. Ramkishen Singh', 8 Pat L T 81. I have given above the facts of the former case. and I find nothing in it to support the above proposition. Nor does the decision in 'Pramatha Nath Mitter's case' support the broad proposition laid down. In that case a share of three annas and odd was mortgaged by three brothers, two of whom subsequently sold two annas out of their shares of two annas and odd to the plaintiffs and some other persons. Then Defendant No. 1 sued on the mortgage and got a decree for sale, without impleading the plaintiffs. Defendants Nos. 2 and 3 purchased the mortgaged property in execution of the mortgage decree and transferred the property to defendants Nos. 4 and 5. Then the plaintiffs sued to redeem the whole mortgage. Adami, J. Macpherson, J. agreeing, held that they were entitled to redeem the whole mortgage "subject, of course, to the right of any others, who have an equity of redemption to exercise that right". The question, therefore, was one of working out the equities between the parties, and their Lordships solved the problem by means of the following complicated direction:

> "In my opinion the appeal should be dismissed with costs, and, in order to safeguard the interest of all the co-owners of the right of redemption, the case should be sent through the lower appellate Court to the trial Court in order that the amount due upon the mortgage with interest may be passed directing the plaintiff to deposit that amount in Court within three months of its ascertainment. If the plaintiffs fail to deposit the amount their suit will have to be dismissed. On such deposit being made, a final decree for redemption will be passed, but possession will not be delivered to the plaintiffs until after the expiry of one week from the date of such decree. If defendants Nos. 4 and 5 consent within that week that their proportion of the total mortgage-money due in respect of their 1 anna 2 pies and odd share be repaid, and also pay up the costs of the suit and appeals decreed against them and their proportion of any other costs which would be a charge under S. 95, or consent that the same be paid to plaintiffs out of the total mortgage-money, possession of the share of those defendants will not be delivered to plaintiffs.
> If at any time within that week or afterwards the owners of the two anna share, other than the plaintiffs, pay to the plaintiff their respective proportion of the total mortgage money, and of the charge under S. 95 other than the amount recovered as costs from defendants Nos. 4 and 5, their respective shares shall be delivered to them, and the plaintiffs shall either not come into possession of them or shall forthwith make over possession of them, as the case may be."

His Lordship Adami, J., in 'Mt. Azizunissa v. Komal Singh', 9 Pat 930, agreed to a simpler method of working out the equities, namely that of allowing only partial redemption, a method which as explained by the Judicial Committee in 'Shah Ram Chand v. Parbhu Dayal', 47 Cal W N 1 (P C) avoid circuity of action.

(21) For the reasons stated above, I consider that the Courts below have rightly held that, supposing the plaintiffs are entitled to redeem at all, they can only redeem in part.

(22) In the result, I would set aside the order of the Subordinate Judge and direct that the appeal be reheard in the light of the above remarks. The appeal to this Court having failed as regards the prayer for total redemption, I would direct that the contesting defendants, defendants Nos. 8 to 13, get the costs of this Court proportional to their success in this respect.

(23) SHEARER, J.: The lower appellate Court will have to consider whether it is at all open to the defendants to raise a plea of this kind. A simple mortgage is a mere contract of loan and, when the mortgagors have conveyed the equity of redemption to a third person and that third person seeks to redeem the mortgage, is it open to the mortgagee to resist his suit on the ground that there is a flaw or defect in his conveyance and one of the mortgagors on whose behalf the others purported to act might be entitled to avoid the conveyance in whole or in part? However, I agree with my learned brother that there must be a remand as this point will not arise for consideration, unless and until it is decided that the arpannama was acted upon and that is a question of fact which the lower appellate Court ought to have determined. I also agree that if redemption is to be allowed it must be partial redemption. As to costs I also agree.

R.G.D. *Order accordingly.*

A. I. R. (39) 952 Patna 106 [C. N. 44.]

RAMASWAMI, J.

On difference between

SHEARER AND SARJOO PROSAD JJ.

The Liquidators, Pursa Ltd, Appellant v. Income Tax Officer Special Circle Patna, Respondent.

Misc. Judicial Case No. 126 of 1950, D/- 16-5-1951.

(a) Income-tax Act (1922 as it stood before its amendment by Act 67 of 1949), S. 10(1) and S. 10 (2) (vii) Proviso 2 — "Carry on business" — Meaning — There can be carrying on of business during winding up of affairs of business — Question of fact or law — Power of High Court to interfere under S. 66 — S. 10(2)(vii) Proviso 2 — Entire aggregate of machinery or plant sold — S. 10 (2) (vii) Proviso 2 applies — Income-tax Act (1922), S. 66.

The assessee Company, incorporated under the Companies Act, carried on business of growing, manufacturing and selling sugar. In June 1943 the Directors commenced to negotiate for the sale of the factory and other assets with the ultimate object of winding up the business. On 7-12-1943 an agreement of sale was concluded. The memorandum of agreement provided that the vendor was to sell and demise to the purchaser for Rs. 28 lakhs all the lands, buildings and machinery and plant. But the stock of manufactured sugar and of grain lying in the godown was expressly excluded and remained the property of the company. It was stipulated that the possession of the assets covered by the contract was to be delivered to the purchaser after the execution of the agreement and after payment of the purchase price. There was a clause that even after possession had been delivered and up to one year from that date the company would retain the right to occupy the manager's bungalow and godown in order to enable the company to dispose of the stock in trade and other capital assets not covered by the sale. On 7th December 1943, the consideration of Rs. 28 lakhs was paid by the vendees and three days later possession of the factory was taken by the vendee. On 7th December 1943 the assessee possessed sugar stocks valued at Rs. 6 lakhs and it was not controverted that the assessee continued to sell the stock of sugar up to June 1944 and the total price realised was Rs. 7 1/2 lakhs. Between 30-9-1943 and 10-12-43, the machinery was not used for manufacturing sugar. The company went into voluntary liquidation on 20-6-1945. The Appellate Tribunal found that the assessee company was carrying on business during the year of account 1-10-1943 to 30-9-1944 and held that the profits (about Rs. 13 lakhs) made by the company on the sale of the buildings, plant and machinery were taxable under S. 10 (2)(vii) Proviso 2 (as it stood before amendment of 1949). The Appellate Tribunal also held that the profits (about Rs. 15,000) on the sale of the stores were taxable under S. 10 (1).

The Company contended that the above items were not taxable. The profits on the sale of plant and machinery were not taxable under S. 10 (2) (vii) Proviso 2 (as it stood before amendment of 1949) because (i) the Company had ceased to carry on business and (ii) The above proviso would not apply where the 'whole' of the plant and machinery was sold. The profits on sale of stores were not assessable under S. 10 as the Company had ceased to carry on business.

'Held ('Per Ramaswami and Sarjoo Prosad, JJ.: Shearer J. dissenting), that though the object of the directors may be to wind up the business and not to earn the profits by the continuance of the business, still if the nature of the activities appertain to commercial methods the company would carry on a business in legal sense. For it is no paradox to say that there can be trading or carrying on of business during the course of winding up of affairs of a business. (Paras 38, 52)

The question whether the company carried on business was essentially a question of fact and there were materials in the case upon which the Appellate Tribunal could properly reach the conclusion that the assessee company was carrying on business in the year of account. (Paras 29, 54)

'Shearer J.': S. 10(2)(vii) Proviso 2 was intended only to apply to a continuing business. It does not apply in the case of a business which has been closed down or is in the process of being closed down. (Paras 7, 8)

'Per Ramaswami and Sarjoo Prosad JJ. (Shearer J. dissenting'): As a matter of construction, the words "any machinery or plant" in S. 10(2)(vii) are applicable to any number of items of machinery or plant. It is clear that the clause applies in a case where the entire aggregate of plant or machinery is sold, though the calculation of allowance or tax cannot be in respect of the aggregate of the machinery or plant, but will be in respect of the written down value of each separate item. For the application of S. 10(2)(vii) it is immaterial that the sale is effected of each separate item of machinery or of the whole aggregate of machinery or plant in one block broken up or in running condition. (Para 50)

'Per Shearer J.': The word "any" in Cl. (VII) means a particular item or items of machinery or plant and does not mean, and certainly cannot very easily mean, the entire aggregate of plant and machinery. (Para 8)

'Held therefore' per 'Ramaswami and Sarjoo Prosad JJ.' (Shearer J. dissenting): The sum of Rs. 13 lakhs and odd on account of the profits of the sale of plant and machinery, chargeable under S. 10 (2) (vii) Proviso 2. (Para 55)

'Per Shearer J.': The sum was not liable to be taken into account in assessing income-tax on the assessee Company during the year of assessment. (Para 8)

As to the taxability of sum of Rs. 15 thousand and odd as profits on the sale of stores of the factory:

'Held' ('Per Ramaswami and Sarjoo Prosad JJ.) that business was (as already shown above) carried on during the accounting year, and as such the sum 'could' be taxed under S. 10 (1). (Paras 30, 52)

'Per Ramaswami J.': But there was no material upon which the Tribunal could hold that the profit of Rs. 15 thousand and odd was made on the sale of the stores. Hence, the sum was not taxable as profit under S. 10(1). (Para 56)

'Per Sarjoo Prosad J.': The specific question that was referred to the High Court by the Tribunal did not call in question the amount of Rs. 15 thousand and odd. The only question referred was whether it was taxable or not. It precluded the assessee from re-opening the matter and contending that there was no evidence on which the Tribunal could hold that the profits on the said item (i.e. sale of factory stores) amounted to the above sum. In view of the answer that the company carried on business during the year of account, the amount was clearly taxable under S. 10(1). (Paras 30, 31)

Having regard to the limited jurisdiction which the High Court exercises in case of a reference under S. 66, it is not open to it to travel beyond the points which have been referred to it by the Tribunal and to take into consideration some of the other points raised by the assessee. (Para 10)

'Per Shearer J.': The profit, if any, made on the sale of the stores was clearly not a profit made out of the business carried on during the year. It was a capital gain and it would not even be taxable under S. 12-B if that section applied. Hence the sum was not taxable under S. 10(1).

(*Para 9*)

The use of such an expression as "on basis of expert valuation" by an Income-tax Officer without indicating who the expert was, is to be deprecated.

(*Para 9*)

Hence, ('Per Ramaswami and Shearer JJ. (Sarjoo Prosad J. Contra')): Rupees 15 thousand and odd was not taxable as profit under S. 10(1)

(*Paras 9, 56*)

('Editorial Note': The case arose and was decided under S. 10(2)(vii) as it stood before its amendment in 1949. After the introduction in the second Proviso to S. 10(2)(vii), of the words "whether during the continuance of the business or after the cessation thereof" by Act 67 of 1949, the question whether the company carried on business during year of account or had ceased to do so has become unimportant for the purposes of S. 10(2)(vii) Proviso 2.).

Anno: I. T. Act, S. 10 N. 2, 9.

(b) *Income-tax Act (1922) S. 5A — Duty of assessee to place all materials required by Department at earliest opportunity.*

'Per Sarjoo Prosad J.: The Tribunal is not bound to entertain and consider all materials placed before them for the first time and not produced before the Income-tax Officers below them. Indeed it is the plain duty of the assessee to place all such materials on which he relied or which are required by the Department from him at the earliest opportunity. It is only in a special case, if at all, that the Tribunal may exercise their discretion in entertaining any fresh materials. (*Para 25*)

(c) *Interpretation of Statutes — Taxing Statute.*

'Per Ramaswami, J.': In a taxing statute there is no room for any presumption or intendment. If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be.

(*Para 51*)

Anno. C. P. C., Pre. N. 7.

S. Mitra, B. N. Mitter, A. K. Mitter and Mundrika Prasad Sinha, for Appellant; S. N. Dutt, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) A I R (37) 1950 All 390: (1950 All L J 728) (Prs 24, 28)
('31) 58 Cal 985: (A I R (18) 1931 Cal 599 S B) (Pr 2)
('37) 1937-5 I T R 734 (Nag) (Prs 5, 39)
(1927) A C 312: (96 L J K B 379) (Pr 54)
(1928) A C 132: (97 L J K B 317) (Pr 54)
(1912) 6 Tax Cas 91: (1912 S C 1108) (Pr 4)
(1921) 12 Tax Cas 303: (126 L T 707) (Pr 52)
(1921) 12 Tax Cas 358: (1921-1 K B 64) (Pr 51)
(1927) 12 Tax Cas 1148: (1928 N Ir 56) (Pr 26)
(1932) 17 Tax Cas 77: (146 L T 474) (Prs 28, 53)
(1939) 22 Tax Cas 716: (1939-A C 689) (Pr 27)
(1942) 24 Tax Cas 97: (1942-1 K B 210) (Prs 38, 50)
(1942) 24 Tax Cas 498: (1942 S C 493) (Pr 24)

SHEARER J.: This is a reference made under S. 66(1) of the Indian Income-tax Act by the Income tax Appellate Tribunal, Calcutta Bench. The assessees are a company known as Pursa Limited, which was incorporated under the Indian Companies Act in 1905 and which then acquired a property in Champaran known as the Pursa Indigo Concern. In or about 1876 the Pursa Indigo Concern had obtained from the Bettiah Raj a mukarrari lease of certain villages in the immediate vicinity of Pursa and it subsequently acquired rights of occupancy in various other parcels of land in the locality. Under the mukarrari lease the Bettiah Raj had an option of repurchase but in 1905 it apparently, did not choose to exercise this option and the mukarrari lease was assigned to the assessees. The assessees constructed buildings and installed plant and machinery for the purpose of manufacturing sugar. This business was regularly carried on until 1943 when, in consequence of the disturbances which had taken place in the previous year, the company decided to wind it up and entered into negotiations with Messrs Dalmia Jain & Co. with a view to selling the sugar factory to them. Prior to this the manager of the Bettiah Raj had apparently intimated that, in his opinion, the Bettiah Raj should exercise its option to repurchase the mukarrari villages and had made certain recommendations in the matter to the Court of wards. These latter negotiations, however, eventually, fell through. Messrs Dalmia Jain & Co. decided to purchase the whole of the rest of the property of the assessees with the exception of their stocks of sugar, as it existed on the 9th of August, 1943, for a sum of Rs. 28,00,000/-. It appears from the correspondence that the company had hoped that the sale would be completed on or before the 30th September, 1943, which was the end of its usual accounting year. Owing, however, to the delay in correspondence between India and England it was not until the 7th of December, 1943, that a memorandum of agreement was finally entered into as between the assessees on the one hand and Messrs Dalmia Jain & Co. on the other. The consideration money of Rs. 28,00,000/- was paid immediately and three days later Messrs Dalmia Jain & Co. took possession of the property. The assessees had kept the factory buildings in repair and the machinery in running order but between the 30th of September, 1943 and the 10th of December, 1943, when they were actually handed over, had not used them for the purpose of manufacturing sugar. Sugar cane is not crushed throughout the year but throughout a period of four or five months which, ordinarily, begins in the latter part of November or the early part of December, appended to the memorandum of agreement was a statement to the effect that out of the purchase price of Rs. 28,00,000/- the purchaser "allocated Rs. 550,000/- to the factory land, buildings and fixed machinery and plant" and "Rs. 17,00,000/- to movable machinery and plant". The Income-Tax Officer, therefore, assumed that the price actually paid for the buildings, plant and machinery used by the assessees for the purpose of manufacturing sugar was more or less Rs. 22,00,000/-. The written-down value of this plant and machinery in the books of the assessees as on the 30th September, 1943, was Rs. 3,17,443/-. The assessees declined or were unable to satisfy the income-tax officer as to what the original cost of them had been. The income-tax officer discovered that the allowances which had been made for depreciation in previous years amounted in the aggregate to Rs. 13,05,144/- and, purporting to act under the second proviso to Cl (vii) of Sub-s. (2) of S. 10 of the Indian Income-tax Act, assessed the company to income-tax on this amount. The question that arises in the reference is whether or not the income-tax officer and the income-tax appellate tribunal, which confirmed his decision, misdirected themselves in law in applying this provision.

(2) In order to understand the scope & effect of the proviso in the Act as it stood in 1939, which

is the Act applicable in this case, it is necessary to consider Cl. (vii) of S. 10 (2) as it stood prior to the amendments which were then made in it. The clause made an allowance admissible "in respect of any machinery or plant which, in consequence of its having become obsolete, has been sold or discarded" the allowance being "the amount by which the written down value of the plant or machinery exceeds the amount for which the machinery or plant is actually sold or its scrap value". In order to entitle an assessee to the allowance, it was incumbent on him to show that the machinery or plant had become obsolete, that is, that, while it may not have ceased altogether to perform its function, it was of a type which was regarded in the particular trade or business as out of date. Although it was not made a condition, as it was in England, of an allowance being granted that the obsolete plant or machinery should have been actually replaced by a modern and up-to-date type, it is clear that the allowance was, in substance, an allowance made towards the cost of replacement. It rarely or never happens that plant or machinery can be discarded or sold without its having to be replaced. When the clause was amended in 1939, it ceased to be a condition that the machinery or plant should have become obsolete. An assessee who chose to instal machinery or plant of the most modern type and such as few, if any, of his business rivals had yet begun to use, might, therefore, become entitled to an allowance and so reduce the capital expenditure to be incurred, the whole of which, prior to 1939, would have fallen on him. Two provisos were added to the clause. One made it a condition that the amount allowed should be actually written off in the books of the assessee. The other is the proviso with which we are now concerned and which is in these terms:

> "Provided further that where the amount for which any such machinery or plant is sold exceeds the written-down value, the excess shall be deemed to be profits of the previous year in which the sale took place."

The proviso occurs as a rider to a clause which gives an allowance for replacement and that clause has to be read in conjunction with the clause immediately preceding it which gives an allowance for depreciation. In pointnig this out in 'Re Shewadayal Jagannath', 58 Cal 985, at p. 986, Rankin, C. J. observed that

> "both are exceptions made by the statute to the general principle that so far as the fixed capital of a business is concerned, appreciation or depreciation do not enter into the computation of profits".

(3) Clauses (vi) and (vii) also occur in Sub-s. (2) of S. 10 of the Act which prescribes the manner in which an account of the incomings and outgoings of a business is to be taken for the purpose of assessing income tax. The combined effect of these various provisions is that, when plant or machinery is sold for more than its written-down value, the excess is set down on one side of the account, while, on the other side of the account, is set down the allowance admissible on the rest of the plant or machinery for depreciation. The result in practice is that, in that particular year, the assessee receives a proportionately smaller depreciation allowance. Suppose, for instance, that a machine is sold for Rs. 30,000/-, the written-down value of it being Rs. 20,000/-, and suppose that the allowance admissible for depreciation is Rs. 50,000/-; Rs. 10,000/- is set down on one side of the account and Rs. 50,000/- on the other, with the result that the allowance for depreciation is, in effect, reduced from Rs. 50,000/- to Rs. 40,000/-.

(4) The contention of Mr. S. Mitra, for the assessees, is that the account is only to be taken in this way when the machinery or plant sold is to be replaced or, perhaps, when it is found possible to adapt another machine to perform an additional process, which, of course, is also a case of replacement. Mr. Mitra, it is true, did not put it in quite that way. What he said was that the proviso applied only in the case of a business which had continued throughout the year of assessment and into the succeeding year and did not apply to a business which had been discontinued or was in the process of being discontinued, it being immaterial that the business of selling goods already manufactured continued, if the business of manufacturing goods had been stopped. That, however, is merely another way of stating the point. Mr. S. N. Datta, for the Department, on the other hand, contended that the proviso applied whenever a sale took place, whether the plant or machinery sold was replaced or intended to be replaced or not. Assuming for the moment and for the sake of argument, that two constructions are possible, I would adopt the method of interpretation laid down by Lord Salvesen in 'Scottish Shire Line, Ltd. v. Lethem', (1912) 6 Tax Cas 91 at p. 99. It was there said:

> "Even in a taxing statute it is legitimate to consider which of two possible constructions is most in accordance with the spirit and intention of the Act".

Machinery and plant wear out or become obsolete and have to be replaced, and every prudent businessman sets aside out of his annual profits a certain sum against the day when replacement becomes necessary. It is in order to enable him to do so that an allowance is given for depreciation. The intention of the Legislature both prior to and since 1939 was that he should be in a position to expend on the purchase of plant or machinery to replace plant or machinery which had worn out or become obsolete at least as much as he had expended originally on the discarded plant or machinery. If the sale proceeds are less than the written-down value, he can not do this, and so an allowance is given under Cl. (vii). Until 1939, if the sale proceeds exceeded the written-down value, the assessee retained the balance and so was able in that particular year to lay aside more than his depreciation allowance. In the view taken by Mr. Mitra, it was in order to prevent this that in 1939 the Income Tax Act was amended.

(5) It is understandable why it should have been amended in this way then. As it was to cease to be a condition of granting a replacement allowance that plant or machinery discarded or sold should be either worn out or obsolete, claims for such an allowance would become more numerous, while, owing to the general rise in prices, plant or machinery would more often be sold for more than its written-down value. Also, it is, I think, at least possible that there was a lacuna in the Act and it was open to an assessee to discard plant or machinery in one year and obtain an allowance based on its scrap value and then, in the succeeding year, sell it for considerably more and appropriate the whole of the sale proceeds. However that may be, it is understandable that the Legislature should in 1939 have altered the Act so as, in effect, to reduce the depreciation allowance admissible to an assessee. It may be observed that when the sale proceeds exceed the written down value, the revenue authorities in England appear to have resorted to somewhat similar devices to raise a kind of counter-balancing charge against the assessee. There the replacement allowance admissible on other machinery or plant sold subsequently for less than its written down value has

sometimes been reduced and, alternatively, depreciation allowance has sometimes not been given on the full cost of the new machinery or plant, but on its cost as proportionately reduced (see Income Tax Law and Practice by Newport and Staples, 11th edition, page 119). In this view of the matter, although the sale proceeds of a capital asset appear in the account taken for the purpose of computing income tax, the tax is still a tax on income and not a tax on capital. All that can be said is, to adopt the language of Rankin, C. J., that depreciation or appreciation enters into the computation of profits more than hitherto. In the view contended for by the Department, on the other hand, the tax is not wholly a tax on income, but in part a levy on capital. In this particular case the assessees did not use their machinery and plant during the year of assessment and no depreciation allowance was at all admissible (vide 'Central Provinces Manganese Ore Co. Ltd. v. Commissioner of Income-tax', CP and UP 1937-5 ITR 734 (Nag). I do not myself attach any great importance to this. It would not, I think, have made any difference if the machinery and plant had been used and a proportionate allowance for depreciation had been admissible. The reason why depreciation allowance is granted may be, as I have said, to enable the assessee to lay aside part of his profits to cover the cost of replacement, but in theory it is an expense incurred by him in earning his profits, and he is entitled to it even if he has closed down or decided to close down his business.

(6) Mr. Datta's argument is that, whenever the sale proceeds exceed the written-down value, it necessarily follows that, in the past, the assessee has received too much in the shape of allowances for depreciation, and it is, therefore, only fair that he should refund the excess. Now, the amount of the allowance is fixed by law and it seems to me impossible to say that in any particular year the assesee has received either too much or too little. Also, there is not a word anywhere to suggest that previous assessments are, as it were, to be reopened or any amount is to be refunded.

(7) Considerations as to what is "fair" or "equitable" are out of place in construing a taxing statute, but I cannot agree with Mr. Datta that it is "fair" that the assessees should be made to "refund" the excess of the sale proceeds over the written-down value. They may have received much more for their machinery and plant than they could ever have anticipated some years ago, but, on the other hand, as the general level of prices has risen, they will also have to pay much more for anything they may wish to purchase with the money they have got for it. To say that the assessees made a profit out of their transaction with Messrs Dalmia Jain and Company is, I think, to use language some what loosely. Even, however, if they had made a profit in the sense that they realised more at the sale than they themselves originally paid, they would have been entitled to retain the whole of it. It was not a profit arising out of their business. It had nothing to do with the business. It arose out of quite other and fortuitous circumstances, such as the rise in prices due to the war in scarcity of sugar in India, due again to the war; and to the consequent readiness of Indian financiars and capitalists to embark on the business of manufacturing sugar. The owner of a sugar factory who, owing to the existence of a state of war, can sell his plant or machinery for more than he paid for it is in exactly the same position as the owner of a picture who bought it when the artist was a young man unknown to the public and who can sell it years afterwards, when the artist has made his reputation, at a very considerable profit. There has been in each case an accretion to the value of a capital asset and until 1946 the owner was entitled to retain the whole of the resulting benefit When I pointed out to Mr. Datta that it was not until 1946 that S. 12B was inserted in the Income-Tax Act and capital gains were made assessable to income-tax, Mr. Datta could only say that S. 12B applied to property of every kind and not merely to plant and machinery. I can not persuade myself that, if it was in 1939 and not until 1946 that the Legislature decided to make so striking a departure from its hitherto well-settled fiscal policy, it would have chosen to do so by inserting what is, at most no more than an ambiguous proviso in a clause dealing with an allowance for replacements. Applying the test laid down by Lord Salvesen, it appears to me that there is every thing to be said for the more restricted, and nothing to be said for the more extended meaning sought to be given to the proviso.

(8) Is there, however, any real or serious ambiguity in the language used by the Legislature? Too much weight cannot be attached to the words "shall be deemed to be profits of the previous year", nor can the proviso, in which these words appear, be more or less completely divorced from its context. The words "any such" machinery or plant in the proviso refer back to the words "in respect of any machinery or plant" which occur at the beginning of clause (vii). The word "any" means, I think, a particular item or items of machinery or plant and does not mean, or certainly cannot very easily mean, the entire aggregate of plant and machinery. The word "sold" occurs in conjunction with the word "discarded" and while the latter word is entirely appropriate in the case of a continuing business, it is altogether inappropriate in the case of a business which has been closed down or is in the process of being closed down. The first of the two provisos to clause (vii) can only apply to a continuing business. Is there any reason not to assume that the second proviso was also intended to apply only to such a business? Finally, the proviso appears in a clause giving an allowance for replacement. That alone suggests that its operation was intended to be confined to cases in which, if the sale proceeds had been less than the written-down value, the assessee would have been entitled to claim on allowance for replacement. For these various reasons the Income-Tax Appellate Tribunal, in my opinion, misdirected itself in law as to the scope and effect of the second proviso to clause (vii) in S. 10 (2) of the Indian Income-Tax Act. I would, therefore, answer the first of the two questions referred to us by saying that the sum of Rs. 13,05,144/- is not liable to be taken into account in assessing income-tax on Parsa Limited during the year of assessment.

(9) The second of the two questions which have been referred to us is stated thus: "Was the profit of Rs. 15,882/- on the sale of stores of the factory taxable under the Income-tax Act in the circumstances of this case?" This sum of Rs. 15,882/- represents the difference between Rs. 88,000/- which the Income-tax Officer described as "sale proceeds on basis of expert valuation" and Rs. 72,118/-, which admittedly was the cost of certain stores to the assessees. The use of such an expression as "on basis of expert valuation", without indicating who the expert was, is to be deprecated, especially as it may have the effect of stating (sic) the assessee out of Court. The Income-tax Appellate Tribunal has, however, made it clear that what the Income-tax Officer really relied on was the stores account opened in

the books of Messrs. Dalmia Jain and Company, which showed that that company or some officer of that company had valued these stores at Rs. 88,000/-. Neither the Income-tax Officer nor the Appellate Tribunal has, in dealing with this matter, referred to the memorandum of agreement. Paragraphs 15 and 16 of the agreement make it quite clear that, so far as any stores ordered or received by the assessees after the 9th August, 1943, were concerned, Messrs. Dalmia Jain & Co., were to pay nothing more than the cost price and, in consequence, on these stores at least the assessees made no profit at all. It is not very clear whether the stores with which we are now concerned are stores which did not at all come within the purview of paragraphs 15 and 16 of the memorandum but stores which came wholly within the purview of Clause (c) of paragraph 19. That paragraph as I have already said, contained a statement by the purchasers as to how they proposed to allocate the total consideration money Rs. 28,00,000/- between certain specific items. It is quite clear that this statement was made in order to enable the vendees to claim certain allowances, and, in particular, allowances for depreciation when they came to be assessed to income-tax. Moreover, it does not show how much was allocated to the stores. The stores are lumped along with other property and to the whole Rs. 2,50,000/- is allocated. Is it reasonable or in law possible to infer from the circumstance that the vendees, for the purpose, presumably, of preparing their balance-sheet under the Companies Act, valued the stores at Rs. 88,000/- and the circumstance that the vendors paid Rs. 72,118/- for them that the vendors made a profits of Rs. 15,882/ ? We do not know how the valuation was made whether on the basis of the list-prices of the firms which supplied them originally or on some other basis. Apart from this, the profit, if any, made out of the sale of these stores was clearly, not a profit made out of the business carried on during the year. It was a capital gain and, in view of the definition of capital asset which excludes stores, it would not even be taxable under Section 12-B if Section 12-B applied to a profit made in 1943. I would, therefore, answer the second question also in the negative. The assessees are entitled to their costs.

(10) SARJOO PROSAD, J.: This is a reference made to us under Section 66 (1) of the Income-tax Act by the Income-tax Appellate Tribunal, Calcutta Bench. The questions of law arising out of the order of the Tribunal which have been formulated for our consideration are the following:

"(1) On the facts and in the circumstances of this case is the surplus of Rs. 13,05,144/- arising out of the sale of plant and machinery of the sugar factory chargeable under section 10 (2) (vii)? and

(2) was the profit of Rs. 15,882/- on the sale of stores of the factory taxable under the Income-tax Act in the circumstances of this case?"

It appears that on behalf of the assessee there were a number of points, as many as seven, sugguested for reference to this Court, but the Tribunal did not see its way to accept the suggestion of the applicant, and there is no application before us made on behalf of the assessee under Section 66 (2) of the Act against the order of the Tribunal refusing to refer the points in question. Our decision, therefore, will have to be confined to the points on which the reference has been made, and having regard to the limited jurisdiction which this Court exercises in case of a reference under Section 66 of the Indian Income-Tax Act (Act XI of 1922 as amended up-to-date). It is not open to us to travel beyond the points which have been referred to us by the Tribunal and to take into consideration some of the other points raised by the assessee.

(11) The facts leading to this reference may be stated as follows: The assessee is "The Pursa Limited", a joint stock company which carried on business in growing, manufacturing and selling sugar. The assessee Company is incorporated in India under the Indian Companies Act but the share-holders and directors reside in the United Kingdom and the meetings are held there directing the affairs and management of the Company. It went into voluntary liquidation on the 20th of June, 1945, and it is at present represented by the liquidators who are the applicants before this Court. The year of assessment is 1945-46 and the accounting year runs between the 1st of October 1943 and the 30th of September 1944. The assessee sold its sugar factory and zirat lands appertaining thereto to Messrs. Dalmia Jain and Company for a sum of rupees twenty-eight lakhs during the year of accounting. The sale took place by virtue of a memorandum of agreement dated the 7th of December 1943. It is admitted that the factory did no crushing of sugar during the year in question but confined its activities to the disposal of the sugar factory and the stock of sugar that was not taken over by the vendee. It also appears to be undisputed that the manufacturing process in the factory in question generally commenced from the month of December and went on till following April. The facts show that during the accounting year and before the crushing season started, the company had made up its mind and commenced negotiations for the sale of the factory and other assets appertaining thereto with the ultimate object of winding up the business. The negotiations culminated in an agreement for sale entered into between the parties on the 7th of December 1943, between the assessee, on the one hand, and Messrs. Dalmia Jain and Company, Limited, on the other. This memorandum of agreement, inter alia, provided that the vendor was to sell and demise to the purchaser for a total price of rupees twenty-eight lakhs all the lands, buildings and machineries mentioned in the agreement in addition to stocks and stores as they existed on the 9th of August, 1943 (subject to the subsequent consumption of the stocks and stores in the ordinary course of business.) The stocks of manufactured sugar and of grain lying in the godown and existing on the 9th of August 1943, were expressly excluded and remained the property of the Company. The possession of the assets covered by the memorandum in question was to be delivered to the purchaser after the execution of the agreement and after the payment of the purchase price; and even after the possession of the assets had been delivered and up to one year from that date the company retained the right to occupy the manager's bungalow, and of the godown in order to enable the company to dispose of the stock in trade and other capital assets not covered by the sale. It may be noted that the title to or possession over the property was not to pass until the execution of the memorandum of agreement and the payment of the purchase money of rupees twenty-eight lakhs by the vendee. The said memorandum of agreement further provided that the purchaser was to pay to the vendee certain additional sums of money on account of the advances made by the vendor to cane-growers for the season 1943-44 in respect of which cane had not been supplied till then, in respect of zarpeshgi loans advanced by the vendor to such cane-growers, as also in respect of stores and other articles ordered by the

vendor for the purposes of the factory and received since the 9th of August 1943.

(12) The assessee in effecting the sale of the buildings, plants and machineries, etc., as also the stores as stated above made certain profits which form the subject-matter of the questions under reference. After the sale of the plants and machineries the assessee disposed of its stock of sugar not sold to the vendee, and then it went into liquidation.

(13) Evidently in submitting its return the assessee claimed certain deductions in respect of the business carried on by the company during the year of accounting. The Income-tax Officer thought that the deductions claimed were not admissible and wrote to the company on the 21st of February 1947, to show cause why the activities of the company during the accounting year should not be taken as tantamount to realisation of assets on liquidation and not to carrying on of any business. The liquidators in their reply dated the 19th of March 1947, refused to accept the position that the activities of the company during the accounting year were merely confined to realisation of assets and not to the carrying on of business. The relevant portion of the letter runs as follows:

> "(1) The company went into liquidation on 20th June, 1945. (2) In view of the date of the liquidation of the company we cannot agree that the company was not carrying on business during the year ended 30th September 1944. In addition, the various debits contained in the Sugar Factory accounts are those incurred in carrying on the Company's business."

(14) The liquidators accordingly pressed for the deductions which they had claimed in their return. It was, therefore, not disputed by the liquidators before the Income-tax Officer that the sale of the buildings, plant, and machinery took place during the accounting year at a time when the business of the factory was still being carried on by the assessee. On receipt of his letter the Income-tax Officer on May 17, 1947, informed the liquidators that the profits made by the company on the sale of their buildings, plant and machinery were taxable under the second proviso to section 10 (2) (vii) of the Income-tax Act, and he called upon them to furnish certain informations in regard to the sale price of the machinery and plant and the original cost to the company for the same, as mentioned in his letter dated the 17th of May 1947. These particulars, however, were not furnished by the assessee and the Income-tax Officer having found that the sale took place during the continuance of the business of the company, long before it went into liquidation, held that the profits on the sale of plant and machinery as also on the value of stores were liable to assessment under S. 10 (2) (vii) of the Income-tax Act. He accordingly by his order dated the 21st of June, 1947, added a sum of Rs. 13,05,144/- on account of the profits on the sale of plant and machinery, etc., and Rs. 15,882/- on account of profits on sale of stores as already stated. The whole dispute, therefore, centres round these two items of assessment. In assessing the amounts of profits on the sale of plants and machinery, the Income-tax Officer had to rely upon previous assessments and depreciation records as the assessee had failed to furnish the particulars required; whereas in respect of the stores the Income-tax Officer found that in the sale-deed no details were available, the price indicated being a lump amount for the entire property sold. He nevertheless proceeded to assess the profits as he says on expert advice. This assessment was affirmed on appeal by the Appellate Assistant Commissioner of income-tax under his order dated the 31st of January 1948. The actual hearing of the case, it appears, took place on the 20th of August 1947, and Mr. S. Mitra on behalf of the assessee complains that, in view of the delay in delivering judgment, the Appellate Assistant Commissioner did not give full weight to the arguments placed before him. The Assistant Commissioner also concedes that in the year under assessment there was no manufacture of sugar by the company because of the negotiations which started from August 1943, and culminated in the memorandum of agreement in December 1943, and that there was only sale of sugar during the period in question. He, however, also agreed with the Income-tax Officer in his view that the sale of sugar by the Company amounted to carrying on business, and that as the plant and machinery were sold during the continuance of the business, the business not having been closed at any stage, it must be assumed that Section 10 (2) (vii) applied to the case, and, as such, the profits made by the company were liable to assessment. He observed as follows:

> "But in this case although the entire block of plant and machinery was sold to Dalmia Jain & Co., Ltd., the entire business was not transferred to the said party and the business was not closed so that it was being carried on as contemplated by Section 10 (1) of the Income-tax Act. There was one organisation, single control, same set of accounts, same capital and same staff employed for the three kinds of activities referred to above (namely growing sugarcane, manufacturing sugar and selling sugar). They were interwoven and inter-twined and were not separable. Even though the first two kinds of activities were absent in the year under assessment the selling activities were carried on and the Company in winding up its affairs still carried on business. It would have been quite a different proposition if the entire business as a going concern was transferred to Dalmia Jain and Company, Limited. But that was not done and only a portion of the activities were discontinued Therefore I support the I. T. O.'s view that the sale of the entire block of machinery was done in the course of the carrying on of the assessee's business."

(15) The matter was then taken in appeal by the assessee before the Appellate Income-tax Tribunal. Before the Appellate Tribunal the assessee did not dispute the correctness of the figure as to the amount of profit in respect of the sale of machinery and buildings. But his contention was that Section 10 (2) (vii) had no application to the case, and he also disclaimed the correctness of the statement of the liquidators contained in their letter dated the 19th of March 1947, which I have already quoted above. The assessee urged that before the profits could be assessed under Section 10 (2) (vii) it had to be established that the sale was made in the course of the carrying on of the company's business. In the present case, according to the assessee, the sale had been effected in the process of winding up the affairs of the company and realisation of its assets. In support of this contention, the assessee produced before the Tribunal some minutes of the Board of Directors meetings held in England and also referred to the correspondence between the company's employees in India and the Board of Directors in England. The contention of the assessee was, however, not entertained by the Tribunal. The Tribunal found that the sale of sugar continued up to June 1944, and the appellant company spent substantial amount of money in the way of establishment and general charges

even subsequent to the sale of the machinery. These activities of the assessee amounted to carrying on the company's business as contemplated by Section 10 (1) of the Act. In addition to the above, the Tribunal observed as follows:

"Besides the question of the company's activities subsequent to the sale on 7-12-1943 it was admitted by learned counsel for the appellant that up to that date of the sale the company's business went on normally. It was at no stage claimed before us that there was discontinuance of the business previous to the sale itself. The only contention raised before us was that as the sale en-bloc brought about cessation of the company's business it must be held that the sale itself was not in the course of carrying of the company's business. We are afraid we cannot subscribe to this view of the learned Counsel. There was no break between the company's carrying on business and the sale of the assets. The sale of the assets must therefore be taken as having been done as a part of the carrying on of the company's business and as such the profit on the sale of machinery en bloc has been rightly assessed under Section 10 (2), (vii)."

(16) In regard to the sum of Rs. 15,882/- the profits on the sale of stores, the assessee contended that the figure was an imaginery figure and had been arrived at by the Income-tax Officer without any data. It was contended that the sale-deed showed a lump amount of sale price. It was, therefore, impossible to allocate any particular portion of it as having been intended solely in consideration of the sale of stores. The Tribunal, however, referred to certain entries in the books of the vendee in order to determine the appropriation of the sale proceeds towards the sale of the stores. They say that this was the method adopted by the Income-tax Officer though the order of the Income-tax Officer does not actually say so. On the contrary, it purports to depend upon some expert advice in the matter. On the basis aforesaid the Tribunal held that the sum of Rs. 15,882/- by way of profits on this account had been correctly determined by the Income-tax Officer. One should have thought that this portion of the Tribunal's order was quite clearly wrong. The decision of the Income-tax Officer proceeds on the basis of some expert advice and not upon any supposed appropriation in the books of the vendee But even if that were so, it is difficult to understand how this could be utilised against the vendor unless it was by some agreement between the parties that the amount had been so allocated. In any case as I shall show later, this consideration is not open to us now and we have to decide on the footing as if this figure of Rs. 15,882/- was a correct figure.

(17) The order of reference does not indicate all the facts which I have mentioned above, but they are self-evident from the various orders of the taxing department and are not disputed before us. We have now, therefore, to answer the points referred to us in the light of the facts as found by the Tribunal. I have quoted above the relevant findings in some detail. The answer to the questions formulated by the Tribunal depends upon the answer to the question whether the profits in respect of the sale of the buildings plant and machinery as also in respect of the stores were earned in course of the business of the company; in other words, if the business of the company continued up to the date of the sale or even after the date of the sale during the accounting year, then it is not disputed that the profits would be chargeable to tax under the second proviso to Section 10 (2), (vii) of the Income-tax Act. On this point the findings of the Tribunal appears to be quite specific, and it is not easy for me to comprehend how on that finding the Tribunal could make a reference under Section 66 (1) of the Act to this Court. On the finding as it stands the question is purely a question of fact, and if there is any evidence to support the finding of the Tribunal on the point, it is impossible for us to interfere with such a finding on this reference.

(18) Mr. S. Mitra, the learned Counsel for the applicants, who has presented the case on their behalf with remarkable learning and lucidity, has urged that the finding in question has not the sanctity of a finding of fact at all; and indeed, he points out that the members of the Tribunal themselves do not attach that sanctity to it. He argues that the question whether trade or business was being carried on during the accounting year is a mixed question of fact and law inasmuch as the inference based upon the primary facts as to whether they amounted to carrying on business was really an inference of law and not an inference of fact. He also contends that even assuming that the question was one of fact, yet the finding in this case could not be sustained as there was no legal evidence to support it. In this connection he points out that the circumstances on which reliance has been placed by the Tribunal to come to that finding are also consistent with the case of the assessee that it was not the business which was carried on, but that all that was being done was to realise the assets of the company as in a case of winding up. The learned Counsel also argues that in any case certain very important materials which should have been taken into account by the Tribunal in forming their conclusion and in arriving at the finding were altogether ignored by them. Those materials, the learned Counsel submits, were an affidavit filed by one Robert Adam Brown, a chartered accountant by profession and a partner in the firm of Lovelock & Lewes, and also one of the liquidators of the assessee company, and the other materials were the correspondence which took place between the Board of Directors in England and the employees of the company in India. In addition to these, there was a letter of Commander, N. W. Dixon, (R.N.) Ex-Chairman and Managing Director of the company (Pursa Ltd.) in reply to the enquiry made by Messrs. Lovelock and Lewes the liquidators of the assessee company in respect of certain matters connected with the business of the company during the period of accounting. The learned Counsel points out that the materials aforesaid which, although at one place have been referred to by the Tribunal, have not been considered by them in so far as they had a bearing on the point involved. In support of his contentions the learned Counsel has referred to a large number of English and Indian decisions. Before I examine the arguments synthesised above, I should refer to some of the relevant provisions of the Indian Income-tax Act.

(19) Section 6 of the Act enumerates various heads of income chargeable to income-tax. One of them is Item No. (iv) in the section which relates to "Profits and gains of business, profession or vocation." The term "business' has been defined in Section 2 (4) of the Act and it "includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture." Therefore, profits and gains out of any trade, commerce or manufacture or any such adventure or concern are liable to be assessed as income. Now, Section 10 of the Act is the section which deals specifically with income arising from business which is chargeable to income-tax. Under Sub-section (1) of the section

it is provided that the tax shall be payable by an assessee under the head "Profits and gains of business, profession or vocation" in respect of the profit or gains of any business, profession or vocation carried on by him. Sub-section (2) of the section provides for certain deductions which are admissible in respect of the profits or gains of such a business, and some of the clauses show that the assessee is entitled to claim a deduction in respect of the buildings, machinery plant, etc., used for the purposes of the business. Clause (iv), for instance, provides for deduction on account of the insurance premium paid for ensuring buildings, plant, machinery, etc., against risk of damage or destruction. In Clause (v) deduction is permissible in respect of current repairs to such buildings, machinery, plant or furniture, and in Clause (vi) in respect of depreciation of such buildings, machinery, plant or furniture. Therefore, so long as the business is being carried on, these deductions are permissible to the assessee. Now, in Clause (vii), similarly it is provided that the assessee can claim deductions in respect of any such building, machinery or plant which has been sold or discarded or demolished or destroyed. This clause is subject to a very important proviso and that proviso shows that where the amount for which any such building, machinery or plant is sold exceeds the written down value, so much of the excess as does not exceed the difference between the original cost and the written down value shall be deemed to be profits of the previous year in which the sale took place; in other words, by virtue of this proviso, the excess amount over the written down value but not exceeding difference between the original cost and the written down value shall be added to the profits of the business, and, therefore, shall be liable to assessment. In fact the Act by introducing Sub-section (6-C) in Section 2 which is the definition section has provided that such a profit shall be included in the term "income", and would, therefore, be assessable as such being the profits of the business. There was some argument addressed to us on the question as to which are the charging sections of the Act. Indeed, the argument is absolutely immaterial for the purposes of the point under enquiry. It is conceded on both sides that if the building, plant and machinery etc., had been sold after the business had been closed down, then any profits earned by the company on account of such sale would not be liable to assessment as it would not relate to the profits or gains of the business, the business having already come to an end. But where the business continues to be carried on and during the continuance of such a business the plants and machineries are sold and profits deprived, the second proviso to Clause (vii) of Sub-section (2) of Section 10 is bound to come into play. The whole question, therefore, as I have said, turns upon this fact whether the business did continue.

(20) In this connection some of the salient facts may be recalled. The accounting year commenced in October 1943. The sale was agreed to in a general meeting of the company on the 8th of October 1943, but the memorandum of sale was actually executed and the purchase money paid on the 8th of December 1943, and the concern was turned over to the purchaser, Dalmia Jain & Co., on the 10th of December 1943. Prior to that, there is absolutely nothing to indicate that the company had stopped its business. We have been persuaded by the learned Counsel for the applicant to peruse the correspondence, the affidavits, and the letter of Commander Dixon, 1 and I do not find anything anywhere to indicate that the company actually had stopped its business. There is no resolution of the Board of Directors or of the general body of share-holders directing cessation of business. These materials, on the contrary, show that although the intention was to dispose of the entire concern, yet the share-holders or directors never wanted that the business of the company should stop until, at any rate, the sale was effected. In fact, it is admitted by Commander Dixon himself that the trading and manufacturing had to be carried on until such time as any sale was completed. The directors realised that they had various difficulties in bringing to fruition the sale of the entire concern. They had to dispose of certain zirat lands which were presumably utilised for the purpose of growing cane for the factory. They had also to negotiate with the Bettiah Raj for the repurchase of the mukarrari interest which were holding under the Raj and which under some contract they were liable to sell to the Raj alone. They had also to sell the stock of sugar and grains and to provide for making other arrangements in order to complete the disposal of their assets. These things naturally required time and as they depended upon uncertain factors, as prudent businessmen, the directors never intended to stop the business altogether, nor did they actually stop it. Commander Dixon says in his letter that:

> 'we were advised that the share-holders should not be asked to agree to the actual winding up until the property sold to Dalmia Jain & Co. had actually been conveyed to them."

and then he proceeds to say:

> "Delays and difficulties arose over proving title and it was not until April, 1945, that we were informed by our Solicitors that this business had been satisfactorily completed."

and then a general meeting of the share-holders decided on the 20th of June 1945, that Pursa Ltd., the assessee company, should be wound up forthwith.

(21) The affidavit of Robert Adam Brown is very much to the same effect. He says that for the purpose of manufacturing sugar the company grew a certain amount of sugar cane on its own lands and purchased further supplies of cane, and when the land on which the company grew sugar cane was sold as part and parcel of the Pursa Sugar Factory in accordance with the agreement dated the 7th December 1947, the company thereafter grew no more sugar cane, and did not buy any sugar cane. The affidavit also shows that between the 9th August 1943, and 7th December 1943, certain stores were also consumed in the normal course of the company's business. These facts very clearly indicate that up till the date of sale the company did carry on its normal business and there was no cessation of business till then. It is true that there was no crushing of sugarcane during the period; but the crushing season, as I have said, did not start until the month of December. Having regard to these facts, it was not surprising that the liquidators claimed certain deductions on account of the carrying on of business during the year of accounting, and when the Income-tax Officer did not consider that the deductions were admissible, they in their letter dated the 19th of March 1947, asserted that the company was carrying on business during the year ending 30th September 1944. This assertion of theirs they said, was further supported by the fact that there were various debits contained in the sugar factory accounts showing expenses incurred in carrying on the company's business.

(22) The learned Counsel for the assessee very strongly urged that this statement of the liquidators was based on a misapprehension of the legal

position. I have shown this was not actually so. It was an admission on a point of fact and an admission which is also borne out by the materials placed before us. The learned Counsel also suggested that the admission, if at all, referred to the state of affairs up to the 9th of August 1943 only, which was very much prior to the accounting period. He says emphasis upon a term of the memorandum of agreement where it is provided that the buildings, plants, machineries, etc., were to be sold as on the 9th day of August, 1943. Now it is quite obvious that this term only means that they were to be sold as they existed on that date. In fact, Robert Adam Brown in his affidavit explains the position. He says that the sale agreement dated the 7th December, 1943, provided that the company will sell the various items enumerated in the agreement including stores, articles and things as on the 9th day of August, 1943, (subject to subsequent use and consumption in the ordinary course of business) and a 'list' of stores as at the 9th August 1943, was appended to the agreement. It is, therefore, quite obvious that this date 9th of August, 1943, had nothing to do with the title to the property or to the possession of the property. It was only concerned with the various things and appurtenances of the factory and the plants and machineries, etc., as they were found on the premises on that date a list of which was appended to the agreement. The agreement itself shows that the purchaser was not entitled to take possession until the consideration money had been paid. In fact, the Board of Directors also were particularly cautious about the payment of the purchase money. In their resolution dated the 20th of August 1943, when they accepted the offer of Dalmia Jain & Co., they sent definite instructions to their joint manager Mr. J. F. Owen, that payment of purchase price must be safeguarded before the concern is turned over to the vendee. There could be, therefore, no intention to make the title vest as from the 9th of August 1943, and, in my opinion, the contention of the learned Counsel is negatived by the very materials which he has placed before us. It is further pointed out by the learned Counsel that the stores consumed by the factory were also negligible and the intention merely was to keep the factory going so that the machinery might not deteriorate. Even this contention does not appear to be well-founded as the affidavit of Adam Brown shows that the consumption was in the ordinary course of business. In any event, obviously there could not have been much consumption because the sale had been already effected on the 8th of December, 1943, almost when the crushing season had just started. These are, however, entirely questions of fact. The liquidators themselves stated that the business of the company was being carried on and the Tribunal was justified in relying upon this statement. They were right in pointing out that at no stage it was claimed before them that there was discontinuance of the business previous to the sale itself, and in fact there was no break between the company's carrying on business and the sale of the assets.

(23) The other phase of the question relates to the sale of the stock of sugar and grains. It is to be noticed that this stock of sugar was not intended to be sold along with the plants and machineries. In explaining the position to Messrs. Lovelock & Lewes, Commander Dixon says that the sugar stocks and grains were purposely excluded as it could not be known at what date such a sale would be concluded and the quantity of both these items and also their market prices were bound to fluctuate from day to day. Robert Adam Brown's affidavit is to the same effect and so is the recital in the memorandum of agreement. Adam Brown says that in the negotiation for the sale of assets the sugar stocks and grains were purposely excluded, inasmuch as they could not foresee when the sale of the assets would be actually concluded, and the market price of sugar as also the quantity of sugar and grains varied from day to day. Evidently the factory was, therefore, not anxious to dispose of the stock of sugar at any cost, but to sell it at its convenience presumably at an advantageous price after the sale of the assets, namely, buildings, plants and machineries, etc., had been completed. The learned Counsel urges that the vendee, Dalmia Jain & Co., had refused to purchase the stock of sugar and contracts for the sale of sugar may have been entered into by their selling agents; and, therefore, they were prevented from disposing of the sugar according to their own pleasure. The affidavit of Adam Brown does not give the exact quantity of sugar in stock on the 7th of December, 1943, but it only shows that the stock in hand at the close of the company's accounting year 30th of September 1943, amounted to 52,860 maunds. The members of the Tribunal have stated in their order that the sugar stock on the 30th of September, 1943, according to the balance-sheet, amounted to over six lakhs of rupees which were sold during the following year for Rs. 7,50,000; and they inferred from the various materials that the activities of the appellant company in disposing of their sugar stock, subsequent to the sale of the factory, amounted to carrying on the business of the company during the accounting period. It is true that the vendee was not prepared to accept the stock of sugar, but in my opinion, there was nothing to prevent the assessee from disposing of this stock of sugar at the earliest opportunity. It is also true that under the terms of selling agency the negotiation for the sale of sugar was to take place through the selling agents. Under paragraph 16 of the terms of that agreement the company was entitled to make direct sales of sugar up to 5,000 maunds normally over which the selling agents were entitled to a commission of half per cent of the price. But the same paragraph shows that the manufacturers could sell sugar in excess of 5,000 maunds directly. The selling agents could not prevent them from doing so. All that they were entitled to was the commission which was payable to them. It must be conceded that, if the selling agents had already entered into some contracts for the sale of sugar in question, then of course the company could not make direct sale of the stock. But this was a matter which the company could have well explained to the revenue authorities, and in the absence of any such material, the tribunal was entitled to come to the conclusion that there were no such contracts actually entered into by the selling agents and the sugar stocks were not sold at once as it was considered more profitable to sell them gradually in normal course of business. They found that the sale of sugar in fact continued up to June, 1944. Some of the observations of the Tribunal have been very severely criticised before us; for instance, where they said that the company spent substantial amount of money in the way of establishment and general charges subsequent to the sale of machinery. It may be that if we had to go into facts ourselves, we might possibly, on a review of the evidence, have come to a different conclusion on the point, but that does not mean that there is no basis for the finding of the Tribunal, and that we would be entitled to interfere with that finding on such an assumption. This Court is not a Court of facts, and even if a different view were permissible on facts, this Court would not be entitled to

reverse the finding of the Tribunal if there is a basis for that finding of fact. In my opinion, the matters which I have discussed above show that there was ample basis for the finding arrived at by the Tribunal, namely, that the business of the company continued during the accounting year, and in fact it did not cease at any stage.

(24) The learned Counsel for the appellant has very strongly relied upon a decision of the Allahabad High Court in 'Lalit Ram Mangilal v. Commr. of Income-tax', AIR (37) 1950 All. 390, where a Division Bench of the Allahabad High Court interfered with the findings of the Appellate Tribunal and set aside the assessment. But if we examine the facts of that case, it would be quite clear that there the position was entirely different. The assessee carried on business in cloth. During the accounting year he purchased some gold bars. He sold six of them at a profit and utilised two of them for making ornaments for his daughter. The view of the Tribunal was that the said transaction was an adventure in the nature of trade. The High Court, however, took the view that there was no definite finding that the transactions were with the sole object of making profits, and that the facts found by the Tribunal were consistent with the position that the purchase of the gold bars was not with the dominant intention of making profits as claimed by the assessee. Therefore it was not an adventure for trading. It should be noted that the selling of gold bars was not the normal business of the assessee; his normal business being the selling of cloth. The assessee claimed that he had purchased the gold bars on account of the special conditions of life prevailing in the year 1942-43 and was actuated by the desire of converting a part of his capital into portable commodity with which he could run away from his place of business in case of necessity. In the present case, there is no doubt that the purchasing, manufacturing and selling of sugar was the normal business of the company, and it was admitted that until the date of sale and payment of the purchase money, there was no intention of closing down the business but to continue its normal activities. In this connection reference was also made to the observation of Lord President Normand in 'Commr. of Inland Revenue v. Fraser', (1942) 24 Tax Cas 498, where he observed:

> "the Appeal Court has always jurisdiction to intervene if it appears either that the tribunal has misunderstood the statutory language — because a proper construction of the statutory language is a matter of law — or that the tribunal has made a finding for which there is no evidence which is inconsistent with the evidence and contradictory of it."

I have shown above that there is no such error in the present case which would justify our interference with the finding of the Tribunal.

(25) At one stage I felt that there was much strength in the criticism of the learned Counsel that the contents of the various documents have not been specifically discussed by the Tribunal, and we, therefore, allowed ourselves to be taken through those documents. This we did because the learned Counsel for the Taxing Department also raised no objection to it. There is no doubt that if material documents which would have influenced the decision of the Tribunal were ignored from consideration, in so far as they had a bearing upon the points involved, it would be open to this Court to set aside the finding of the Tribunal and remit the case to them for a reconsideration of those materials and then to submit a case afresh. But having examined the materials ourselves, I find nothing to support the argument that the company had ceased its business during the accounting period. Therefore, no useful purpose will be served in remitting the case to the Tribunal. I must not, however, be understood to encourage the practice that the Tribunal is bound to entertain and consider all materials placed before them for the first time and not produced before the Income-tax officers below them. Indeed it is the plain duty of the assessee to place all such materials on which he relies or which are required by the Department from him at the earliest opportunity. It is only in a special case, if at all, that the Tribunal may exercise their discretion in entertaining any fresh materials.

(26) It is, in my opinion, unnecessary to refer to the numerous other cases which have been cited by the learned Counsel. Most of those cases show that the High Court refused to interfere with the finding of fact of the revenue Tribunals. I will refer to two decisions in particular on which the learned Counsel has prominently based his submissions. The first is the Commissioners of Inland Revenue v. The Old Bushmills Distillery Co. Ltd.', (1927) 12 Tax Cas 1148. In this case, a company carrying on the business of whisky distilling went into liquidation in August 1920, and over a period extending from the date until March 1923, the liquidator sold off the company's stock of whisky, though the company had ceased distilling operations in March 1921. The company was assessed to corporation profits tax on the sales of whisky during the accounting period running from the 6th April 1921, to the 24th March 1923. On appeal, the Recorder found that the said profits did not arise from the carrying on of the trade of the company, but from realisations, sales and capital transactions incidental to the winding up of the business, and he accordingly discharged the assessment. The Commissioners of Inland Revenue then applied for statement of a case to the King's Bench Division of Northern Ireland. It was held that the question whether the liquidator was carrying on a trade or business was one of fact, and there was evidence to justify the finding of the Recorder. On the analogy of this case Mr. Mitra has argued that here also the sale of the stock of sugar should be regarded not as carrying on of the company's business but as mere realisation of assets in the process of winding up the business. The distinction between the present case and the case aforesaid is obvious. There the company had already gone into liquidation in August, 1920, and the process of distilling had stopped long before the accounting period. In the present case there is no such thing. In fact the liquidation actually took place in 1945 long after the accounting year. The decision, to my mind. is against the contention of the learned Counsel because in disposing of the case Moore, L. C. J., observed:

> "In my opinion the question remained a pure question of fact. Was the company trading or was it not? The Recorder has found as a fact that these were not ordinary trading sales, and, that, therefore, the profits were not profits of trade. On the evidence we cannot override the decision of the learned Recorder, nor decide that he was bound to find the company liable."

Brown, J., concurred in that decision and he also observed: "the question whether or not the liquidator was carrying on a trade or business was a question of fact." Therefore, when the Tribunal in the present case has come to a definite finding that the assessee was carrying on business, it is impossible for us to override that finding which related to a pure question of fact.

(27) The next case is a decision in 'Commissioners of Inland Revenue v. Nelson', (1939) 22

Tax Cas 716. In this case the assessee was a whisky-broker, purchasing and storing in bond whisky or eventual resale. He had earned great reputation in his trade and was known to be a holder of large stocks of whisky. In 1936 and 1937 he was in poor health and in March 1937, he entered a sanatorium and was advised to go for a long sea voyage. He in fact went to South Africa later on. As he had been for some time contemplating retirement from business, the assessee on the 15th July 1937, closed his banking account and instructed his accountant to take steps to wind up his business. On the next day he also notified his creditors and customers through the press and by circular letters of his retirement from business. After this on the 27th of July, 1937, he sold his whisky and casks, trade name, office furniture, fittings, etc. The profits on this sale were assessed by the income-tax authority, and on appeal the Special Commissioner found that the business had ceased on the 15th of July 1937, and that the sale having taken place after the trading had ceased was not a realisation of profits in the course of trade. Against that the Commissioners of Inland Revenue took the matter on a reference to the Court of Session. Here again the Court held the judgment having been delivered by Lord President Normand that:

> "The Special Commissioners have concluded in fact from the whole circumstances that the sale was not a sale in course of trade and I am unable to say that there was no evidence to support this conclusion."

At another place in the judgment Lord Normand made the following observation:

> "But I am of opinion that sale of a stock-in-trade such as whisky or grain on realisation may be either a sale in the course of trade or a sale not in the course of trade according to circumstances, and that the Special Commissioners here had, in the facts admitted or proved, evidence on which they were entitled to hold that the sale was not a sale in the course of trade."

Here, I should observe that the Tribunal were entitled to hold on evidence whether the sale profits were in course of business of the company or after the cessation of business, and it is impossible for us to say on the facts of this case that there was no evidence to support the conclusion of the Tribunal. The facts of the case also do not help the learned Counsel because there was justification for the Special Commissioners to come to the finding which they did. In that case there were ample materials to show that the sale had taken place after the assessee had wound up and retired from his business.

(28) Mr. S. N. Dutt, on behalf of the Department has very rightly pointed out that in none of the cases cited by Mr. S. Mitra for the assessee the High Court interfered with the findings of fact arrived at by the Income-tax Tribunals in holding whether trading was or was not being carried on by the assessees in each case. The only exception was the case in AIR (37) 1950 All 390, where the facts found did not amount to trading at all. He has also drawn our attention to a decision in 'Hillerns and Fowler v. Murray', (1932) 17 Tax Cas 77. The facts of the case show that there was a partnership agreement for a limited period and after the expiry of the period the partnership stood dissolved by lapse of time. The assessment in the case related to business carried on by the partnership after its dissolution. The partnership had trading stock and received further stocks on account of the previous contracts and supplied the stocks to customers. It was held by the revenue authorities that business was being carried on, and the High Court of Justice refused to interfere because there was evidence upon which it could be found that the appellants were trading even after the date of dissolution of partnership. This was a much stronger case where profits earned after dissolution of business were found taxable. Indeed Mr. Mitra himself concedes that even after the winding up if there was evidence to show that business was being carried on account of unexecuted contracts previously entered into, the profits would be liable to assessment.

(29) These decisions which I have referred to above all lead to the conclusion that it is not open to this Court to interfere with a finding of fact arrived at by the Tribunal. The question whether a business was or was not being carried on was purely a question of fact, and as the finding arrived at by the Tribunal does not appear to have been vitiated by any misconception of the legal position, I cannot see my way to interfere with this finding. As I observed above, a reference on such a question of fact did not lie to this Court.

(30) In regard to the next question, the learned Counsel contended that the decision of the Tribunal was quite clearly wrong because the amount of profits of Rs. 15,882/- was not based upon any evidence. In an earlier part of this judgment I have already dealt with this question, and it is unnecessary for me to repeat what I have said in regard to it. I am inclined to agree that the decision of the Tribunal on the point was erroneous, but it has been rightly contended on behalf of the Taxing Department that we are precluded from going into the matter because of the specific question which has been referred to us. The question as framed is: "Was the profit of Rs. 15,882/- on the sale of stores of the factory taxable under the Income-tax Act in the circumstances of this case." So the amount of Rs. 15,882/- has not been called in question. The only question is whether it is assessable to tax. The learned Counsel for the assessee vehemently urged that the Tribunal did not propose to interfere with the last part of question No. 7 as suggested by them which is as follows: "In any event, was there any evidence upon which the Tribunal could hold that such profits amounted to Rs. 15,882 — ?" I am afraid this contention cannot be entertained. Whatever the view of the Tribunal may have been, the specific question which they have referred to us precludes the assessee from reopening the matter that there was no evidence on which the Tribunal could hold that the profits on the said item amounted to the above sum. The proper remedy of the assessee in such a case was to apply to this Court Section 66 (2) of the Act for calling for a reference on the point within the period of limitation allowed by law. This was not done by the assessee, and, therefore, on the question referred to us we cannot now say that the profit of Rs. 15,882/- as assumed by the Tribunal was without any basis. This contention also, therefore, fails.

(31) The result is that the answer to both the questions under reference is in the affirmative, and the decision of the Tribunal is upheld. The reference may be answered accordingly.

(32) After this judgment had been prepared, my learned brother Shearer, J., in course of consideration of the matter discovered certain aspects of the case which had not been specifically pressed into our consideration at the Bar. Those aspects had an important bearing upon the interpretation of Section 10 (2), (vii) of the Income Tax Act, 1939. Shortly put, they may be stated as follows: (1) whether the second proviso to Clause (vii) would apply to a case where the profits are made

out of transactions entered into, not with a view to replacing a machinery or plant in use for the purposes of the business but out of a transaction entered into by way of closing down the business permanently; and (2) whether the said clause would apply in a case where the machinery in question has not been admittedly used for the particular purpose for which the machinery had been intended. We accordingly heard fresh arguments on these points and after having given my anxious thought to the matter, I regret to have to observe that I find nothing to make me change my mind with respect to the answers which I have suggested above. I must briefly indicate my reasons on the points though at the risk of adding to the volume of this judgment.

(33) Clause (vii) of Section 10 (2), as it stood prior to the amendment of 1939, made provisions for an allowance only in respect of machinery or plant which in consequence of its having become obsolete had been sold or discarded. In that event the assessee was entitled to an allowance in respect of the difference between the original cost to the assessee of the machinery or plant as reduced by the aggregate of the allowances made in respect of depreciation under Clause (vi) of the section, and the amount for which the machinery or plant was actually sold or its scrap value. In other words, if the original cost of the machinery was, say for instance Rs. 50,000, and if the aggregate amount of depreciation allowed on account of that machinery was Rs. 25,000, then if the machinery or plant actually came to be sold for Rs. 20,000, the assessee was entitled to an allowance of Rs. 5,000. This Rs. 5,000 represents as it were the loss which the assessee sustained on the sale of the plant or machinery for a price lower than the written down value or the depreciated value. We may assume that the written down value indicates the amount left after deducting the amount of the total depreciation allowed to the assessee from the actual cost price of the machinery or plant. It is to be noticed that this clause, as it stood prior to the amendment of 1939, provided only for machinery and plant which in consequence of obsolescence had come to be discarded or sold. It also provided for an allowance in case of loss sustained by the assessee on sale of the obsolete machinery for a price below the written down value. There was, however, a significant omission. It did not take into account the possible cases of profits earned by an assessee on such sales which were for a price in excess of the written down value and in certain cases even in excess of the original cost. The result was that the assessee had only advantages. He had the advantage of the depreciation allowance already given to him on account of the wear and tear of the machinery used in course of business. He had also the advantage of the profits on sales where it exceeded the written down value. To add to these in case of sales for a lower price than the depreciated value the advantage of a further allowance on account of the difference was also secured to him.

(34) When the provision was amended in 1939 (this being the provision with which we are concerned in this case), it provided for an allowance in respect of any machinery or plant which had been sold or discarded not merely on account of its becoming obsolete but also on account of any other factor. In all such cases an allowance had to be made to the assessee in respect of the amount by which the written down value of the machinery or plant exceeded the amount for which the machinery or plant was actually sold or the scrap value thereof, provided also that such amount was actually written off, in the books of assessee. Except for the "writing off" this was in effect also the old law. But what is more important, however, is that in 1939 a further proviso was added to the clause which is as follows:

> "Where the amount for which any such machinery or plant is sold exceeds the written down value, the excess shall be deemed to be profits of the previous year in which the sale took place."

(35) This proviso clearly shows that whereas, on the one hand, the assessee was entitled to an allowance for the difference between the actual sale price and the written down value, where the former was less; the assessee, on the other hand, became liable to be taxed by way of profits in case the actual sale price for which the plant or machinery was sold exceeded the written down value. Therefore, the effect of the amendment was firstly to guarantee an allowance to the assessee where the aggregate of depreciation already allowed to him did not cover the loss sustained on the sale of the property or its scrap value, and secondly where he made a profit over the written down value, to tax such a profit by way of income, he having already had the benefit of the depreciations allowed to him by the Revenue Authorities. The amendment thus equitably balanced the advantages which had been conceded to and enjoyed by the assessee under the law as it stood prior to 1939. But it created a disadvantage in another respect, namely, that it proceeded to claim as taxable income even the price fetched on sale in excess of the actual cost price. To use the illustration given above, it may be observed that if the property is actually sold for Rs. 60,000 then the difference between the written down value and the price for which it is sold would be deemed to be profits; in other words, Rs. 35,000 would be added up as the income of the assessee during the accounting year in which the sale took place. Thus the proviso, as it stood after the amendment of 1939, treated as income the entire Rs. 35,000 though in fact the property was actually purchased for Rs. 50,000 only, and the sum of Rs. 10,000 earned by the assessee was in excess of the actual cost price and may have been regarded as profits on capital.

(36) This anomaly was subsequently rectified by an amendment in 1947 wherein it was specifically provided that the difference between the written down value and the actual sale of the property which was to be treated as income should not in any case exceed the difference between the original cost and the written down value. In other words, only Rs. 25,000 in the illustration in question after the amendment of 1947 would be treated as income within the meaning of the provision, whereas the remaining Rs. 10,000 would be regarded as capital gain. The introduction of 12-B by the amendment of 1947 which section deals with capital gains strengthens the same conclusion.

(37) It appears, therefore, that the intention of the amendment of 1939 to Section 10 (2) (vii) of the Act quite clearly was to make equitable adjustments on account of depreciation allowances for plants and machineries used in business. This depreciation allowance, after all, had to be on a notional basis: if the depreciation allowed did not cover the loss incurred on actual sale of the property or its scrap value, then a further proportionate allowance had to be made to the assessee; if on the contrary, the assessee made a profit on the sale and recouped himself in regard to the total amount of depreciation already allowed to him, then the amount of depreciation along with the excess profits over the actual cost price had to be treated as the income of the assessee.

This anomaly about the excess over the cost price, as I have shown above, has been subsequently removed by the amendment of 1947. It is under the above proviso to Section 10 (2) (vii) of the Act of 1939 that the Department is claiming assessment over the income of the assessee earned from the sale of the plants or machineries. I have already discussed that the definition clause relating to 'income' had also to be amended in view of this change in the law so as to include such profits in the definition of 'income.' This sale having taken place during the year of accounting and at a time when the business was actually running, there seems to be no reason why the second proviso to Clause (vii) of Section 10 (2) of the Act should not apply to the case.

(38) It is, however, argued that the word 'any' in the aforesaid clause shows that it cannot relate to a case where the entire aggregate of plant or machinery is sold as it has been in this case but refers to individual items of plants or machineries. Where the aggregate of plant or machinery is sold and the business is intended to be closed down, it is suggested that the proviso will not operate as it must be restricted only to a case where the business is running and where the plant or machinery sought to be sold is intended to be replaced. In my opinion, the learned Counsel for the Department is right in contending that even if the aggregate of plant or machinery is sold, the calculation of the profits would be on the basis of the individual items, and therefore in any case the frame of the clause will have to be in the manner in which it has been drafted. It is rightly pointed out that the calculation cannot be in respect of the aggregate of machinery or plant but in respect of the written down value of each item, see for instance 'Charente Steamship Co. Ltd. v. Wilmot', (1942) 24 Tax Cas 97: (1942) 1 K B 210. All that the section requires is that the sale of the plant or machinery must have taken place in course of the continuance of the business during the accounting year. On the finding as it stands, the business did continue up to the date of the sale and even after the sale, and therefore the profits earned on account of the sale of these plants will have to be taxed as income within the meaning of the second proviso to Clause (vii) of Section 10 (2) of the Act. I do not see how any different principles can arise on the plain wording of the section.

(39) The other point that the machinery or plant was admittedly not in use for manufacturing purposes during the year of accounting and therefore any profits gained on account of the sale thereof could not be deemed to be profits of the business did at first create a great deal of impression on my mind. This argument was evidently based on the analogy of Clause (vi) of Section 10 (2) of the Act wherein an allowance for depreciation of the machinery in use is permissible. It was suggested that if during the period of accounting the machinery in question had not been used, then the assessee would not be liable to any allowance on account of depreciation of such machinery or plant as provided by Clause (vi) of Section 10 (2) of the Act. For this purpose, reliance was placed upon a decision in 'C. P. Manganese Ore Co., Ltd. v. Commr. of Income-tax, C. P. & U. P.', (1937) 5 ITR 734 at p. 738. This was a case where the assessee was engaged in the business of mining and selling manganese. In the year of accounting there was no mining operation at all, and the only business which the company did was of selling the manganese already mined. The assessee, however, claimed a deduction on account of the depreciation of the plants and machineries used for the purpose of mining. It was held that the assessee was not entitled to such an allowance. The considerations which applied to the interpretation of Clause (vi) of Section 10 (2) of the Act cannot in toto apply to the interpretation of Cl. (vii) of the section. The learned Counsel for the Department has laid much stress upon the presence of the word 'such' in Clause (vi) aforesaid and the absence thereof in Clause (vii) as it stood in the Act of 1939. He argued that the word 'such' indicates that the building, machinery, plant or furniture in Clause (vi) must have been used for the purposes of the business during the period of accounting, and if it has not been so used, then depreciation could not be allowed; whereas in Clause (vii) the absence of the word 'such' shows that the plant or machinery during the year of accounting need not necessarily have been used for the purpose of carrying on the business. In my opinion, the absence of the word 'such' in Clause (vii) does not make any material difference; though I agree that in order to enable the assessee to claim a depreciation allowance in any particular year the machinery must have been used for earning the profits of the business in that year, e.g.: A new machinery which has not been used will not be a subject of depreciation allowance. There can be no doubt that the plant or machinery mentioned in Clause (vii) must also have reference to the business and must be in connection with the business carried on by the assessee. But, in my opinion, the real key to the interpretation of Clause (vii) lies in the use of the expression 'discarded' with reference to plant or machinery referred to in the clause. A discarded machinery may have been discarded even before the year of accounting and therefore could not have been actually used for the business in question during that year. Even then if it was sold during the year of accounting and written off in the books of the assessee, the assessee, as the case may be, would be respectively entitled to an allowance or liable to assessment in case the sale was for a price lower or higher than the written down value. Therefore, although the plant or machinery sold was not during the year of accounting actually used for manufacturing sugar, yet this factor would be no bar to the application of Clause (vii) of the Act provided the business otherwise continued. If the assessee had claimed a depreciation in respect of the plant or machinery during the year of accounting, such an allowance might possibly have been refused to him on that account. Therefore, in my opinion, the decision in '5 I T R 734' has no application to the point which we are at present investigating with reference to the interpretation of Clause (vii) of the section.

(40) It does not appear to me that the interpretation which I am giving will work any hardship on the assessee. By virtue of Clause (vii) he gets the benefit of any loss which he incurs in case of sale below the written down value, and the Department has to make an allowance for it in his favour. There is no reason why if he makes a profit over the written down value, he should not be liable to assessment on that profit and in effect reimburse the Department. This seems to have been the evident intention of the amendment of 1939 which applies to the present case. It is true that the amendment went a little further inasmuch as it included as profit even the amount fetched on sale in excess of the original cost of the plant or machinery; but that, as I have said, was subsequently cured by another amendment where such a profit in excess of the original cost was not regarded as profit of the business. This consideration, however, cannot affect the interpretation which we have to give to the clause as it stood under the Act of 1939. The Act itself does

not indicate that the allowance by way of depreciation or by way of loss below the written down value was only with the intention of providing for re-placement of the plant or machinery. It may be that usually a plant or machinery would be replaced where the business is kept going but this consideration is foreign to the interpretation of the language of the provision. Nor does it appear to me to be any hardship if before finally winding up the business the assessee makes a profit by the sale of the entire plant and machinery with which the business was carried on, provided the sale was during the continuance of the business. Of course, if the sale was held long after the business had definitely closed down, which is not the case here on the findings, then the position might have been different. In that case there is no business on the profits of which the assessee could be taxed within the meaning of Section 10 (1) of the Act, the business having closed long before the actual sale of the plants or machineries.

(41) For these reasons, therefore, I see no ground to alter the conclusion at which I have arrived in suggesting the answers proposed.

(In view of the difference of opinion between Shearer and Sarjoo Prosad, JJ., the case came before Ramaswami, J., who delivered the following judgment:)

(42) RAMASWAMI, J.: This reference is made by the Income-tax Appellate Tribunal, Calcutta Bench, under Section 66 (1) of the Indian Income-tax Act.

(43) The reference relates to an assessment order made by the Income-tax Officer, Special Circle Patna, on 21st June 1947 against the assessee. The order was with respect to income-tax for the year of assessment 1945-46 but was based on the accounting period from 1st October 1943 to 30th September 1944. The assessee is "Pursa Limited", a joint stock company which carried on business in growing, manufacturing and selling sugar. The assessee company was incorporated under the Indian Companies Act but the share-holders and directors resided in the United Kingdom and directed the affairs of the company therefrom. The company went into voluntary liquidation on the 20th June 1945 and is at present represented by liquidators in this Court. In June 1943 the directors had commenced to negotiate for the sale of the factory and other assets with the ultimate object of winding up the business. On 7th December 1943, an agreement for sale was concluded between the assessee on the one hand and Messrs. Dalmia Jain & Co. on the other. The memorandum of agreement provided that the vendor was to sell and demise to the purchaser for a total price of Rs. 28 lakhs all the lands, buildings and machinery and plant. But the stock of manufactured sugar and of grain lying in the godown was expressly excluded and remained the property of the company. It was stipulated that the possession of the assets covered by the contract was to be delivered to the purchaser after the execution of the agreement and after payment of the purchase price. There was a clause that even after possession had been delivered and up to one year from that date the company would retain the right to occupy the manager's bungalow and godown in order to enable the company to dispose of the stock in trade and other capital assets not covered by the sale. On 7th December 1943, the consideration of Rs. 28 lakhs was paid by Messrs. Dalmia Jain & Co. and three days later possession of the factory was taken by the vendee. On 7th December 1943 the assessee possessed sugar stocks valued at Rs. 6 lakhs and it is not controverted that the assessee continued to sell the stock of sugar up to June 1944 and the total price realised was Rs. 7½ lakhs. In the course of the present assessment proceeding the Income-tax Officer wrote to the company to show cause why the activities of the company during the accounting year should not be taken as tantamount to realisation of the assets on liquidation. In their reply dated the 19th March 1947 the liquidators asserted that the company carried on business during the accounting year and did not merely realise assets. They claimed that the various debits contained in the sugar factory accounts were those incurred in carrying on the company's business. The liquidators accordingly pressed for deductions which they had claimed in their return. On receipt of this letter, the Income-tax Officer on 7th May 1947 informed the liquidators that the profits made by the company on the sale of the buildings, plant and machinery were taxable under the second proviso to Section 10 (2) (vii) of the Indian Income-tax Act and he called upon them to furnish certain particulars in regard to sale price of the machinery and plant and the original cost which the company had incurred. On 22nd May 1947, the liquidators wrote to the Income-tax Officer that the proceeds arising out of the sale of the company's plant and machinery were not taxable since the company had ceased to carry on business. But the Income-tax Officer held that the proceeds of the sale of plant and machinery and the value of the stores were liable to assessment under Section 10 (2) (vii) of the Income-tax Act. Accordingly by his order dated 21st June 1947 he added a sum of Rs. 13 lakhs and odd on account of the proceeds of the sale of plant and machinery and Rs. 15,882/- on account of the proceeds of the sale of stores. The assessment was affirmed in appeal by the Appellate Assistant Commissioner of Income-tax by his order dated 31st January 1948. The Appellate Assistant Commissioner held that in the year of account there was no manufacture of sugar by the company and there was only sale of sugar. But he agreed with the Income-tax Officer that the sale of sugar by the company amounted to carrying on business, that the plant and machinery were sold during the continuance of the business and the profits made by the company were liable to assessment under Section 10 (2) (vii). Before the Appellate Tribunal the assessee did not dispute the correctness of the figure as to the amount of profits in respect of the sale of machinery and building. But his argument was that Section 10 (2) (vii) of the Act had no application to the case since the sale had been effected in the process of winding up the company and realising its assets. Appellate Tribunal however rejected the contention of the Assessee holding that the sale of sugar continued up to June 1944 and the assessee had spent substantial amount of money in the way of establishment and general charges even after the machinery and plant had been sold.

(44) At the instance of the assessee the Appellate Tribunal formulated the following questions for the determination of the High Court:

"(1) On the facts and in the circumstances of this case is the surplus of Rs. 13,05,144 arising out of the sale of plant and machinery of the sugar factory chargeable under Section 10 (2) (vii), and (2) Was the profit of Rs. 15,882/- on the sale of stores of the factory taxable under the Income-tax Act in the circumstances of this case."

(45) The reference was argued before Shearer and Sarjoo Prosad, JJ., in the first instance. But the learned Judges did not agree as to the answers to be furnished to either of the questions raised. Shearer, J., held that Section 10 (2) (vii), was applicable only in the case of a business which had continued during the year of assessment and in

succeeding year, that it did not apply to a business which had been discontinued or was in the process of being discontinued. The learned Judges considered that the Appellate Tribunal had misdirected itself in law as to the scope and effect of the second proviso to Clause (7) of Section 10 (2); and that the sum of Rs. 13 lakhs and odd was not liable to be taken into account in assessing income-tax on the assessee during the year of assessment. Upon the second question Shearer, J., held that there was no material upon which the Income-tax Department could draw the inference that the profit of Rs. 15,882 was made by the assessee on the stores of the factory and therefore the amount of Rs. 15,882/- was not taxable under the Income-tax Act. On both these questions Sarjoo Prosad, J., expressed a contrary view. As regards the amount of Rs. 13 lakhs and odd Sarjoo Prosad, J., held that Section 10 (2) (vii) would apply even to a case where the profits were made out of transaction entered into with a view to closing down the business and not with a view of replacing the machinery and plant. The learned Judge accordingly found that the amount of Rs. 13 lakhs and odd was liable to be taxed. As regards the amount of Rs. 15,882/- Sarjoo Prosad, J., held that upon the question as framed it was not open to the assessee to argue that there was no evidence upon which the Tribunal could hold that the profits amounted to Rs. 15,882.

(46) In view of the difference of opinion this case has been placed before me for decision under Section 98 (2) of the Civil Procedure Code read with Section 66-A of the Indian Income-tax Act.

(47) The learned Judges have formulated the following points of law on which they have differed:

(1) "When, in the process of closing down a manufacturing business, the entire aggregate of plant and machinery is sold, is the difference between the price obtained at the sale and the written-down value of the plant and machinery to be deemed to be profits of the business and assessable to income-tax under the proviso to Section 10 (2) (vii) of the Indian Income-tax Act? Does it make any difference that the business of selling goods manufactured in the previous accounting year has continued? and (2) when, in such a case, stores used in the business are sold, is the difference between the price paid by the vendee and the value which the vendee puts on the stores in his books of account a profit? If so, is it deemed to be a profit of the business and liable to income-tax under the aforesaid provision?"

(48) It is desirable at the outset to call attention to the scheme and structure of the Indian Income-tax Act. Section 6 of the Act enumerates the various heads of income chargeable to income-tax. Item (iv) of this section relates to "profits and gains of business, profession or vocation". The term "business" is defined in S. 2(4) to include any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. Section 10 of the Act is a section which deals specifically with income arising from business which is chargeable to income-tax. Sub-s. (1) of this section provides that the tax shall be payable by the assessee under the head "profits and gains of business, profession or vocation" in respect of the profits or gains of any business, profession or vocation, carried on by him. In the twelve clauses of Sub-s. (2) are enumerated various deductions which are permissible out of the gross profits in order to arrive at the taxable profits of the business. Clause (iv), for example, provides for a deduction on account of insurance premium paid for insuring buildings, plant, machinery etc. against the risk of damage or destruction. Clause (v) refers to current repairs of such buildings, plant, machinery or furniture. Clause (vi) provides that an allowance may be claimed in respect of depreciation of such buildings, machinery, plant or furniture which is equivalent to such percentage on the original cost to the assessee as may be prescribed in any case. Clause (vii) enacts that an allowance may be claimed "in respect of any machinery and plant which had been sold or discarded, the amount by which the written down value of the machinery or plant exceeds the amount for which the machinery or plant is actually sold or its "scrap value". This clause is subject to the first proviso that such amount should be actually written off in the books of the assessee. The second proviso is important, for it enacts that "where the amount for which any such machinery or plant is sold exceeds the written down value the excess shall 'be deemed' to be profits of the previous year in which the sale took place". It should be noticed that S. 2 of the Act has been correspondingly amended; and Sub-Section (6c) states that 'income' includes any sum deemed to be profits under second proviso to Cl. (vii) of Sub-s. (2) of S. 10."

(49) The issue in the present case depends on the true meaning and effect of the second proviso to Cl. (vii) of S. 10(2) of the Act.

(50) Before the amendment of 1939, S. 10(2)(vii) only made an allowance admissible "in respect of any machinery or plant which in consequence of its having become obsolete had been sold or discarded", the allowance being "the amount by which the written down value of the plant or machinery exceeds the amount for which the machinery or plant is actually sold or its scrap value". To cite an example, if the original cost of the machinery was Rs. 10,000, depreciation allowed up till the year of sale was Rs. 3000, written down value was Rs. 7000 and the plant was sold for Rs. 6000, the balancing allowance would be Rs. 1000. But it was incumbent on the assessee to show that the machinery or plant had become obsolete, before he could be granted the allowance. It was not however made a condition as it was in the corresponding English statute of an allowance being granted that the obsolete plant or machinery should have been actually replaced by a modern and up-to-date type. When the clause was amended in 1939 it ceased to be a condition that the machinery or plant should have become obsolete. The allowance could be claimed by the assessee even though the machinery or plant was not technically obsolete but such plant or machinery was sold or scraped for any reason whatever. The allowance in the case of sale was of such sum as represented the excess of the written down value over the sale proceeds. The purpose of the allowance was that the balance of the amount of capital expenditure remaining unallowed minus the amount of sale proceeds should be granted to the assessee so as to enable him to recoup his cost in full. In the English Act of 1945 the allowance is for this reason called "balance allowance". The allowance is similar in its nature to depreciation, which is a loss and expense incurred in using the asset for the earning of profits and ought therefore be charged against those profits they have earned. If instead of being sold, the machinery is merely discarded or put aside, the entire written down value on that date would represent the allowance. In either case, such amount is required to be completely written off in the books of the assessee. But where a sale of a machinery or plant or a building fetches an amount in excess of the written down value there is no scope of any allowance to be granted to the assessee but a different principle operates. The principle is

that such portion of the depreciation allowance granted in the past and which has proved unwarranted should be brought into charge. In other words the charge is imposed to balance the depreciation allowance already granted to the assessee and which turns out in the event to have been undeserved. For this reason the charge is styled "balancing charge" in S. 68(i) of English Income-tax Act, 1945. To take the previous example, if the plant is sold for Rs. 11,000, the amount of Rs. 4000 would be charged to tax. The amendment of 1939 was defective in one respect for the amount of sale proceeds in excess of cost price was taxed though it should be capital profit, free of tax. The defect was removed by Act VIII of 1946 wherein provision was made that the difference between the written down value and the actual sale price of the plant which was to be treated as income should not in any case exceed the difference between the original cost and the written down value. In other words, the effect of the 1946 amendment was to tax the entire depreciation allowance granted till the time of sale but the excess of the sale proceeds over cost price of the plant was treated as capital profit free of tax. On behalf of the assessee, it was contended by Mr. Mitra that S. 10(2)(vii) will operate, and the excess sale proceeds will be taxable, only if the machinery or plant sold has been replaced and the business of manufacture continued in the year of account. It was argued in effect that the S. 10(2)(vii) will not be applicable if the machinery was sold in the process of closing down a manufacturing business. I see no reason why the section should be construed in this restricted manner. There is no express condition (as in the corresponding English statute,) that the allowance could be claimed only if the assessee replaced or intended to replace the machinery or plant which had been sold. It was also contended for the assessee that Cl. (vii) will not operate in a case where the entire aggregate of plant or machinery is sold. In my opinion this argument too is not valid. As a matter of construction, the words of the clause "any machinery or plant" are obviously applicable to any number of items of machinery or plant. It is clear that the clause applies in a case where the entire aggregate of plant or machinery is sold, though the calculation of allowance or tax cannot be in respect of the aggregate of the machinery or plant, but will be in respect of the written down value of each separate item (see 'Charente Steamship Co. Ltd. v. Wilmot', (1942) 24 Tax Cas 97. For the application of S. 10 (2) (vii), it is immaterial that the sale is effected of each separate item of machinery or of the whole aggregate of machinery or plant in one block broken up or in running condition.

(51) It is a well-known principle that in a taxing statute there is no room for any presumption or intendment. If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. In a taxing statute, there is no room for any intendment. In the 'Cape Brandy Syndicate v. Commrs. of Inland Revenue', (1921) 12 Tax Cas 358 at p. 366 Rowlatt J. observed:

"Now of course it is said and urged by Sir William Finlay that in a taxing Act clear words are necessary to tax the subject. But it is often endeavoured to give to that maxim a wide and fanciful construction. It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts. It means this, I think; it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment; there is no equity about a tax; there is no presumption as to a tax; you read nothing in; you imply nothing; but you look fairly at what is said and at what is said clearly and that is the tax."

(52) On behalf of the assessee, the argument was addressed that if S. 10(2)(vii) was to operate the assessee must "carry on business" within the meaning of S. 10(1) of the Act. It was pointed out that the object of the assessee in selling the machinery and plant was to wind up and discontinue the business, that it was immaterial that the business of selling goods already manufactured continued since the business of manufacturing goods had been stopped. The argument is attractive but, in my opinion, it is wholly untenable. Though the object of the directors may be to wind up the business and not to earn the profits by the continuance of the business still if the nature of the activities appertain to commercial methods the company would carry on a business in legal sense. For it is no paradox to say that there can be trading or carrying on of business during the course of winding up of affairs of a business. A trader for instance who wishes to retire from business may wind up his business in several ways. He may sell his concern as a going concern or he may auction off his stock. But he may also without resorting to a forced sale involving him in a sacrifice, wind up by continuing to carry his business in the ordinary way, without however replenishing his stock. He would ultimately leave himself with no stock and then retire. In these circumstances the realisation of stock would effectuate both his purposes and consequently there would be trading. For example in 'J. & R. O'Kane & Co. v. Commrs. of Inland Revenue', (1921) 12 Tax Cas 303 the appellants, who carried on business as wine and spirit merchants, issued a circular letter early in 1916, announcing their decision to retire from business, and shortly afterwards they issued to their regular customers lists of spirits for sale. The lists were headed "Retiring from business" and contained certain conditions of sale which required that the purchaser should clear the goods from bond and retain the casks. During the year 1916, few sales were made, but during the year ending 31st December 1917, practically the whole of the stock was sold. Meanwhile the appellants had acquired a certain quantity of spirits up to the spring of 1917 under running contracts with distillers, but no other purchases were made. The appellants were assessed to excess profits duty for the yeyar 1917 in respect of the profits arising from the whole of their sales in that year, and on appeal, it was held by the House of Lords that there was ample evidence on which the Special Commissioners could arrive at their findings and that the appellants were liable to excess profits duty in respect of the profits in question. In his speech Lord Buckmaster states (at page 347):

"The first question, therefore, is: Did the profits in question arise from any trade or business? It is alleged that they did not, for the reason that they were derived, not in carrying on the business, but in the process of realisation under an altered method of trading not consistent with a continuing concern.

My Lords, I find it difficult to think that these considerations can in the circumstances of this case afford any protection to the appellants. For in truth it is quite plain that right up to the end of 1917 they were engaged in trading which, so far as the external world is concerned, was the ordinary method of carrying on trade modified only by arrangements which were merely part of the machinery of business dealing adopt-

ed to effect their intention to retire. It may well be accepted that they did so intend; yet the intention of a man cannot be considered as determining what it is that his acts amount to: and the real thing that has to be decided here is what were the acts that were done in connection with this business and whether they amount to a trading which would cause the profits that accrued to be profits arising from a trade or business?"

(53) In a similar case, 'Hillerns & Flower v. Murray', (1932) 17 Tax Cas 77 the partnership agreement by which the assesee firm was constituted, expired on 31st March 1926. The dissolution of the partnership by lapse of time was announced to customers by circular letter dated 31st March 1926. On that date, the firm held certain trading stock, and after that date the partners received delivery of further stock contracted to be bought before that date. The stock thus held and acquired was delivered to customers in fulfilment of contracts made before, but due for fulfilment after 31st March 1926. No new contracts of purchase or sale were made after 31st March 1926. An assessment to income-tax was made upon the firm for the year 1926-27 in respect of profits realised through the fulfilment of contracts in that year On appeal it was held by the King's Bench Division that there was evidence upon which it could be found that the appellants were trading after the date of dissolution of partnership. At page 91 Romer L. J. states:

"When there is stock-in-trade which can only be sold at a sacrifice by what is called a forced sale—some immediate sale by auction — it may be necessary, in order to dispose of that stock-in-trade to the best advantage, to carry on the business so that the stock-in-trade can be sold in the usual course of trade. That seems to me to have been the case in Ireland which came before the House of Lords in 'O'Kane's case', 12 Tax Cas 303. Or it may be, and in my opinion this is what happened in the present case, the partnership may be possessed of outstanding contracts of a beneficial character. In that case, instead of shutting up the whole business and letting the people who suffered damage by breach of contract be paid their damage at winding-up, it is considered more beneficial to the partnership to continue the business for the purpose of completing the contract. In those circumstances, of course, it would be impossible to say that the fact that all that was done by the partners was to realise the assets to the best advantage necessarily showed that they were not carrying on a business, because in many cases, in fact I think one might say in most cases, in the case of a winding-up of a partnership it is necessary, for the proper getting in of the assets and the winding-up of the affairs of it, to carry on the business for a short time, or to carry on the business to a limited extent."

(54) The question therefore in the present case is whether the assessee was carrying on the business in the year of account. It is not material to enquire whether the transactions were entered into with the ultimate object of closing down the business or liquidating it. But the question whether the company carried on business is essentially a question of fact, for the decision of the question depends upon the quality and character of the facts established in the case. (See for instance 'Martin v. Lowry', (1927) A C 312; 'Ducker v. Rees Roturbo Development Syndicate, Ltd.', 1928 A C 132. The Appellate Tribunal has found in the present case that the assessee company was carrying on business after the factory had been sold during the year of account. This conclusion is one of fact and there are materials in this case upon which the Appellate Tribunal could properly reach this conclusion of fact. In the first place there is the admitted circumstance that in the memorandum of sale dated 7th December 1943 the stock of sugar was not included. From the affidavit of Robert Adam Brown it appears that on 30th September 1943 the stock of sugar was 52860 maunds that out of this stock the company made direct sales of 822 maunds and the balance of stock was sold by Messrs Bird & Co. between December 1943 and June 1944. It is stated in the same affidavit that there was an agreement between the assessee company and Messrs. Bird & Co. dated 22nd April 1942 by which the latter were appointed sole selling agents for a period of five years from 1st January 1943 and the assessee company undertook that they would not themselves or through any other agent sell any sugar manufactured in the factory though by clause 16 of the agreement the assessee company did retain the right to effect direct sales up to 5,000 maunds per season. The Appellate Tribunal has found that the stock of sugar was valued at Rs. 6 lakhs but it was sold for Rs. 7½ lakhs. It is an admitted fact the company spent a sum of Rs. 50,000 on account of establishment and general charges even after the machinery and plant had been sold. It appears that the proposal to sell the plant and machinery was agreed to on 8th October 1943 in a general meeting of the share-holders of the company. But the contract of sale was actually executed and the purchase-money paid on 8th December 1943 and possession was given to the purchaser Dalmia Jain & Co. on 10th December 1943. It is true that there was no crushing of sugar cane on the part of the assessee during the accounting period but the crushing season, it is conceded, did not start until the month of December. On behalf of the assessee Mr. S. Mitra, contended that the Tribunal had failed to consider copies of certain minutes of the Board meetings and the correspondence between the company's administration and the Board of Directors. The Appellate Tribunal has referred to these documents though the matter is not considered in detail. In any case, the documents do not, in my opinion, support the contention of the assessee that no business was carried on in the accounting year. For in his letter dated 24th April 1948 Commander Dixon states that

"the trading and manufacturing had to be carried on until such time as any sale was 'completed'. Commander Dixon states that "in negotiating the sale of the assets in connection with the mill and zerats, sugar stocks and grains were purposely excluded as it could not be known at what date such a sale would be concluded, and the quantity of both these items and also their market prices must vary from day do day."

According to the contract with Messrs. Bird & Co. the sugar of 1943 must be sold by the latter according to the requirement of the market and despatched according to delivery dates required by the purchaser. Commander Dixon states that these despatches were completed by 1st March 1944, that these despatches were a completion of contracts made by the selling agents of sugar given to them to sell before the sale of the factory was completed. The affidavit of Robert Adam Brown is to the same effect. He says that for the purpose of manufacturing sugar the company grew a certain amount of sugar cane on its own lands and purchased further supplies of cane and that all land on which the company grew sugar cane was sold as part and parcel of the Pursa Sugar Factory, & the company thereafter grew no more sugar cane and did not buy any sugar cane. The affidavit states that between 9th August 1943 and 7th December 1943

certain stores were consumed in the normal course of the company's business. From para 3 of the agreement with the selling agents, exhibit A, (annexed to the affidavit of Robert Adam Brown) it appears that the company agreed that they will not themselves or through their agent sell any sugar manufactured except in accordance with the terms of the agreement. The letter of Commander Dixon and the affidavit of Robert Adam Brown, to which learned counsel has made reference, do not support the contention made on behalf of the assessee that no business was carried on during the accounting year. On the contrary, these documents support the finding of the Appellate Tribunal that during accounting period the company carried on business even after they had sold the machinery and plant to Dalmia Jain & Co.

(55) For the reasons assigned, I agree with my brother Sarjoo Prosad J. and hold that upon the facts of this case the surplus of Rs. 13,05,144 arising out of the sale of the plant and machinery of the sugar factory is chargeable under S. 10(2)(vii), proviso 2 of the Indian Income-tax Act. I would answer the first question of law formulated by the Division Bench in the above manner. I regret that on this question I have reached a conclusion different from that of my brother Shearer, J. for whose opinion I have great respect.

(56) As regards second question, the finding of the Appellate Tribunal is, in my opinion, erroneous, for there is no material upon which the Tribunal could hold that the profit of Rs. 15,882 was made on the sale of the factory stores. From the statement of the case it appears that the sum of Rs. 15,882 represented the difference between Rs. 88,000 which the Income-tax Officer described as "sale proceeds on the basis of expert valuation" and Rs. 72,118 which was the cost of certain stores to the assessee. The Income-tax Officer did not indicate upon what material the assessment of Rs. 15,882 was made and whose expert valuation was accepted. But the Appellate Tribunal stated that the Income-tax Officer really relied upon the stores account opened in the books of Messrs. Dalmia Jain & Co. which showed that the company or some officers of the company had valued the stores at Rs. 88,000/-. But paras 16 and 17 of the memorandum of agreement indicate that with respect to the stores ordered or received by the assessees after the 9th August 1943 Messrs. Dalmia Jain & Co. were to pay nothing more than the cost price, and in consequence, on these stores at least the assessee made no profit at all. Clause (c) of para 19 contained a statement by the purchasers as to how they proposed to allocate the total consideration money of Rs. 28 lakhs between certain specific items, but the stores were not separately valued but were valued along with other property and to the whole a sum of Rs. 2,50,000 was allocated. In my opinion, there was no material upon which the Income-tax Officer could draw the inference that the vendors made profit of Rs. 15,882 on the sale of stores. On the second question of law formulated by the Division Bench I agree with Shearer, J. and hold that the amount of Rs. 15,882 which is alleged to be the profits on the sale of the stores is not taxable under the Income-tax Act in the circumstances of this case.

V.B.B. *Answer accordingly.*

A. I. R. (39) 1952 Patna 123 [C. N. 45.]

SINHA AND RAI, JJ.

Yusuf Mian and others, Appellants v. Gafoor Mian and others, Respondents.

A. F. A. D. No. 1051 of 1949, D/- 9-2-1951.

(a) *Limitation Act (1908), Article 144 — Possession referable to good title.*

Where possession can be referable to a good title the Courts will not too readily attribute to such a possession the character of adverse possession. It is open to the widow of a deceased Muhammadan to take possession of the entire estate, and so long as she does not bring it to the notice of the other heirs that she was claiming the estate adversely to them, no question of adverse possession can arise. Added to that consideration, where a Muhammadan lady has her claim to the dower debt owing from her deceased husband, she can, in law, retain possession of the entire estate of her husband so long as her claim to dower debt has not been satisfied. AIR (4) 1917 Pat 320, Diss. from. (Para 4)

Anno: Limitation Act, Art. 144, N. 16, 21, 35.

(b) *Limitation Act (1908), Art. 144 — Possession in lieu of dower.*

A transfer of property by a widow who has been holding the property in lieu of her dower debt is valid during her life-time, and the limitation against the true owners would begin only upon her death. AIR (10) 1923 Pat 72, Rel. on. (Para 6)

Anno: Limitation Act, Article 144, N. 21, 78.

Dr. Qazi Nazrul Hassan, for Appellants; R. S. Chatterji; Syed Hassan and J. P. Chaudhury, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('17) 39 Ind Cas 579: (AIR (4) 1917 Pat 320) (Pr 5)

('23) 2 Pat 75: (AIR (10) 1923 Pat 72) (Pr 6)

SINHA, J.: This is a defendants' second appeal from the decision of the learned Additional Subordinate Judge of Motihari, dated the 7th May 1949, reversing that of the Munsiff of Bettiah, dated the 3rd of March, 1948, in a suit in ejectment.

(2) In so far as it is necessary for the determination of this appeal, the facts may be stated as follows: One Magali Mian died in 1913 after having married thrice. By his first wife he had three daughters, plaintiffs 1 and 2, and plaintiffs 4 to 10, who are the heirs of the third daughter. By his second wife he had a daughter who figures as the third plaintiff. On Magali's death his third wife inherited his properties to the extent of a two annas share, the remaining fourteen annas being divisible amongst the several daughters aforesaid by the first two wives. Mt. Bandhui, who is the third wife of Magali Mian, came into possession of the entire estate of her husband, and, according to the plaintiffs' case, she thus came into possession partly as a co-sharer, and in respect of the rest of the estate, in lieu of her dower debt of Rs. 400. Her husband had left her 'raiyati' interests in two 'khatas' in two villages, the total area of the estate being 4.17 acres. Mt. Bandhui died sometime in 1944, and on her death, the present suit was commenced in March, 1946, for recovery of possession in respect of the plaintiffs' share in the property. Before her death Mt. Bandhui had executed two sale-deeds on the 17th of April, 1919, namely, one in respect of 1 bigha 4 kathas and 12 dhurs for the sum of Rs. 260 to defendant No. 9, and the second in respect of 4 kathas and 3 dhurs in favour of the tenth defendant for the sum of Rs. 26. The defendant No. 10 is said to have built a house and constructed a well on the plot sold to him. These two transactions were in respect of 'khata' No. 448. The other 'khata', namely, 'khata' No. 64, with an area

of 3 bighas 9 kathas and 8 dhurs, was sold to the defendant No. 8 on the 10th of October 1934, for the sum of Rs. 698. Hence at the death of Mt. Bandhui the entire estate left by her husband had passed into the hands of the transferees aforesaid. The suit was contested by the defendants 8 to 10, that is to say, the transferees, chiefly on the ground that after the death of Mt. Bandhui's husband she came into exclusive possession of the entire estate to the knowledge of the other heirs and adversely to them. They, therefore, contended that the Mt. herself, and, after the transfers in their favour, they, were in exclusive adverse possession of the estate, with the result that the plaintiffs' claim for possession was barred by limitation.

(3) The learned Munsiff decreed the suit in part and dismissed it in respect of the rest, holding that the Mt. though she was in possession of part of the estate in lieu of her dower debt, had acquired title at least in respect of a portion of the estate by adverse possession. On appeal by the plaintiffs, in respect of the portion for which the suit had been dismissed, the lower appellate Court has passed a decree for the entire claim of the plaintiffs subject to certain directions as to the way in which the property should be held so as to protect the interest of some of the transferees who, according to the lower appellate Court, had acquired a good title to that portion of the estate which could legally come into the hands of Mt. Bandhui as one of the heiress to her husband. Hence this second appeal by defendants 8 to 10.

(4) The learned Advocate on behalf of the appellants vehemently argued that soon after the death of her husband Mt. Bandhui got herself recorded in the records-of-rights in the year 1916 as the only tenant in respect of the two 'khatas' aforesaid, and that this conduct of hers was sufficient notice to her co-heirs that she was asserting a hostile title to the entire estate of her husband in complete denial of the plaintiffs' title. In my opinion, there is no substance in this contention for the simple reason that it is a well-established principle of law that where possession can be referable to a good title the Courts will not too readily attribute to such a possession the character of adverse possession. The Mt. was one of the heiresses to her husband, and it is open to one of the heirs of a deceased person to take possession of the entire estate, and so long as that co-sharer does not bring it to the notice of the other co-sharers that he was claiming the estate adversely to them, no question of adverse possession can arise. Added to that consideration is the further fact that it has been concurrently held by both the Courts below that the Mt. had her claim to the dower debt owing from her husband, and she could, in law, retain possession of the entire estate of her husband so long as her claims to dower debt had not been satisfied. Hence in this case, when the Mt. took possession of the entire estate of her husband, whether there was a 'panchaiyati' or not, her possession could be attributed to her legal title partly as a co-sharer in the estate and, in respect of the rest of the estate, as one who had a charge on the property for her unpaid dower debt. Hence, in respect of the entire estate left by her husband, the Mt. could legally continue in possession of the estate so long as the other heirs had not paid off the unsatisfied portion of that debt, or so long as the debt had not been satisfied out of the usufruct of the property.

(5) It has further been urged on behalf of the appellants that not only did the Mt. get herself exclusively recorded in the record-of-rights, but she laid an unequivocal claim to the entire estate by executing the two sale-deeds in the year 1919, as aforesaid, in favour of defendants 9 and 10 in respect of a portion of her husband's estate claiming the property as her own. The two sale-deeds of the year 1919 are, therefore, claimed to have been executed in exercise of her rights as the only heiress to her husband, who was absolutely entitled to the property, to the exclusion of the other co-sharers. It was further contended that the heirs never claimed any account from the Mt., and, as the area was more than 4 acres, it should be presumed that the dower debt of Rs. 400 would have been satisfied many years ago, and that, therefore, the Mt. was holding the estate not in lieu of her dower debt, but as an absolute owner. Reliance was placed upon the decision of a single Judge of this Court in the case of 'Haji Mutsaddi v. Habib Mian', 39 Ind Cas 579 (Pat), where the learned Judge has made the following relevant observations:

> "..... but I base it (my decision) on the ground that this Muhammadan lady entered into possession without having ever been called upon to render account and that she further proceeded openly to assert her hostile right as owner of the property as against her other co-sharers, and got herself recorded in the record-of-rights as tenant of the entire holding; and from that onwards she remained on in possession and no challenge was ever made by the other co-sharers as to her right within the period of twelve years from the date of the hostile assertion of her title; and thus in point of law, I hold, she acquired a right hostile to that of the other co-sharers and became absolutely entitled as tenant of the lands in suit...."

In my opinion, the observations quoted above made by the learned single Judge of this Court are of very doubtful authority. In that case, in my opinion, with all due respect to the learned Judge, enough consideration was not given to the principles referred to above, namely, that the possession of a co-sharer is not adverse until those co-sharers have been told in unequivocal terms that the co-sharer was asserting a title hostile to them; and secondly, the principle that where possession can be referable to a legal title, the Courts do not give effect to the claim that the possession was hostile to the true owner.

(6) It was next contended that in any view of the matter the suit, in so far as it related to the lands sold to defendants 9 and 10 in the year 1919, must be held to be barred by limitation as the transferees held the estate adversely not only to the Mt. herself but to the plaintiffs also. This argument is attractive enough, but does not bear scrutiny and, in view of the decisions of a Division Bench of this Court in the case of 'Abdur Rahman v. Wali Mohammad', 2 Pat 75, must be negatived. In that case, their Lordships have held that a transfer of property by a widow who has been holding the property in lieu of her dower debt is valid during her life-time, and that the limitation against the true owners would begin only upon her death. Hence the limitation in the present case would begin to run against the plaintiffs only after the death of Mt. Bandhui. As that event happened very much within twelve years of the suit, it must be held that no question of limitation arises in this case. The other transfer in favour of the eighth defendant was made in October 1934, and, as the suit was commenced in March 1946, it is manifest that that transaction also is within the period of limitation.

(7) As the points of law urged in this appeal all fail, it must be dismissed; but, in the circumstances of this case, there will be no order as to costs.

(8) RAI, J.: I agree.

D.H. *Appeal dismissed.*

A. I. R. (39) 1952 Patna 125 *[C. N. 46.]*

NARAYAN J.

Ramkisto Sahu, Petitioner v. The State of Bihar.

Criminal Misc. No. 223 and Cri. Revn. No. 575 of 1951, D/- 4-9-1951.

(a) *Criminal P. C. (1898), Ss. 202, 436 — Enquiry should not be full-dress trial — Complaint against highhandedness of Armed police — Duty of Magistrate.*

An enquiry under S. 202 should not be converted into a full-dress trial. What is required of the magistrate is to see wheher the complainant has made out a prima facie case. Detailed enquiry is not called for. Where the magistrate examines the witnesses and allows their cross-examination, even examines Court witnesses and conducts the enquiry into the complaint against the highhandedness of the Armed Police, as if it were a trial, the procedure is not satisfactory. A tribunal whose business it is to administer criminal justice has to be alert and watchful to see that it is not deceived by false testimony or false pleas and the administration of justice should always be conducted in a manner which may preserve the people's confidence in it. If an officer conducting an enquiry is found to overdo things, that may reasonably lead to an apprehension that he had started with certain pre-conveived notions. It will be very sad if an impression is created that a man subjected to 'zulum' by police men and responsible officer can have no redress in a law Court, especially when the framers of the Indian Statute Law were perfectly alive to the fact that the powers of the police are sometimes abused for purposes of extortion and oppression. (Further inquiry ordered) 'Case law Ref.' (*Para 3*)

Anno: Cr. P. C., S. 202 N. 14; S. 436 N. 9.

(b) *Penal Code (1860), S. 211 — Complaint against Armed Police — Enquiry under S. 202, Cr. P. C. by magistrate — Report that complaint is false — Enquiry unsatisfactory and held almost like a trial — Case under S. 211, should not be kept before the same magistrate.* (*Para 3*)

Anno: Penal Code, S. 211 N. 10.

T. K. Prasad, for Petitioner; Shambhu Prasad Singh, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('83) 6 All 509: (1884 All W N 229 F B) (Pr 3)
('05) 9 Cal W N 199: (2 Cri L J 51) (Pr 3)
('49) A I R (36) 1949 Pat 36: (49 Cri L J 599) (Pr 3)

ORDER: These two applications have been heard together. The application which has been registered as Criminal Miscellaneous No. 223 of 1951 is for the transfer of a case under S. 211 of the Indian Penal Code, pending in the Court of Mr. J. P. Singh, Subdivisional Magistrate of Khunti, from his file to the file of any other competent Magistrate, and the application which has been registered as Criminal Revision No. 575 of 1951 is an application for directing a further enquiry into the case on account of the dismissal of which the petitioner is being prosecuted under S. 211 of the Indian Penal Code.

(2) On the 8th of May, 1950, the petitioner lodged a first information report at the Tamar police station in which certain very serious allegations were made by him against the Inspector of Amins, deputed for the demarcation of forests, a Forest Guard and certain constables of the Armed Force. The occurrence was alleged to have taken place on that very day at 9 A.M. and the first information report was lodged at 4 P. M. The allegations were that the abovementioned persons went to the shop or the house of the complainant and asked him to supply flour, sugar and ghee. Neither the complainant nor his brother Gangadhar Sahu, who happened to be at the shop at the time, was prepared to supply them anything until the price was paid: and when Gangadhar Sahu demanded the price, he was assaulted and dragged out of the shop. The applicant, on seeing this, went inside his house and from there saw his brother Sadhu Sahu and a co-villager of his named Dina Sahu being assaulted by the constables and the Inspector. The constables kept a watch on his house, but he managed to get out after scaling the walls and ran to the house of one Raghunandan Sahu. At Raghunandan Sahu's place he learnt from Sadhu Sahu and Dina Sahu that the Inspector and the members of the Armed Force had assaulted them and had extorted a sum of Rs. 5/- from each of them. The village chaukidar was then called and informed about the occurrence, and the petitioner started for the police station where he lodged the first information report. The police took up the investigation of the case, but they submitted a final report 'false' and recommended the prosecution of the complainant under S. 211 of the Indian Penal Code. The learned Subdivisional Magistrate, therefore held a judicial enquiry and after the enquiry agreed with the police report that the case was maliciously false. The report of the learned magistrate is dated the 26th of August, 1950 and on the 18th of September, 1950, the petitioner filed a protest petition on which the learned magistrate passed the following order:

> "Perused the petition of Ramkisto Sahu filed on 18-9-50. I went through the connected records. I have already made an exhaustive enquiry and written a report. I have passed order in C. R. Case No. 120 of 1950 in which I have held the case to be maliciously false and ordered for prosecution of the informant under S. 211, I. P. C. There is no ground to change my order. The petition will be filed."

The case under S. 211 of the Indian Penal Code is in the file of the same learned magistrate, and the petitioner contends that in view of the report submitted by this learned magistrate he should not have kept this case in his own file. An application in revision for directing further enquiry has been filed before the learned Judicial Commissioner of Chotanagpur and it was heard by the Additional Judicial Commissioner, who dismissed the application with the observaton that this was not a fit case for directing further enquiry.

(3) In my opinion, this is a fit case in which further enquiry ought to be ordered and it was very improper on the part of the learned Subdivisional Magistrate to have kept the case under S. 211 of the Indian Penal Code in his own file after he had made such strong observations against the complainant in his report. Even the learned Additional Judicial Commissioner has observed as follows:

> 1. "Though the learned Magistrate could have ordered the prosecution of the complainant on the report itself of the police, he took pains to examine witnesses and has written out a detailed order extending over 12 pages showing that the police report recommending his prosecution under S. 211 I. P. C. was quite justified. It is immaterial what lable is put on this enquiry. At best it can be said that he did more than he was required to do under the law. But on that ground no fault can be found with his order agreeing with the police report."

2. "The prosecution witnesses no doubt support the case for the complainant but P. W. 8 Chaitan Munda the chowkidar of the village does not support the prosecution case."

3. "The only thing that can be said in favour of the complainant's case is that the story set up by him is so fantastic that nobody could have invented it. True it is difficult to think that the complainant will trump up such a false story against the armed constables."

Even though the learned Additional Judicial Commissioner thought that such a story could not be invented by the complainant, he was very much influenced by the learned Subdivisional Magistrate's observation in his judgment that the complainant was taking a leading part in obstructing the demarcation of the forest and that the present case arose because of the alleged obstruction to the demarcation of the forest. I am afraid the learned Additional Judicial Commissioner as well as the learned Subdivisional Magistrate appear to be of the view that even though a 'prima facie' case had been made out by the complainant, a detailed enquiry was not unjustified and that the findings arrived at after the detailed enquiry were conclusive of the case and conclusive of it against the complainant. This Court has, more than once, expressed its view that an enquiry under S. 202 of the Code of Criminal Procedure should not be converted into a full-dress trial. In a recent case in 'Radha Kishun Sao v. S. K. Misra', AIR (36) 1949 Pat 36 at p. 39 Das, J. observed as follows:

"Assuming that the accused person makes certain statements in his defence, I do not see how the learned Subdivisional Magistrate can hold that the witnesses who support the petition of complaint should be disbelieved, unless the learned Subdivisional Magistrate is prepared to convert his enquiry into a full-dress trial. If the accused person is not to be permitted to cross-examine the witnesses who support the petition of complaint, their evidence cannot be thrown out merely on the statements of the accused. Their evidence can be thrown out only if the enquiry is converted into a trial; but that is a practice which has been condemned by this Court on more than one occasion."

With this view I find myself in respectful agreement. That this complainant had almost made out a 'prima facie' case appears from the report itself. On behalf of the complainant, 13 witnesses had been examined and their statements indicated that the members of the Armed Force under the control of the Inspector of Amins had misbehaved with other persons as well. One Bhunesar Sahu son of Sita Sahu stated that Rs. 150/- had been extorted from his father and Sita Sahu himself came forward to say that he had to pay Rs. 150/-. The evidence of so many witnesses was rejected by the learned Subdivisional Magistrate on the ground that they did not appear to him to be independent witnesses. The following observation in the report of the learned magistrate shows that quite sufficient evidence had been adduced before him for proving some of the important allegations made by the complainant:

"These witnesses have tried to support the occurrence, but their evidence has to be considered very carefully because none of them appears to be independent witness. I will discuss the relevant portion of their evidence later on."

The discussion which has followed this observation undoubtedly indicates that the learned magistrate had treated the enquiry as a trial and dealt with the case as if he had to pronounce finally on the truth or otherwise of the allegations made by the complainant. Certainly some injury marks were found on the persons of the complainant and others and the learned magistrate says that though from "the case diary it appears that Ramkisto Sah and others had slight marks of injuries, the doctor has not been cited as a witness and the injuries are not serious." This sort of approach to the case at the enquiry stage cannot be regarded as absolutely fair and the way in which the learned Subdivisional Magistrate has discarded the evidence of some of the witnesses is also open to criticism. It is very important that not only this complainant but certain other persons as well had to complain about the high-handed action of the Inspector of Amins and the members of the Armed Force under him. Undoubtedly, if the complainant was obstructing the demarcation of the forests, there was some motive for him to bring forward certain false accusations against the Inspector and the men under him. But if this Inspector and the constables were not behaving properly with the people of the locality and were not even inclined to pay the price of the food-stuff and the other articles required by them, then certainly there was the motive for them to invent a false story of obstruction in their self-defence. The final report which the police had submitted in this case, did not carry much weight. After all, certain members of the Armed Force were involved in this case and what is known as "professional bias" is a thing which we are not unfamiliar. I should like to quote the following passage from a well-known judgment of Straight, C. J., in 'Queen Empress v. Babu Lal', 6 All 509 at p. 548:

"What the Courts in dealing with such matters ought to do is to bear in mind that police evidence in this country necessarily partakes more or less of a, so to speak, professional bias, that it is frequently, if not invariably, highly coloured, and that it requires to be received and weighed with much caution and discrimination."

A Bench of the Calcutta High Court did not approve of an enquiry into a complaint against a Sub-Inspector by Superintendent of Police, as would appear from the following observation in the judgment of that Court in 'Haladhar Bhumij v. Sub-Inspector of Police, Hura Outpost', 9 Cal WN 199 at p. 201:

"Further, when these charges were laid against a Sub-Inspector, it seems to us that the enquiry into the truth of these charges would have been better carried out if entrusted to a Deputy Magistrate than to the District Superintendent of Police, who, as head of the Police, might not be in as impartial a position for discovering the truth, as an officer, not connected with the Police."

The final report of the police in this case was, therefore, not of much value, and it could not be acted upon without hesitation; and fortunately even the learned Subdivisional Magistrate did not at once act upon it. But the error which the learned Subdivisional Magistrate seems to have committed is this that he has dealt with the matter as if he was hearing a regular case. He starts with the observation that he has to see how far a 'prima facie' case has been made out, but he brings forward some reason or other for discarding the evidence of each of the prosecution witnesses. He even examined some witnesses as Court witnesses, and appears to have been influenced by the evidence of Mr. Minz, a Deputy Magistrate. Mr. Minz had been deputed to see that there was no breach of peace at the time of the demarcation of the forests and the learned magistrate attaches importance to his evidence, though he observes that there might have been ill-feeling between the forest staff and the complainant Ramkisto Sahu.

If there was ill-feeling between the forest staff and the complainant, we should not forget that Mr. Minz was there as a person connected with the forest staff. Even Mr. Minz appears to have stated before the learned Subdivisional Magistrate that he had asked the Havildar to send some constables to call Ramkisto Sahu — the expression "some constables" being important. Mr. Minz could not tell the learned Subdivisional Magistrate how many constables were actually sent, but he seemed sure that at least three members of the Armed Force must have kept themselves engaged in cooking. It is very significant that not one constable but several constables had to be sent for calling Ramkisto Sahu. It further appears from the report that the Inspector of Amins had gone to the house of Ganga Sahu. Thus, even in the report of the learned magistrate there are some indications of a 'prima facie' case having been made out by the complainant. A tribunal whose business it is to administer criminal justice has to be alert and watchful to see that it is not deceived by false testimony or false pleas and the administration of justice should always be conducted in a manner which may preserve the people's confidence in it. If an officer conducting an enquiry is found to overdo things, that may reasonably lead to an apprehension that he had started with certain pre-conceived notions. It will be very sad if an impression is created that a man subjected to 'Zulum' by police men and responsible officer can have no redress in a law Court, especially when the framers of the Indian Statute Law were perfectly alive to the fact that the powers of the police are sometimes abused for purposes of extortion and oppression. I would like to quote the following passage from the judgment of Mahmood, J. in the case of 'Babu Lal', 6 All 509, referred to above, though this observation was made in connection with a case in which the main question related to the admissibility of a confession: (page 523).

> "That the extortion of confessions by torture continued to be a rampant evil in India is further shown by the fact that the Legislature, in framing the Indian Penal Code (which became law on the 16th October, 1860), provided two special sections (330 and 331), directed especially against such mal-practices; and it is very significant that out of the four illustrations appended to S. 330, two contemplate torture by a police officer, one describes torture to obtain a confession, and the other relates to torture for procuring discovery of stolen property."

I should not be understood to say that I feel satisfied that there is absolute truth in the allegations that have been made by the complainant. What I mean is this that the police report was not fit to be acted upon and it was rightly not acted upon by the learned Subdivisional Magistrate, and that the error which the learned Subdivisional Magistrate committed was that he conducted this enquiry as if it was a full-dress trial — a procedure which has been condemned by this Court more than once. The learned Subdivisional Magistrate should have realised what was his province and scope at that stage and he should have applied his mind to the materials which were before him, with a view to judging how for a 'prima facie' case had been made out. Judged by this standard, the report of the learned Subdivisional Magistrate cannot be regarded as satisfactory and fair and I am constrained to direct a further enquiry into the matter.

(4) The learned Counsel appearing for the State could not support the view that an elaborate enquiry of such a nature at the initial stage was justified and he was inclined to think that the report of the learned Subdivisional Magistrate is really a report on the question as to whether a prosecution under S. 211 of the Indian Penal Code would be justified. But, in my opinion, the learned State Counsel was wrong in making this submission because what I find is that on the very day on which the learned Subdivisional Magistrate passed the order that he would hold a judicial enquiry, he passed the following order on the report recommending the prosecution of the applicant under S. 211 of the Indian Penal Code:

"Put up after the disposal of the final report.

Sd. J. P. Singh, 3-6-50."

It is, therefore, obvious that this elaborate enquiry was made with regard to the allegations which had been made by the complainant in his first information report. It is true that though the report is dated the 26th of August, 1950, the protest petition by the complainant could not be filed before the 18th of September, 1950. But this delay does not appear to be material in this case because, unfortunately, the learned Subdivisional Magistrate took more than two and a half months in finishing this enquiry. The complainant found himself almost in the same position as a complainant who has to adduce evidence at a regular trial, and the matter dragged on till the 26th of August, 1950. The learned Counsel for the applicant submitted that after such a report by the Subdivisional Magistrate lawyers had to be consulted and the complainant had to decide after a careful deliberation if it was worthwhile pursuing the matter. I think, in the circumstances of the case, this is to be regarded as a satisfactory explanation for the delay that was made in filing the protest petition against the enquiry report.

(5) In the result, I would allow both the applications and direct that a further enquiry into the complaint be made either by the Deputy Commissioner or by any other Magistrate Subordinate to him and that the case under S. 211 of the Indian Penal Code be transferred from the file of the learned Subdivisional Magistrate to the file of any other Magistrate, preferably a Munsif-Magistrate, for disposal according to law.

R.G.D. *Order accordingly.*

A. I. R. (39) 1952 Patna 127 *[C. N. 47.]*

LAKSHMIKANTA JHA, C.J. AND NARAYAN, J.

Bateshwar Prosad, Appellant v. Sir Kameshwar Singh Bahadur, and others, Respondents.

A. F. A. D. No. 642 of 1948, D/- 17-7-1951.

Tenancy Laws — Bihar Tenancy Act (VIII (8) of 1885), Sch. III Art. 3 — Dispossession through Court — Limitation Act (1908), Art. 144.

The landlord, if he becomes a purchaser in execution of a money decree of the right, title and interest in the holding of his judgment-debtor in which the latter has no interest, may dispossess the person in possession as auction-purchaser 'qua' landlord either by his own act or by the act of his agents or servants or through a settlee. He may also cause dispossession through the instrumentality of the Court. If the dispossession is through the instrumentality of the Court, then the landlord uses not his own power in causing dispossession by the power of the Court. In such a case it cannot be said that the dispossession is by the landlord as such and, therefore, the application of Art. 3, Sch. III, would not be attracted. The suit would be governed by the ordinary law of limitation. But even if the landlord takes a symbolical delivery of possession and later on uses his own power in taking physi-

cal possession, Art. 3 will apply and the right of the person dispossessed would be barred if the suit is not brought within two years of the date of the actual dispossession. AIR (17) 1930 Pat 256 FB; Rel. on: AIR (27) 1940 Pat 476; Dist.; AIR (38) 1951 Pat 6, Diss. from. (*Paras 3, 7*)

Anno: Limitation Act, Art. 144, N. 100.

Sultan Ahmad and Baidyanath Jha and K. K. Sinha, for Appellant; Angad Ojha and S. P. Srivastava, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('30) 9 Pat 788: (AIR (17) 1930 Pat 256 FB) (Prs 3, 4, 6, 9)

('40) AIR (27) 1940 Pat 581: (187 Ind Cas 518) (Pr 4)

('40) 21 Pat L T 374: (AIR (27) 1940 Pat 476) (Prs 5, 6, 9)

('50) 29 Pat 1031: (AIR (38) 1951 Pat 6) (Prs 7, 10)

LAKSHMIKANTA JHA, C. J.: This is an appeal by the plaintiff from a decision of the Additional District Judge of Purnea, dated the 5th of March 1948.

(2) The only question for consideration is whether the suit is governed by the special rule of limitation under Article 3, Schedule III of the Bihar Tenancy Act.

(3) The facts giving rise to this question may be shortly stated as follows: The land in dispute originally belonged to one Ritoo Rao. The plaintiff is the purchaser of the suit land by a private treaty from the original tenants. Ignoring the sale, the landlord brought a suit for rent in the year 1931 against the original tenant and got an ex parte decree, and in execution of that decree he purchased the right, title and interest of his judgment-debtor in the holding of which he got delivery of possession through Court on the 14th of June 1936. Thereafter he settled the land with the defendants second party. The present suit was instituted on the 21st of December 1945, for recovery of possession on the ground that the Court sale was not binding on the plaintiff. It is contended before us that the suit is governed by the ordinary law of limitation, and not by the special rule of limitation, and in support of this contention reliance has been placed upon a Special Bench decision of this Court in 'Gajadhar v. Ram Charan', 9 Pat 788. In my opinion, the case is fully covered by the decision of the Special Bench and the appeal ought to be decreed.

(4) The facts of 'Gajadhar Rai's case' 9 Pat 788, were shortly these: The landlord instituted a suit for arrears of rent in respect of a holding and in that suit only some members of the family were impleaded as defendants, although other members of the family were also interested in it. In execution of the decree the right, title and interest of the judgment-debtors were sold, but the members of the family who were not parties to the suit were also dispossessed through the process of Court. Thereafter, those members of the family who were not parties to the suit brought a suit for declaration of title and recovery of possession in respect of their interest in the holding. It was found that the decree in execution of which the sale has taken place had the effect of a money decree and that the right, title and interest of the plaintiff of that suit were not at all affected. The question for consideration before the Special Bench was whether the special rule of limitation prescribed by Art. 3, Sch. III of the Bihar Tenancy Act would apply. Kulwant Sahay, J. who delivered the judgment of the Special Bench, on a review of the case-law from the earliest times held that where a landlord in execution of a decree for arrears of rent puts the holding to sale, purchases it himself and obtains delivery of possession through Court, such dispossession of the tenant is not a dispossession within the meaning of Art. 3, Sch. III, of the Bihar Tenancy Act. This decision was followed in several other cases of this Court and I need refer only to one of them, namely, 'Jaga Singh v. Basdeo Singh', AIR (27) 1940 Pat 581, in which it was held that if a landlord as auction-purchaser dispossesses a tenant, whose interest has not been affected by the sale through the process of Court, the special rule of limitation does not apply.

(5) There are some decisions of this Court, however, where the Special Bench case has been sought to be distinguished and special rule of limitation applied and I would refer only to the case of 'Mt. Deorati Kuer v. Dasarath', 21 Pat L T 374, which has been relied upon by the respondents. Meredith, J. held that the special rule of limitation applied to the facts of the case before him and distinguished the Special Bench case on the ground that the dispossession in the case before him was not through Court but "forcibly years later as a result of the plaintiff's conviction in the criminal case." Therefore, in my opinion, the ruling of the Division Bench in 'Deorati Kuer v. Dasarath', 21 Pat L T 374 has no application to the facts of the case before us.

(6) An examination of the case law relevant to the point for decision before us shows that two lines of reasoning have been adopted in applying the rule of limitation. One line of reasoning is that when there is a sale in execution of money decree and the dispossession is by the landlord through the instrumentality of the Court, then the person dispossessed is not a raiyat or an under-raiyat, nor the dispossessor a landlord as such, and, therefore, in such a case the special rule of limitation does not apply. The case of 'Gajadhar Rai v. Ram Charan Gope', 9 Pat 788 is a type of this class of cases. The other line of reasoning is that if the landlord dispossesses a person interested in a holding, not through the instrumentality of Court, but by his own force, he is entitled to plead special rule of limitation and defeat the suit if brought more than two years after the date of dispossession. The Case of 'Mt. Deorati Kuer v. Dasarath', 21 Pat L T 374 is a type of this class of cases. Therefore, even if a landlord gets a symbolical possession through Court, but later on succeeds in getting khas possession by his own force, the special rule of limitation would apply and the tenant's suit can be defeated if brought beyond two years of the date of dispossession because dispossession in such a case is directly by the landlord. In the present case it cannot be said that the landlord as such dispossessed the plaintiff, nor did the plaintiff seek to recover possession in his capacity as a raiyat. I may observe that when a plaintiff brings a suit for recovery of possession, such a suit is not by a raiyat as such brought against a landlord but a suit for recovery of possession brought against a trespasser. Therefore, in my opinion, Art. 3 of Sch. III of the Bihar Tenancy Act, which lays down that the suit must be for recovery of possession of land claimed by the plaintiff as a raiyat, does not apply to such a case.

(7) Mr. Angad Ojha has strongly relied upon the decision of a Division Bench of this Court in 'Hitlal v. Kameshwar Singh', 29 Pat, 1031 and his contention is that we ought to follow the decision in that case. It seems to us that the Division Bench

laid down a proposition of law on a misconception of the facts of the Special Bench case. In any case, the view taken by the Division Bench is contrary to the decision of the Special Bench and we are in case of such difference of opinion bound to follow the decision of the Special Bench in preference to the decision of the Division Bench. A review of the case law relating to the point for decision before us shows that the law is that the landlord if he becomes a purchaser in execution of a money decree of the right, title and interest in the holding of his judgment-debtor in which the latter has no interest, may dispossess the person in possession as auction-purchaser 'qua' landlord either by his own act or by the act of his agents or servants or through a settlee. He may also cause dispossession through the instrumentality of the Court. If the dispossession is through the instrumentality of the Court, then the landlord uses not his own power in causing dispossession but the power of the Court. In such a case it cannot be said that the dispossession is by the landlord as such and, therefore, the application of Art. 3, Sch. III, would not be attracted. But the tenant's remedy would be barred if the dispossession is by the landlord by his own act or by the act of his agents or servants or settlees if the suit is brought beyond two years of dispossession. Therefore, even if he takes a symbolical delivery of possession and later on uses his own power in taking physical possession, Art. 3 will apply and the right of the person dispossessed would be barred if the suit is not brought within two years of the date of the actual dispossession.

(8) In the appeal before us, as already observed, dispossession was by the landlord as auction-purchaser and through the instrumentality of Court; therefore, the general law of limitation would apply. The appeal is accordingly allowed and the suit decreed vide order no. 9 D/- 16-8-51 with costs throughout, with mesne profits to be ascertained by an appropriate proceeding.

(9) NARAYAN, J.: I agree as I have no hesitation in holding that this suit should be decided on the principle laid down by the Special Bench of this Court in 'Gajadher Rai v .Ram Charan', 9 Pat 788. The two decisions relied on by Mr. Angad Ojha, for the respondents, need not trouble us at all. Meredith, J., who delivered the judgment of the Division Bench in 'Mt. Deorati Kuer v. Dasrath Dubey', 21 Pat L T 374 observed that, so far as the facts of the case before him were concerned, it was quite obvious that the dispossession was not through Court at all and that it had taken place several years after delivery of possession. In the penultimate paragraph of the judgment he no doubt observed as follows:

"In any case, however, I think that the point does not really arise in the present case, since the finding is that the decree obtained against the original tenant was only a money decree and the tenancy continued."

This observation is of the nature of an obiter dictum in view of what he had said before, that is, that it was quite obvious that the dispossession had not taken place through Court. Even while making this observation he pointed out that the tenancy had continued.

(10) The other decision 'Hitlal v. Kameshwar Singh', 29 Pat 1031 has already been referred to by my Lord the Chief Justice, and it is obvious from the perusal of the judgment of Ray J., who delivered the judgment in this case, that the facts of the Special Bench case were taken to be different from what they actually were. His Lordship Ray, J., observed that the Special Bench decision was of no assistance to the appellant as in that case the sale was in execution of a rent decree and the entire holding had passed by the sale, though, as a matter of fact, it appears from the perusal of the facts as given in the Special Bench judgment that only some of the tenants had been sued.

D.H. *Appeal allowed.*

A. I. R. (39) 1952 Patna 129 *[C. N. 48.]*

MANOHAR LALL

AND MAHABIR PRASAD, JJ.

Visheshwar Singh, Appellant v. Province of Bihar, Respondent.

A. F. O. D. No. 462 of 1946, D/- 10-8-1948.

(a) Sales Tax — Bihar Sales Tax Act (IV (4) of 1944), S. 2(c) and (d) — Dealer — Sale of excess agricultural produce.

The mere fact of sale of excess of agricultural produce such as grains like paddy, wheat and gram and sugarcane grown in his own lands by a person owning vast areas of zirat and bakast lands, atfer storing sufficient portion to meet his personal and staff requirements, does not make the person a 'dealer' within the meaning of S. 2 (c), though the grains or sugarcanes are 'goods' within Cl. (d) of S. 2. The largeness of the produce and the bigness of the amount realised by sale are irrelevant considerations. (Paras 22, 23, 26, 28)

(b) Specific Relief Act (1877), S. 42 — Applicability.

A declaratory decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been given by the Court, or unless in certain cases a declaration of right is required as a step to relief in some other Court.

Where, therefore, a plff. does not ask for declaration of any right, but asks for a declaration that he is not a dealer, and therefore cannot be assessed by the Sale Tax Authority the requirements of S. 42 are not satisfied.

Moreover, it is not desirable that the cases requiring the decision of a question of fact on which further action of the authority depended should be withdrawn from the jurisdiction of the authority constituted under the special Act, namely the Bihar Sales Tax Act. The Civil Court, therefore, cannot grant such declaration or prohibit the Sale Tax Authorities from proceeding to go on with the assessment proceedings. (1919) 12 Tax Cas 166 and (1928) 14 Tax Cas 171, Rel. on; Case law discussed.'

(Paras 18, 19, 20)

Anno: Specific Relief Act, S. 42, N. 3.

Baldeva Sahay and S. P. Srivastava, for Appellant — Lalnarain Sinha, for Respondent.

Cases referred to:

('75-77) 5 I A 87: (1 All 688 P C) (Pr 20)
('76) 2 I A 169: (15 Beng L R 83 P C) (Pr 20)
('99) 26 I A 16: (22 Mad 270 P C) (Pr 20)
('16) 43 I A 91: (A I R (3) 1916 P C 78) (Pr 20)
('39) 7 I T R 48: (A I R (26) 1939 P C 1) (Pr 27)
('45) 13 I T R 221: (A I R (32) 1945 P C 89) (Pr 17)
(1947) 15 I T R 332: (A I R (34) 1947 P C 78) (Pr 17)
('48) 16 I T R Supp 87: (A I R (35) 1948 P C 74) (Pr 28)
('36) 4 I T R 341: (A I R (24) 1937 Mad 241) (Pr 17)

('38) 6 ITR 502: (AIR (25) 1938 Rang 260 FB) (Pr 26)
(1848) 2 Ex 352: (11 LJ Ex 209) (Pr 9)
(1866) 2 Tax Cas 143 (Pr 26)
(1888) 2 Tax Cas 332 (Pr 7)
(1903) 4 Tax Cas 549 (Pr 8)
(1913) 6 Tax Cas 279 (Pr 10)
(1915) 6 Tax Cas 613: (1916-1 AC 215) (Pr 10)
(1919) 12 Tax Cas 166: (1920-1 Ch 85) (Prs 12, 14, 18)
(1922) 8 Tax Cas 327 (Pr 11)
(1925) 9 Tax Cas 437: (1925-2 KB 250) (Pr 9)
(1928) 13 Tax Cas 746 (Pr 16)
(1928) 14 Tax Cas 171 (Prs 15, 18)

MANOHAR LALL, J.: In this appeal by the plff. whose suit has been dismissed by the Additional Subordinate Judge of Darbhanga, the two questions for decisions are whether the suit is maintainable & whether the appellant is a "dealer" within the meaning of the Sales Tax Act (The Bihar Act IV (4) of 1944) hereafter to be called the Act.

(2) Except as to whether the plff. is a dealer within the meaning of the Act, the facts are not in dispute. The plff. Raja Visheshwar Singh Bahadur is the proprietor of Rajnagar Estate in the district of Darbhanga & possesses extensive zirat fields on which he grows grains like paddy, khesari, wheat & gram besides sugarcane. After meeting the personal requirements of himself, his family & his large staff, a portion of the excess, which is not required to be stored for consumption, is sold. The cause of action for the suit was that in February 1945, the Sales Tax Officer of Darbhanga, served the plff. with a notice that he should get himself registered as a dealer under the Act, but the plff. denied that he was a dealer within the meaning of the Act. The Superintendent of Commercial Taxes, Darbhanga, Circle, however, called upon the plff. to produce the papers by his notice dated 1-6-1945, apparently under S. 9 of the Act. The plff. again denied his liability to furnish the returns or produce the papers, & accordingly the plff. served a notice dated 20-6-1945 on the deft., who is the Province of Bihar, requesting the Superintendent for the withdrawal of the aforesaid notice. As the Sales Tax Officers appeared to be unwilling to withdraw the notice, the plff. instituted the suit giving rise to this appeal on 7-9-1945 for the following reliefs: that a declaration be made in the plff's favour that he is not a dealer under the Sales Tax Act & so need not get himself registered under the Act & is not liable to assessment of Sales Tax; & that a permanent injunction be granted restraining the deft. from ever proceeding with the assessment & realising any tax under the Sales Tax Act from the plff. The suit was valued at Rs. 5001/-.

(3) The deft's contention was that the suit was not maintainable & was barred under the provisions of the Act & the Civil Court had no jurisdiction to try it, & further that the deft was a dealer within the meaning of the Act.

(4) The learned Subordinate Judge has come to the conclusion that the suit was maintainable because no order had yet been passed by the Sales Tax Officer which could be called an order under the Act. Upon a consideration of the evidence adduced he held that the plff. was a dealer because the sale or supply has grown into a profession — the learned Subordinate Judge does not say the sale or supply of which of the agricultural produce he has in mind, but apparently he is thinking of sugarcane which was sold to the Lohat Sugar Mill & Sakri Sugar Mill to the value of Rs. 72,000 in 1943-44 & Rs. 50,000 in 1944-45. The only evidence adduced in the case is that of the accountant of the plff. who also stated that paddy, khesari, wheat & gram are also sold by the plff., & more than Rs. 5000/- worth of these articles were sold in 1351 & 1352 fasli, & also in previous & subsequent years.

(5) The learned Subordinate Judge on these findings has dismissed the suit & hence this appeal to this Court.

(6) The first question which I propose to consider is whether the suit is maintainable.

(7) The principle upon which the extent of jurisdiction of a Court with limited powers is to be determined has been laid down in the leading case of 'Queen v. Special Commissioners of Income Tax', (1888) 2 Tax Cas 332. The oft quoted & frequently followed observations of Esher, M. R. may be usefully reproduced:

"When an inferior Court, or an inferior tribunal, or an inferior body which is trusted by the Legislature to come to a decision on facts is constituted by Act of Parliament for the first time, the Legislature has to consider what power it will give to those persons. It may say if a certain state of facts exist before you have anything to do with the matter, then you will have jurisdiction to do what we will tell you to do, but you shall not have jurisdiction otherwise, then the existence of such facts is not for them to decide, & if they exercise the jurisdiction which is given them without the existence of those preliminary facts which they have not to decide upon, you may question the exercise of their jurisdiction afterwards, & hold that they have no jurisdiction to do what they did. They would then have done all that was entrusted to them under circumstances when that jurisdiction which was to be entrusted to them did not exist — the preliminary facts did not exist; but they had not to decide upon the preliminary facts, they had no jurisdiction to decide upon the preliminary facts; but there is another state of things. The Legislature may, if the matter will present some doubt, entrust them not with two jurisdictions, in my opinion — with one jurisdiction but a jurisdiction which comprises & includes two sets of facts. They have the jurisdiction given to them to decide whether the preliminary set of facts exists, which if they do exist, will entitle them to go farther, & to do something more. If the Legislature gives them that, I do not call it a double jurisdiction, but that comprehensive jurisdiction, it is all one jurisdiction. They have jurisdiction with regard to what you may call the preliminary facts, the first set of facts — the same jurisdiction & just as much jurisdiction as they have with regard to the second. When the Legislature given to an inferior body of any kind by Act of Parliament for the first time a jurisdiction, the Legislature has to consider this: 'Will we, or will we not, grant an appeal against those persons with regard to their decisions?" If, in such a case, when the Act of Parliament gives them jurisdiction for the first time, & a limited jurisdiction, the Act of Parliament does not give an appeal, there is no appeal. Then, in the case I have just spoken of, it is not right to say

that they are giving themselves jurisdiction by deciding wrongly upon certain facts; the jurisdiction is given them over all the facts, & no appeal is given; & in that case, to my mind, as to the first set of facts just as much to the second, if the Act of Parliament has given them no appeal, there is no appeal."

(8) As an illustration of the application of the principle I refer to some cases. In 'Kodak Ltd. v. Robert Clark', (1903) 4 Tax Cas 549, the Court refused to issue a writ of prohibition to the Commissioners of Income Tax forbidding them from making an assessment. The contention of the assessees was that they were not carrying on a trade so as to make them liable for taxation on the profits thereof. The Master of the Rolls observed at p. 572,

"Now what is it that the General Commissioners of Taxes have to ascertain? Surely they had to ascertain what trade a tax payer who is assessable to income-tax is carrying on, & to do this it is within the jurisdiction of the Commissioners to ascertain what is the connection between the Kodak Company in this country & that Rochester business in America. This is what the Commissioners are doing, & I agree with the King's Bench Division that the assertion that the Commissioners have gone, or are going, wrong in determining this question gives no ground for prohibition."

(9) In 'Rex v. The Swansea Income Tax Commissioners', (1925) 9 Tax Cas 437, the assessees obtained a Rule Nisi for a writ of Prohibition against the General Commissioners to prohibit them from proceeding with the assessment on the ground that, as there were no trading profits in the year of assessment, the company was not assessable. Lord Hewart, C. J., discussed a number of cases & drew attention to the general principle so clearly and authoritatively enunciated by Baron Parke in the case of Allen v. Sharp', (1848) 2 Ex 352 at p. 363:

"On a careful consideration of these Acts of Parliament, they seem to me to differ from the Statute of Elizabeth as to poor-rate & that the Legislature intended that the assessment of the assessor appointed by the Commissioners should be final & conclusive, unless appealed from in the first place, to the Commissioners, & further, if necessary, to the Judges of the superior Courts."

& a little later he added,

"Without referring to the Statutes, I should say, a priori, that the object of the Legislature was to make the decision of the assessor final & binding, unless disputed in the manner pointed out."

Avory, J. in the agreeing judgment refers to the above quotation from Esher, M. R.

(10) I have, however, come across some cases in the English Courts, where writs of prohibition have been issued e.g. 'The King v. Kensington Income-tax Commissioners', (1913) 6 Tax Cas 279. See also 'House of Lords The King v. Kensington Income-tax Commissioners', (1915) 6 Tax Cas 613.

(11) In 'Rex v. Inspector of Taxes for Parish of Kingsland', (1922) 8 Tax Cas 327, a notice was issued to the General Commissioners & the Inspector of Taxes to show cause why a writ of Prohibition should not issue, prohibiting them from proceeding with the additional assessments, like S. 34 proceeding in India, Lush, J. observed at p. 330,

"I wish to preface what I am about to say by pointing out that we are not dealing with a case where there is no remedy provided if a mistake either of law or of fact should be made. We are dealing with a case in which admittedly there is a right of appeal both upon law & fact, to the General Commissioners."

and after discussing the materials on the record he came to the conclusion that the jurisdiction is given to the surveyor to investigate the matters & come to the conclusion whether it is upon the matter of law or upon the matter of fact, & then refused the writ of prohibition. This is exactly the position of an assessee under the provisions of the Sales Tax Act.

(12) In 'Smeeton v. Attorney-General', (1919) 12 Tax Cas 166, the plff. brought an action against the Attorney General to obtain in substance a declaration that he does not carry on a business & is not liable under S. 39, Finance (No. 2) Act, 1915, or under any other statutory enactment to the payment of excess Profits Duty. Peterson, J. at p. 172 observed, "while the Court has jurisdiction to make a declaration in such a case as the present, the exercise of the jurisdiction is discretionary", and referred to some cases. He then puts the matter thus at p. 173, "but the real question is whether the plff.'s business or occupation is one which comes within S. 39 of the Act, & that question depends upon the circumstances of the particular case. Nor can it be said that the Commissioners are obviously doing something which they are not authorised to do, for the question whether the plff. is subject to the duty is one which may well be, and has in fact been, the subject of considerable discussion & some doubt. The plff.'s contention involves the proposition that whenever the Commissioners require a return under S. 144 it is open to the recipient of the notice to commence an action for a declaration that his business or occupation is not one of those which are subject to the tax under S. 39 on the ground that there is a question of fact whether he is carrying on a business which comes within the scope of the section. On this basis the Commissioners could not without exposing the Crown to an action for a declaration require a return from any person unless the knowledge of the details of his business or occupation was such as to satisfy them that it came within S. 39. But in many cases it is quite impossible for them to have this previous knowledge. How without investigation of the books of the subject or information supplied by him could they, for instance, say what amount of capital was required for the purpose of his profession, or whether his profits are dependent mainly upon his personal qualifications, or whether his business is that of an agent whose remuneration consists wholly of a fixed sum not dependent on the amount of business done or any other contingency, or whether he takes commissions?

(13) The Legislature in passing this Act can hardly have contemplated that questions of this kind were to be removed from the consideration of the Commissioners, who are the appropriate body for the purpose of investigating facts of this description. Nor can it be said that the question in this case can only be determined in an action of this sort. The plff. might have followed the course which has been accepted in other cases. He might have made a return & at the same time raised the question whether he was chargeable at all under the Act, & if the

Commissioners decided against him he could have the question determined by the Court which decides Revenue cases. If he preferred to insist upon what he considered to be his strict rights & refused to make a return, although he had the material for his Income Tax return available for the purposes of this return, he might have waited until the Commissioners assessed him in default of making a return & appealed from their assessment. In the result the learned Judge held that it was not desirable that cases of this character should be withdrawn from the Court which is constituted for the purpose of dealing with Revenue cases. He therefore, declined to make the declaration for which the plff. asked & abstained from expressing any opinion on the question whether the plff. is carrying on a trade or business which is subject to the provisions of the Act.

(14) In my opinion, the question which arises for consideration in this case is similar to the one dealt with in 'Smeeton's case', (1919) 12 Tax Cas 166, & I should follow this decision.

(15) In 'Lionel Sutcliffe, Ltd. v. The Commrs. of Inland Revenue', (1928) 14 Tax Cas 171, it was held that the writ can only issue where the Income Tax Authorities are merely masquerading & pretending to do their duties, but really they are arbitrarily & injudiciously refusing to hear the assessee.

(16) Similarly, in 'Rex v. General Commrs. of Income Tax for the Division of St. Maryleborne', (1928) 13 Tax Cas 746, Lord Hewart, C. J., says at p. 757:

"Now this appln. for a writ of prohibition is undoubtedly an endeavour to prevent the Commissioners for the General Purposes of the Income Tax from pursuing that course which is laid down very clearly by the Income Tax Acts as the normal course to be pursued with reference to the question whether, & to what extent, a person is liable to be taxed. There are, no doubt, a few very exceptional cases in which that normal course has not so much been departed from as interrupted & prevented for a sufficient reason. The question is whether this particular case falls within that exceedingly narrow & restricted category,"

and then referred to the instances in which the departure had been affirmed. With regard to the question before himself, the learned Chief Justice observed at p. 760 that

"here the question of the fact upon which the liability of Mr. Caesar Schlesinger to pay Income Tax depends is a question of the kind which, in the clearest terms, the legislature has appointed the General Commissioners of Income Tax to determine. Avory, J. in a concurring judgment adopted a passage from the judgment of Lord Chancellor, Lord Selborne, in the case of the 'Denaby Main Colliery Company that the Railway Commissioners 'have acted within their jurisdiction. They have not done anything which is shown to be prohibited by any law or statute, & they have not omitted anything which is shown by any law or statute to be made a condition of the exercise of their jurisdiction'."

(17) The most recent pronouncement of the Judicial Committee in 'Raleigh Investment Co. Ltd. v. Governor-General in Council', 1947-15 ITR 332, in probably a settler of this question — it was decided that where the Act (Income Tax Act in that case) provides a complete remedy a Civil Suit is not maintainable, even if the officer violates the provisions of the Act. Applying this to the present case the assessee has a complete remedy under the provisions of the Sales Tax Act &, therefore, no relief should be granted to him in the Civil Suit. There is a most exhaustive & illuminating discussion of the relevant authorities in the judgment of that eminent Judge Varadachariar J. & by Stodart, J. in 'Secy. of State v. Meyyappa', (1936-4 ITR 341). But the conclusion of the learned Judges as to the ambit of S. 67, Income Tax Act cannot be supported in view of the P. C. decision in 'Raleigh Investment Co.'s case', (supra) & in 'Maharajah of Pithapuram v. Commissioner of Income-tax, Madras', 1945-13 ITR 221.

(18) It is unnecessary to cite or consider other cases decided in England or in this country. I am clearly of the opinion that for the reasons given in 'Smeeton's case & Lionel Sutcliffe's case' (supra) the relief sought for against the Sales Tax Department should be refused.

(19) But Mr. Baldeva Sahay on behalf of the plff. founded an argument upon S. 18 of the Act corresponding to S. 21, Bihar Sales Tax Act, of 1947. There it is provided that if any question arises (otherwise than in a proceeding before a Court) whether or not for the purposes of this Act:

" (a) any person ... is a dealer, the Commissioner shall determine such question."

He, therefore, argued that the Civil Court is not debarred from determining the question whether the plff. is a dealer. I think the argument is entitled to succeed, but only to this extent that the determination of the question is not taken out of the jurisdiction of Civil Court, but that does not assist the plff. as the question is not whether the Civil Court can determine the question but whether the Court can prohibit the Sales Tax authorities from proceeding to go on with the assessment proceedings.

(20) In several cases decided by their Lordships of the Judicial Committee it has been pointed out that the Court shoud not pass declaratory decrees in India unless circumstances are special & exceptional of the type pointed out by Sir Montague E. Smith while delivering the judgment in 'Sheo Singh v. Mt. Dakho', 5 I A 87. His Lordship stated at p. 111:

"It is scarcely necessary to say that their Lordships desire to adhere to the opinion declared in several decisions of this Board, that S. 15, Indian Act VIII (8) of 1859 relating to declaratory decrees ought to receive the same construction as S. 50, English Act, 15 & 16 Vict. C. 86, which is similarly worded, has received from the English Courts. In the last of these decisions, the English & Indian cases on the subject were reviewed, & it was laid down that a declaratory decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been given by the Court. or unless in certain cases a declaration of right is required as a step to relief in some other Court. (Kathama Natchiar v. Dorasinga Tever', 2 I A 169."

See also 'Robert Fischer v. Secy. of State', 26 I A 16; and 'Sheoparsan Singh v. Ramnandan', 43 I A 91 at p. 97, in this case Sir Lawrence

Jenkins pointed out that the plff. coming under S. 42, Specific Relief Act, must be entitled to a legal character or to a right as to property. The plff. in the present case does not ask for any declaration of any right; but he asks for a declaration that he is not a dealer, & therefore, cannot be assessed by the Sales Tax Authority i.e. the requirements of S. 42 are not satisfied.

(21) But this is an appealable case & we are bound to give our finding on the question whether the plff. as a dealer or not within the meaning of the Sales Tax Act.

(22) Now the word 'dealer' is defined in S. 2 (c) to mean a person who carries on the business of supplying goods, & the word 'goods' by sub-cl. (d) means all kinds of movable property with certain exceptions. It is not denied that grains or sugarcane are goods within the meaning of the Act, but it is vehemently denied that the plff. is a dealer within the meaning of the definition. The only evidence in the case on this point has been reproduced above. I am unable to hold that on that evidence it can be reasonably held that the plff. is a dealer. I see no evidence or no sufficient evidence rather to hold that the plff. is carrying on a business as a dealer. It is true he sells agricultural products or goods but he has set up no place of business. The evidence is to the effect that the goods are sold in each village probably in the Khalihan where an agriculturist stores them after harvesting or after they are brought to the granaries except with regard to sugarcane which has to be carted to the mills — this is the normal way in which sugarcane is sold in this province at least. The plff. has a vast area of zirat or bakast lands in his cultivation & therefore the amount of goods produced will be large & the bigness of the figures realised by sale thereof is irrelevant.

(23) Mr. Baldeva Sahay correctly drew attention to the provisions in the Act relating to sale or transfer of the business of a dealer — S. 7 of the old Act & S. 19 of the new Act. It is argued how can the plff. transfer or sell this business which is inextricably connected with the ownership of the villages in which the lands producing the goods are situated. I would accept the argument as well founded.

(24) The provisions of S. 13 of the old Act & S. 16 of the new Act regarding keeping of accounts by dealers — not referred to at the bar — completely demolish the argument of the learned Govt. Pleader who appeared for the deft. These provisions are clear that the dealer is required to keep a true account of the value of goods bought & sold by him. The plff. admittedly does not buy these goods — ex facie therefore he is not a dealer.

(25) The decided cases support me in my conclusion based on principle. I am referring only to some of the relevant decisions.

(26) In 'Brown v. Watt', (1866) 2 Tax Cas 143, a seed merchant took a farm & worked it in connection with the business which was that of selling the seeds. Their Lordships pointed out that there may be engrafted upon that, no doubt, as in many cases there is, the occupation of producing that which the merchant sells, & then he is a manufacturer as well as a merchant, & in such a case the occupation which he was carrying on at the farm is really the manufacturing of seeds to be used in his business. It will be noticed that the business existed apart from the farm operations. In the present case before me all that I find is that the plff. owns agricultural zirat lands which he cultivates & from which he produces the goods. This is one operation. Now he cannot consume all the goods & he must sell the excess if he does not require all for his own consumption. How can the mere fact of selling the excess make the plff. carry on a business of selling the produce? See the case of 'Commr. of Income Tax, Burma v. Kokine Dairy, Rangoon', where a dairy business was being carried on by an assessee owning agricultural lands, '1938-6 ITR 502'.

(27) In the Privy Council case of 'Commissioner of Income Tax, Madras v. S. I. Mathias', 1939-7 I T R 48, it was found that the assessee was carrying on a business in coffee. Although green coffee itself could not be regarded as income, profits or gains within the meaning of the Act, but it was found that a great organisation was set up by the assessee who owned curing factories at Mangalore & then sold the coffee through his agents at Mangalore & the entire operation from the cultivation to the sale was controlled by the assessee from Mangalore. There are no such facts in the present case.

(28) An interesting discussion will be found in a recent case decided by the Privy Council from Australia — 'The Producers Co-operative Distributing Society, Ltd. v. The Commissioner of Taxation', 1948-16 I T R Supp. 87, where the "agricultural products" were defined as meaning "the products of any rural industry" & "rural industry" was defined as meaning "the pastoral, dairying or rural purpose" by the relevant Australian Act. The question for decision was whether the making of butter by a factory process was not agricultural product. Their Lordships pointed out inter alia that the use or cultivation of the agricultural lands results in one definite product-cream, & that "at that stage a distinct organised industry appears on the scene", that is to say, there are two industries, the farming industry & the butter-making industry, and even though the industries are closely related, they are independent & the product of the latter industry is not in any real sense the product of the former industry. In the present case no organised industry appears on the scene after the agricultural produce is removed from the lands. For these reasons my conclusion is that within the meaning of S. 2(c) the assessee is not a dealer as he is not carrying on any business of selling the agricultural produce or goods in Bihar.

(29) In the result, I would reverse the findings of the Additional Subordinate Judge on both the issues, but would confirm his decree by which he dismissed the plff's suit.

(30) I would also direct each party to bear his own costs in this Court & in the Court below.

(31) MAHABIR PRASAD, J.: I agree.

D. R. R. *Appeal allowed.*

A. I. R. (39) 1952 Patna 134 *[C. N. 49.]*

RAMASWAMI AND SINHA JJ.

The Arrah Electric Supply Co. Ltd., Petitioner v. Workmen of Arrah Electric Supply Co., Ltd. and others, Opposite Party.

Misc. Judicial Case No. 119 of 1950, D/- 21-9-1951.

Industrial Disputes Act (1947) Ss. 2(k) and 10(1). — Settlement between Union of Workers and Company employer — Demands relating to revision of scales of pay, increment in dearness allowance and payment of bonus still pressed by workers and not settled between parties — Matter referred by State under S. 10(1) to Industrial Tribunal — These matters included in reference — Matters held formed "industrial dispute" within meaning of S. 2(k), the alleged award by Labour Commissioner in arbitration previous to settlement, regarding these matters notwithstanding. (Paras 5 and 6)

Jaleshwar Pd. and J. N. Sahai, for Petitioner — Govt. Pleader, Sheonarayan Lal Nandkeolyar and Awadheshnandan Sahai, for Opposite Party.

RAMASWAMI, J. In this case the petitioner, The Arrah Electric Supply Co. Ltd., has obtained a rule calling upon the State of Bihar and other opposite party to show cause why a writ in the nature of certiorari should not be issued for quashing the award made by the Industrial Tribunal. Cause has been shown against the rule by the State of Bihar and other opposite parties to whom notice of the rule was directed to be given.

(2) The material facts are not seriously controverted. On 1st of May 1949 the Arrah Electric Supply Company's Workers Union which will hereinafter be referred to as 'Union' submitted a list of demands from the management of the Arrah Electric Supply Co. Ltd. for immediate compliance. As their demands were not fully met with the Union served upon the Company a notice on 4th of June 1949 to the effect that the workers would go on strike from 21st June 1949. Thereafter the Deputy Labour Commissioner informed the Union that the strike would be illegal whereupon the Union gave to the Company a second notice under S. 19(2) of the Industrial Disputes Act on 22nd of June 1949. After the expiry of two months from this date the Union submitted a list of demands on 23rd August 1949. Thereafter a settlement was arrived at between the Union and the Company and the memorandum of settlement was published by the Government of Bihar on 18th October 1949. From the memorandum it is apparent that the demands relating to the revision of scale of pay, increment in dearness allowance and payment of bonus which were still pressed by the workers could not be settled between the parties. On 18th of October 1949 the Government of Bihar in exercise of the powers conferred by S. 10(1) of the Industrial Disputes Act made reference of the dispute to the Industrial Tribunal for adjudication. On 10th of February 1950 the Industrial Tribunal gave the award which was duly published in the Bihar Gazette. Thereafter the Union gave notice to the Company that unless the award was implemented the workers of the Company would go on strike from 19th May 1950.

(3) Being dissatisfied with the award of the Tribunal the Company has filed an application under Arts. 226 and 227 of the Constitution of India.

(4) The main argument addressed by Mr. Jaleshwar Prasad is that the award of the Industrial Tribunal is wholly without jurisdiction since there was no 'Industrial dispute' within the meaning of S. 2(k) of the Act. The contention of the learned counsel is founded upon the circumstance that in the memorandum of settlement dated 20th September 1949 there is a statement that the demands relating to revision of scale of pay, increment in dearness allowance and payment of bonus were still pressed by the workers but on which no settlement could be arrived at. As regards the other 9 demands the document states that there was settlement between the parties. Mr. Jaleshwar Prasad therefore contended that with respect to items 4, 5, 6 and 7 of annexure A to the Government Notification by which the Tribunal was constituted there was no industrial dispute and the Tribunal had no jurisdiction to decide these matters. The contention of the learned Counsel appears to be invalid. As regards item No. 5 with respect to the reinstatement of Sri P. K. Mitra the Tribunal itself has observed that there was no dispute in existence and no order would be passed with respect to the case of Sri P. K. Mitra. With respect to item No. 6 the Tribunal has interpreted the memorandum of settlement with reference to the award given by the labour Commissioner on 10th of May 1948. The Tribunal held that arrears of house rent allowance from March 1948 cannot be allowed to the emergency staff though it was clear from the memorandum of settlement that house rent allowance must be paid from October 1949 to members of the emergency staff. As regards item No. 7 of annexure A the Tribunal referred to the award of the labour Commissioner of 10th May 1948 to the effect that the company should provide free medical aid to the workers. In view of the fact that in practice the management had been supplying free medical aid to the members of the employer's family the Tribunal directed that the practice should be continued. Admittedly this question was not referred to or decided in the Labour Commissioner's award and the Tribunal had jurisdiction to consider and determine this question.

(5) Mr. Jaleshwar Prasad stressed the argument that even as regards items 1, 2 and 3 of annexure A to the notification there was no dispute between the parties and the reference made under S. 10(1) by the Government of Bihar was without jurisdiction and in consequence the award of the Tribunal was illegal, void and of no effect. It was contended by the learned Counsel that with respect to these three items there was an arbitration and the Labour Commissioner gave award on 10th May 1948 which was binding upon the parties. The argument of the learned counsel on this part of the case cannot be accepted since, in the first place, the award made by the Labour Commissioner on 10th May 1948 has not been printed in the paper book and there is no material from which it is possible to hold that the Labour Commissioner had previously decided the three matters which were referred to by the Government of Bihar to the Industrial Tribunal for being adjudicated. In the second place, the memorandum of settlement dated 20th of September 1949 clearly shows that the three items of annexure A to the notification had not been settled between the parties, that the workers still pressed those three demands but the Company had not acceded thereto. It is therefore apparent from this memorandum of settlement that in spite of the alleged award given by the Labour Commissioner in 1948 the demands with respect to revision of scale of pay, increment in dearness allowance and payment of bonus were not accepted by the Company though they were still pressed by the workers.

(6) Upon the materials produced in this case it is manifest that there was industrial dispute with respect to all the items mentioned in annexure A at the time the Government of Bihar made reference to the Industrial Tribunal under S. 10(1) of the Industrial Disputes Act. It follows that the Tribunal had complete jurisdiction to decide the

matters referred to it and the award made cannot be impeached on the ground of want of jurisdiction.

(7) For these reasons the rule must be discharged and the application must be dismissed with costs to the contesting opposite party. Hearing fee three gold mohars to be paid to respondents 1 and 2 and three gold mohars to respondent No. 3, State of Bihar.

(8) SINHA J.: I agree.

R.G.D. *Rule discharged.*

A. I. R. (39) 1952 Patna 135 *[C. N. 50.]*

SHEARER AND AHMAD JJ.

The State v. Hira Dubey and another, Accused.

Death Reference No. 28 of 1951 with Criminal Appeals Nos. 377 and 387 of 1951, D/- 28-11-1951.

Penal Code (1860), S. 34 — Applicability — Two accused armed with lathis pursuing victims and striking him several blows — One of the blows fatal — Both held guilty of murder.

In order that S. 34 may apply, it is incumbent on the prosecution to show, in the first place, the existence of a common purpose or design or enterprise. If this cannot be shown, each of the accused persons is liable only for what he himself actually did. If, on the other hand, the prosecution succeed in showing the existence of a common purpose or design, then each of the accused persons is liable for any act done in pursuance of that common purpose or design. When the acts done are similar, as where a number of blows are struck with lathis, then each of them is liable for every one of the blows struck, and if in the event of every blow having been struck by one man, that man would have been guilty of murder, each of them is guilty of murder, it being immaterial whose blow it was which was the direct and immediate cause of death.

Section 34 lays down a principle of joint liability for acts done by several persons in pursuance of a criminal design or enterprise and the principle laid down in the section, as originally enacted, was the same principle as is recognised by the common law in England. Under that principle one of several persons who engages in a criminal enterprise or design may be liable for an act done by another which he himself never intended, and perhaps never contemplated. If, for instance, a number of men set out to burgle a house, and entrust one among their number with a fire-arm, impressing on him that he is not to use it except under circumstances of compelling necessity, and if that man loses his head and shoots one of the inmates of the house, it would be no defence on the part of his companions to assert that they had never intended him to use his weapon in the way he did.

An act may be done by one of several persons in furtherance of the common intention of them all without each one of them having intended to do the particular act in exactly the same way as an act may be done by one member of an unlawful assembly in prosecution of the common object which the other members of the unlawful assembly did not each intend to be done. In order to determine the common intention and to determine also whether a particular act was done in furtherance of the common intention regard must be had not solely to the particular act, but to all the acts that were done. If two or three of several men proceed to assault another man with their fists, and if suddenly one of the by-standers joins in the affray and pulls out a knife and stabs him fatally, it might well be said that the stabbing was not part of the criminal act in which all of them had joined, but was the individual act of the man who used the knife. Where, however two men, each armed with lathis set out in pursuit of another and overtake and assault him, each of them striking him several blows, it is quite impossible to argue that any particular blow was not struck in furtherance of the common intention. If the victim dies as a result of one of the blows, both of them are guilty of murder.

Assuming that the common intention of the appellants was to administer a severe beating to the victim, it is clear that it was the existence of that intention which led to the fatal blow being struck, and that that blow was struck in furtherance of such intention. Case law Ref. (Para 2)

Anno: Penal Code, S. 34 N. 1.

Government Advocate, for the reference; Mrs. D. Lall, against the reference.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('45) 26 Pat L T 229: (AIR (32) 1945 PC 118: 46 Cri L J 689 PC) (Pr 2)

('48) AIR (35) 1948 All 229: (49 Cri L J 271) (Pr 2)

('66) 5 W R Cr 45: (Beng L R Sup Vol 443) (Pr 2)

('41) AIR (28) 1941 Cal 106: (42 Cri L J 385) (Pr 2)

('96) 19 Mad 483: (1 Weir 298) (Pr 2)

('37) AIR (24) 1937 Mad 792: (39 Cri L J 139) (Pr 2)

('51) AIR (38) 1951 Mysore 1: (51 Cri L J 1603) (Pr 2)

('39) AIR (26) 1939 Oudh 49: (40 Cri L J 187) (Pr 2)

(1881) 14 Cox C C 494: (6 Q B D 79) (Pr 2)

SHEARER, J.: This is a reference made by the learned Sessions Judge of Shahabad under S. 374 of the Code of Criminal Procedure for confirmation of the sentence of death imposed by him on two men, Hira Dubey and Shriram Pandey, who have been convicted of the murder of one Radha Pathak. Hira Dubey and Shriram Pandey have appealed against their convictions and sentences, and the appeal has been heard along with the reference. Radha Pathak died in consequence of an assault which was committed on him in the early morning of the 26th of April, 1951. Radha Pathak belonged to Kapasia, but resided in another village Nimia, where he had relations. In the early morning of the 26th of April, 1951, he left his house in Nimia intending to go to Kapasia. According to the prosecution, the two appellants followed and overtook him at a point close to the boundary of Nimia and assaulted him with lathis. Blood was found by the Sub-Inspector at this point, and it is not suggested that it was not the venue of the occurrence. The post mortem shows that Radha Pathak was struck some six or seven, or possibly more, blows with lathis. One of the blows was on the head, and caused a fracture of the skull to which Radha Pathak succumbed the same day at the police station. When, however, he reached the police station, he was still in a position to give a fairly detailed account of the occurrence. The reason which he then gave for the appellants having attacked him was that about two months earlier he had given evidence for the prosecution, in a case instituted by one Mt. Lakhia, who was a Gareri, against five men, one of whom was a Gareri and the other four of whom were Brahmans. One of these Brahmans was the appellant Hira Dubey and another, Rambaran Pandey was a relation of the appellant Shriram Pan-

dey. Hira Dubey and Rambaran Pandey were convicted on the 3rd of February, 1951, but an appeal, which was pending when Radha Pathak was killed, was preferred and was ultimately successful. In order to corroborate the version of the occurrence contained in the dying declaration of Radha Pathak the prosecution relied on the evidence of three men, who claimed to have seen it. (Reviewing their evidence his Lordship continued) In any event, the dying declaration of Rada Pathak himself, and the evidence of Ramnath Mahto coupled with the existence of a motive on the part of the appellants, was sufficient to justify their conviction. The only question of any difficulty that arises in the appeal is as to whether or not the learned Sessions Judge was correct in convicting both men of murder.

(2) In a statute the singular is deemed to include the plural, and it is plain that the words at the beginning of S. 34 of the Penal Code "when a criminal act is done by several persons" mean, and can only mean, "when criminal acts are done by several persons", or to put it more broadly, "when several persons engage in a criminal enterprise". The acts may be different acts as when several men set out to burgle a house, and one of them keeps watch outside and the others enter the house, and one of the latter uses a fire arm and shoots one of the inmates, or they may be similar acts as where several men combine to assault another. In either case, in order that S. 34 may apply, it is incumbent on the prosecution to show, in the first place, the existence of a common purpose or design or enterprise. If this cannot be shown, each of the accused persons is liable only for what he himself actually did. ('Mahbub Shah v. Emperor', 26 Pat L T 229 (P C)). If, on the other hand, the prosecution succeed in showing the existence of a common purpose or design, then each of the accused persons is liable for any act done in pursuance of that common purpose or design. When the acts done are similar, as where a number of blows are struck with lathis, then each of them is liable for every one of the blows struck, and if in the event of every blow having been struck by one man, that man would have been guilty of murder, each of them is guilty of murder, it being immaterial whose blow it was (which?) was the direct and immediate cause of death. Now, even assuming for the moment that Mrs. Dharamshila Lall is correct in saying that the purpose of the appellants was to cause bodily injury to Radha Pathak, and not to kill him, nevertheless, it is clear that the fatal blow was struck in furtherance of that purpose, and it is also, I think, clear that if there had been one assailant, and not two, the assailant would have been guilty of murder. Radha Pathak was knocked down and after he was knocked down he was belaboured with lathis, one of which at least was a particularly formidable lathi. It seems to me impossible to say that if the assault had been committed by one man it would have been culpable homicide not amounting to murder and not murder. It is contended by Mrs. Lall that, in order to convict her clients of murder, it must be shown that each of them intended to kill Radha Pathak. Section 34 lays down a principle of joint liability for acts done by several persons in pursuance of a criminal design or enterprise, and the principle laid down in the section, as originally enacted, was the same principle as is recognised by the common law in England. Under that principle one of several persons who engages in a criminal enterprise or design may be liable for an act done by another which he himself never intended, and perhaps never contemplated. If, for instance, a number of men set out to burgle a house, and entrust one among their number with a fire-arm, impressing on him that he is not to use it except under circumstances of compelling necessity, and if that man loses his head and shoots one of the inmates of the house, it would be no defence on the part of his companions to assert that they had never intended him to use his weapon in the way he did. The point is, I think, well illustrated by the decision in 'Queen v. Salmon Hancock and Salmon', (1881) 14 Cox C C 494. In that case several members of a volunteer corps went out to practise shooting and put up their target in such a situation that a shot fired by one of them went wide and killed a boy. They were all convicted of manslaughter on the ground that each one of them was 'answerable for the acts of the others, they all being engaged in one common pursuit." Under S. 34 as it stood originally it seems to me quite clear that each of the appellants would have been guilty of murder. In 'the Queen v. Gora Chand Gope', 5 W R Cr 45, a case decided in 1866, Peacock, C. J. observed:

> "It is laid down that when several persons are in company together engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the others commits an offence, the others will not be involved in the guilt, unless the act done was in some manner in furtherance of the common intention."

In that case the question that arose was whether certain persons who had been present when a fatal assault was committed but had not themselves taken any part in it were acting in concert with the actual assailants and whether the beating was in furtherance of the common design of all of them and His Lordship the Chief Justice, without deciding the point as the case was remanded, expressed the opinion that in certain circumstances such an inference might be justifiably drawn. The argument which has been put forward by Mrs. Dharamshila Lall assumes that the fatal blow on the head is, in this particular case, the criminal act referred to at the beginning of Section 34. That act, however, was not an act done by several persons. The act done by several persons was the totality of the blows struck or the beating itself. The only question that could arise under the section as originally enacted was whether or not this fatal blow was struck in pursuance of the purpose of both men, and as to this, there can, clearly, be only one answer. The words, "in furtherance of the common intention of all" were inserted in Section 34 in 1870, and as their Lordships of the Judicial Committee have pointed out in 'Mahbub Shah's case', the words were inserted in order to clarify and not in order to modify the pre-existing law. The result of the amendment made in the section was, at the most, merely this, that if a doubt arose as to whether a particular act was done in pursuance of the common purpose or design, the onus was, in future, on the prosecution to show that it was so done and not on the defence to show that it was not so done. In 'Mahbub Shah's case', after pointing out that Section 34 lays down a principle of joint liability in the doing of a criminal act Sir Madhavan Nair observed:

> "Under the section the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention."

Assuming that the common intention of the appellants was to administer a severe beating to Radha Pathak, it is clear that it was the existence of that intention which led to the fatal blow being struck, and that that blow was struck in furtherance of such intention. Mrs. Lall did not cite any authority in the course of her argument, but she

subsequently asked us to refer to the following decisions: 'Emperor v. Mujjafar Sheikh', AIR (28) 1941 Cal 106; 'Emperor v. Narasingadu', AIR (24) 1937 Mad 792; 'In re: Basappa', AIR (38) 1951 Mysore 1; 'Emperor v. Mahabir', 14 Cri L J 241; 'Zahid Khan v. Emperor', AIR (26) 1939 Oudh 49; and 'Queen Empress v. Duma Baidya', 19 Mad 483. With one exception these decisions were prior to the decision of their Lordships of the Judicial Committee in 'Mahbub Shah's case', and in 'Basappa's case', AIR (38) 1951 Mysore 1, the facts were not similar to those with which we have to deal here, that being a case in which a murder was committed in the course of a burglary. The learned Government Advocate, on the other hand, referred us to a recent decision of the Allahabad High Court, 'Nazir v. Emperor', AIR (35) 1948 All 229, which is directly in point. I respectfully agree with the observations which were made by Raghubar Dayal, J., as to the practical difficulty in the way of being satisfied in a case in which several men armed with the same or similar weapons commit a fatal assault that, prior to setting out to commit the assault, they all decided and agreed that no blow likely to cause death should be struck. It appears to me, however, that in such a case speculation of that kind is quite unnecessary. What Section 34 of the Penal Code is aimed at is a criminal act done by several persons which, as I have already said, means each of the acts done by several persons in furtherance of their common intention. It is, I think, quite clear that an act may be done by one of several persons in furtherance of the common intention of them all without each one of them having intended to do the particular act in exactly the same way as an act may be done by one member of an unlawful assembly in prosecution of the common object which the other members of the unlawful assembly did not each intend to be done. In order to determine the common intention and to determine also whether a particular act was done in furtherance of that common intention regard must be had not solely to the particular act, but to all the acts that were done. If two or three of several men proceed to assault another man with their fists, and if suddenly one of the bystanders joins in the affray and pulls out a knife and stabs him fatally, it might well be said that the stabbing was not part of the criminal act in which all of them had joined, but was the individual act of the man who used the knife. Where, however, two men, each armed with lathis set out in pursuit of another and overtake and assault him, each of them striking him several blows, it seems to me quite impossible to argue that any particular blow was not struck in furtherance of the common intention. The appellants were, in my opinion, rightly convicted of murder. The reason presumably why the learned Sessions Judge imposed the extreme penalty of the law was that murderous assaults of this kind in Shahabad have, in recent years, become much too common. There is, however, evidence to show that this attack on Radha Pathak was not premeditated, and that the appellants would not have committed this crime at all unless another man had gone to them and suggested that they should take the advantage of Radha Pathak having gone out unaccompanied to administer a beating to him. I would, therefore, reject the reference and while affirming the conviction, would alter the sentence to one of transportation for life. Subject to this modification, I would dismiss the appeal.

(3) AHMAD, J.: I agree.

R.G.D. *Appeal dismissed.*

A. I. R. (39) 1952 Patna 137 *[C. N. 51.]*

LAKSHMIKANTA JHA C. J.

Ramkirpal Missir and others, Petitioners v. Mahesh Pandey and others, Opposite Party.

Civil Revn. No. 141 of 1951, D/- 10-8-1951.

Civil P. C. (1908) S. 115, O. 26 R. 9 — Order appointing Commissioner to make local investigation — Interference in revision.

An order appointing a commissioner for making local investigation on points which are extraneous to the suit and beyond the scope of inquiry under O. 26 R. 9, C. P. C. will be set aside in revision by the High Court when the order instead of promoting the ends of justice hampers justice and involves a calamitous waste of time and money. AIR (11) 1924 Pat 761, Rel. on. (Para 2)

Anno: C. P. C. O. 26 R. 9 N. 10.

A. B. N. Sinha, for Petitioners; K. Rai and Kameshwar Prasad Sinha, for Opposite Party.

Case referred to:

('24)AIR (11) 1924 Pat 761: (83 Ind Cas 124) (Pr 2)

ORDER: This is an application under S. 115 of the Code of Civil Procedure directed against an interlocutory order of the Munsif, 1st Court, Buxar. The learned Munsif has ordered appointment of a commissioner to make local investigation under O. 26, R. 9, Code of Civil Procedure, and has asked the Commissioner to follow certain directions in making measurement of certain lands which are not within the scope of the suit. In order to appreciate the point raised before me I may shortly state the facts of the case which are as follows: The present defendants instituted a suit for a declaration that certain persons who claimed to be members of the family of the present plaintiffs have made encroachments on the defendants' lands namely, plots 440 and 438, by constructing two rooms thereon. It may be stated that the present plaintiffs were not parties to that suit, but the defendants, who were plaintiffs in the previous suit, succeeded up to the High Court and it was held that the two rooms, which are the subject-matter of dispute now, were encroachments on plots 440 and 438. When the defendants started the execution, the present plaintiffs brought the suit for a declaration that the rooms really belonged to them and that the decree in the earlier suit is not binding on them because they were not parties to the suit. They have accordingly sought a declaration that the decree is not effective against them and have also asked for a perpetual injunction.

(2) The plaintiffs applied for the issue of a commission for measurement of certain land. Their case was that plot No. 439 belongs to them whereas plots 440 and 438 belong to the defendants. According to them, the two rooms, which are the subject-matter of the suit, are on plot No. 439 and not an encroachment on the defendants' plots 440 or 438. The plaintiffs have now applied for issue of a commission and prayed that a commissioner be appointed to find out by measurement (1) what is the width of the lane lying north of the plaintiffs' house situated on plot No. 435, and (2) if defendants have encroached in the said lane as well. I may state that the plaintiffs applied for issue of commission on two previous occasions, but they failed. But their third attempt succeeded and the learned Munsif was pursuaded to appoint a commissioner and to measure the width of the lane lying north of the plaintiffs' house and to find out if the defendants have made any encroachment. These points are extraneous to the suit and, in my opinion, beyond the scope of enquiry under O. 26, R. 9, Code of Civil Procedure. The

order of the learned Munsif does not appear to be one to promote the ends of justice but to hamper justice. I may, in this connection, quote the observation of Dawson Miller, C. J. in 'Ramji Ram v. Ramasre Raut', AIR (11) 1924 Pat 761, which is quite appropriate so far as the present case is concerned. His Lordship observed:

"The only question is whether we should interfere in revision or under our powers of superintendence to prevent what, in my opinion, would be a calamitous waste of time and money if an enquiry on the lines suggested by the learned Subordinate Judge were to take place."

I think it will be in the present case an equally calamitous waste of time and money if a roving enquiry like that as ordered, by the Munsif is made. The order of the learned Munsif, is, therefore, set aside; and if the learned Munsif feels that it is necessary that a commission should issue he should strictly follow the provisions of O. 26 R. 9, Code of Civil Procedure.

(3) The application is, therefore, allowed with costs and the order of the learned Munsif set aside: hearing fee one gold mohur.

K.S. *Revision allowed.*

A. I. R. (39) 1952 Patna 138 *[C.N. 52.]*

IMAM, J.

Kari and others, Petitioners v. The State.

Criminal Revision No. 397 of 1951, D/- 6-11-1951.

(a) *Penal Code (1860), S. 153 — "Wantonly" — Person killing cow openly does the act wantonly.*

"Wanton" in S. 153 means recklessly, thoughtlessly without regard for right or consequence. Today, it must be recognised that to kill or to sacrifice a cow in the open exposed to the view of the public would cause needless offence to a very large body of persons who inhabit this land. A person who so kills or sacrifices a cow obviously does so recklessly, thoughtlessly and without regard for the sentiment of those who do not approve of such an act. Such conduct, therefore, amounts to a wanton act. 29 All 569, Rel. on. (*Para 4*)

Anno: Penal Code , S. 153, N. 1.

(b) *Penal Code (1860), S. 153 — Killing of cow — Act must not only be wanton, but it must also be illegal.*

If the act is not illegal, however, wanton however undesirable, however to be deplored the act may have been, there could be no offence committed under S. 153. Where there is no provision of law which would make the killing of a cow an offence, it is impossible to hold that the act of persons in killing a cow in the open is an illegal act, although it may have been wanton and one which was deplorable. (*Para 4*)

Anno: Penal Code, S. 153, N. 1.

M. Fazl Ali, for Petitioners; Standing Counsel, for the State.

Case referred to:

('07) 29 All 569: (6 Cri L J 14) (Pr 4)

ORDER.: The petitioners have been sentenced to three months' rigorous imprisonment under Section 153 of the Indian Penal Code. They had originally been convicted under Sections 153 and 298 of the Indian Penal Code and had been sentenced under the former Section to six month's rigorous imprisonment and under the latter section to one year's rigorous imprisonment. The lower appellate Court, however, acquitted the petitioners of the offence punishable under Section 298 of the Indian Penal Code and reduced the sentence passed under Section 153 of the Indian Penal Code from six months to three months' rigorous imprisonment.

(2) On the facts found there can be no question that on the 25th of May 1950, at 10 a.m., one Jiwachh Sah noticed the petitioners killing a cow in the field of one Sk. Sadique. The animal was observed to have its throat cut and Jiwachh Sah informed the choukidar. When the choukidar arrived, he saw the petitioners cutting the cow to pieces and taking the meat in baskets. There was subsequently a sulehnama, as it is described, whereby the Muslims of the village declared that there would be no such repetition of the incident which had taken place. There was, however, one Mujibur Rahman who stood in the way of this Sulehnama with the result that the petitioners along with Mujibur Rahman were prosecuted for offences punishable under Sections 153 and 298 of the Indian Penal Code. By the irony of things Mujibur Rahman was acquitted—the individual who had prevented an amicable settlement of the trouble in the locality. I am, however, not concerned with that matter in the present proceedings.

(3) The Sessions Judge in appeal, as I have already said, acquitted the petitioners of the offence punishable under Section 298 of the Indian Penal Code and so far as the offence punishable under Section 153 of the Indian Penal Code is concerned definitely found that the act of the petitioners was not malignant or malicious but that it was wanton. On behalf of the petitioners it has been urged that their act was not wanton, and even if it was wanton, the act which they committed was not illegal having regard to the definition of that word in Section 43 of the Indian Penal Code. Consequently, there could be no conviction under Section 153 of the Indian Penal Code which runs as follows:

"Whoever malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both."

(4) In my opinion, the act of the petitioners was undoubtedly wanton. The expression "wanton" came to be considered by the Judges of the Allahabad High Court in the case of 'Emperor v. Hussain Bux', 29 All 569. It means recklessly, thoughtlessly without regard for right or consequence. Today, I think it must be recognised that to kill or to sacrifice a cow in the open exposed to the view of the public would cause needless offence to a very large body of persons who inhabit this land. A person who so kills or sacrifices a cow obviously does so recklessly, thoughtlessly and without regard for the sentiment of those who do not approve of such an act. The evidence is clear that in this village the field in which the cow was killed was open at least on three sides exposed to the public view. Having regard to the circumstances prevailing today, of which a Court is justified in taking judicial notice, to kill a cow in such a place is an act which is reckless, thoughtless and without regard for the sentiment of a very large body of persons who inhabit this land. Such conduct, therefore, in my opinion amounts to a wanton act. The question, however, still remains to be considered that even if the act of the petitioners was wanton, whether the act was illegal. If it was not illegal, however, wanton, however undesirable, however to be deplored the act may have

been, there could be no ofience committed under Section 153 of the Indian Penal Code. The word "illegal" has been defined in Section 43 of the Indian Penal Code, which states:

> "The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which ground for a civil action: and a person is said to be "legally bound to do" whatever it is illegal in him to omit."

The killing of the cow in this particular case certainly did not furnish ground for a civil action. No provision of law has been placed before me which would make the killing of the cow an offence. No provision of law, nor any notification by a lawful authority has been placed before me by which it would appear that the killing of a cow had been prohibited. In such circumstances, it is impossible to hold that the act of the petitioners in this particular case was an illegal act, although it may have been wanton and one which was deplorable. Since it has not been established that the act was illegal, obviously an essential ingredient of the offence punishable under Section 153 of the Indian Penal Code has not been established in this case. I would accordingly allow the application and set aside the conviction and sentence.

R.G.D. *Revision allowed.*

A. I. R. (39) 1952 Patna 139 *[C. N. 53.]*

JAMUAR AND RAI, JJ.

Karunamoy Banerji and others, Appellants v. Kumar Pashupati Nath Malia and another, Respondents.

A. F. A. D. No. 1390 of 1948, D/- 22-11-1951.

(Bengal) Courts of Wards Act (9 (IX) of 1879), Ss. 39 and 18 — Agreement to grant mining lease by Manager, Court of Wards — Absence of sanction under S. 39 — Release of estate — Subsequent confirmation of agreement by manager of coal and minerals on behalf of Ward — Agreement not enforceable — Specific Relief Act (1877), Ss. 27-A, 3 — Contract Act (1872), S. 2 (h).

The Manager, Court of Wards, entered into a written agreement with the plaintiff to grant a mining lease of the lands under his management. The plaintiff paid the salami for the lease and a draft lease was prepared. The draft was sent to the Member, Board of Revenue for approval but as the estate was released in the meantime from the management of the Court of Wards the Member replied that sanction was unnecessary. Subsequently after the release the manager of coal and minerals informed the plaintiff on behalf of the defendant (ward) that the proposed draft lease could be engrossed on stamp paper and asked the plantiiff to verify the draft lease once more. Inspite of this the defendant refused to execute and register the lease, whereupon the plaintiff brought a suit for specific performance.

Held that (i) the Manager, Court of Wards had no power to enter into an agreement to grant a lease without the sanction of the Board of Revenue as required by S. 39, Bengal Court of Wards Act. The reply given by the Member, Board of Revenue could not be construed as waiver of the provisions of Ss. 18 and 39 of the Act. Hence the agreement to grant a lease could not be enforced under S. 27-A, Specific Relief Act. (*Prs 5, 7, 8*)

(ii) A person in charge of coal and minerals cannot be presumed to be one who has authority to alienate or enter into an agreement to alienate a portion of the estate. In the absence of evidence to show that the manager in charge of coal and minerals had such authority the confirmation of the draft lease by him on behalf of the defendant after the release of the estate could not bind the defendant. Even if it be held that the confirmation of the draft lease was binding on the defendant, it could not be enforced as it related to the execution of a lease by a ward of the Court of Wards which admittedly could not be enforced in the suit. (*Paras 9 and 10*)

B. C. De and S. K. Majumdar, for Appellants; S. M. Dutt; P. B. Ganguli and K. N. Chaturvedy, for Respondents.

Cases referred to:

(1877) 3 A C 106 (Pr 9)
(1848) 2 Ex. 259: (36 L J Ex. 147) (Pr 9)

RAI, J.: The plaintiffs have come up in second appeal before this Court against the judgment and the decree of the Additional District Judge of Purulia upholding the judgment and the decree of the Subordinate Judge of Dhanbad.

(2) The plaintiffs filed the suit out of which the present appeal arises for specific performance of an agreement directing the defendants to execute a lease of coal mining rights described in the schedule attached to the plaint on terms and conditions specified in a draft lease. The case of the plaintiffs was that the estate of defendants 1 and 2, namely, Siarsol Raj Estate, was under the supervision of the Court of Wards. In 1943 defendant No. 1, Kumar Pashupatinath Malia, was working as an Honorary Manager of the estate under the Court of Wards. In February 1943 the plaintiffs addressed a letter to the Manager Court of Wards for Siarsol Raj Estate, proposing for grant of lease of 41 bighas of coal lands in Mauza Bhaljhuria. After some correspondence defendant No. 1, in his capacity as the Manager of the Estate under the Court of Wards, agreed to settle the lands to the plaintiffs. In accordance with the settlement, the plaintiffs sent a cheque for Rs. 1,025 in full payment of the salami for grant of the lease. A draft of the indenture of the proposed lease was prepared. The proposal for the settlement of the land in question was referred to for approval of the member of the Board of Revenue but as the estate was released on the 14th of August 1944, the Secretary, Board of Revenue, Bengal, wrote to the Commissioner of the Burdwan Division that as the estate had been ordered to be released with effect from the 14th of August 1944, sanction of the Board to the proposal was not necessary. The case of the plaintiffs further was that after the release of the estate in favour of defendants 1 and 2 the latter agreed, through their Manager in charge of the coal and minerals, who informed them through a letter, dated the 2nd of September 1944, that the draft lease which had already been approved could be engrossed on proper stamp paper and asked the plaintiffs to verify the draft lease once more. But in spite of this agreement, as the defendants refused to execute and register the lease, it became necessary for the plaintiffs to institute the present suit.

(3) The suit was contested by defendants 1 and 2 who pleaded that there was no valid agreement entered into between the plaintiffs and the defendants which could be enforced in the present action. They further pleaded that they had not agreed to lease the properties in dispute to the plaintiffs nor had they authorised any of their manager to ratify or agree to any agreement to lease. They raised several other pleas which it is not necessary to mention here.

(4) Both the Courts below have held that there was no valid agreement in favour of the plaintiffs which could be enforced in the present action and have consequently dismissed the suit.

(5) Mr. De for the plaintiffs contended before us that it is well established from evidence on record that defendant No. 1, in his capacity as the Manager of the Court of Wards of the Siarsol Estate had agreed to lease the properties in dispute on the terms incorporated in the draft lease and his Manager having subsequently accepted those terms after the release of the estate, a valuable right had accrued in favour of his clients which could be enforced in the present action. He further contended that even without the sanction of the Member of the Board of Revenue, defendant No. 1 in his capacity as the Manager, Court of Wards, could have entered into an agreement to lease. According to him, it was only when the document of lease was to be executed that it would have been necessary to procure sanction of the Member of the Board of Revenue. In this connection he referred to the provisions of Sections 18 and 39 of the Court of Wards Act 1879, (Bengal Act IX of 1879). In my opinion, there is no force in the contention of the learned Advocate for the appellants. Section 39 of the Court of Wards Act runs thus:

"Every manager appointed by the Court shall have power to manage all property which may be committed to his charge, to collect the rents of the land entrusted to him, as well as all other money due to the Ward, and to grant receipts therefor;

and may, under the orders of the Court, grant or renew such leases and farms as may be necessary for the good management of the property."

From the wordings of the above section it is clear that the lease could have been granted only under the orders of the Court. In view of this specific provision, I am not inclined to accept the contention of Mr. De that the Manager could have independently entered into an agreement to lease..

(6) Mr. De further contended that from the letter Exhibit A-2, dated the 14th of August 1944 sent by the Secretary, Board of Revenue, Bengal, to the Commissioner of the Burdwan Division, it was clear that the Board had waived its right given to it by Sections 18 and 39 of the Bengal Act IX of 1879. In that view of the matter, according to him, absence of a specific sanction would not invalidate the agreement which had already been completed between his clients and defendants No. 1 as the Manager of the Siarsol Estate, in pursuance of which his clients had deposited the salami money. In this connection he referred to a passage from "The Interpretation of Statutes" by Maxwell. The relevant passage runs thus:

"Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy."

I am afraid this passage cannot come to the assistance of Mr. De's clients. From the wordings of Exhibit A-2, it is clear that the Court never waived any of its rights conferred on it by the provisions of Sections 18 and 39 of the Court of Wards Act 1879.

(7) Now, the alleged agreement by the Manager, Court of Wards, without the sanction of the Member of the Board of Revenue cannot be enforced at all in the present action. Section 27-A of the Specific Relief Act deals with specific performance of a 'contract' to lease. The section runs as follows:

"Subject to the provisions of this chapter where a contract to lease immovable property is made in writing signed by the parties thereto, or on their behalf, either party may notwithstanding that the contract, though required to be registered has not been registered, sue the other for specific performance of the contract if:

(a) Where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract; and

(b) Where specific performance is claimed by the lessee he has is part performance of the contract taken possession of the property or being already in possession continues in possession in part performance of the contract, and has done some act in furtherance of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof,

This section applies to contracts to lease executed after the first day of April 1930."

Section 3 of the Specific Relief Act provides that:

"all words occurring in this Act, which are defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively assigned to them by that Act."

Section 2 (h) of the Indian Contract Act, 1872, runs as follows:

"An agreement enforceable by law is a contract."

(8) Now, it is admitted by Mr. De, that the agreement to lease entered into by the Manager, Court of Wards, cannot be enforced until the granting of the lease has been sanctioned by the Member of the Board of Revenue. In this view of the matter, the said agreement by defendant No. 1, in his capacity as the Honorary Manager under the Court of Wards, is not enforceable at all in the present action.

(9) Mr. De thereafter relied upon the letter dated the 2nd September 1944, Ex. 3(z) 8 sent to his clients by one Mr. Dasgupta, Manager of defendants 1 and 2, in charge of coal and minerals of the estate, in support of his contention that the defendant will be deemed to have agreed after the release of the estate by the Court of Wards to grant the lease of the properties in dispute to the plaintiffs. The relevant portion of the letter runs as follows:

"I have to refer you to this office letter No. ..... dated 22nd August 1944, and to say that the necessary documents may now be engrossed on proper stamp papers as per approved draft lease and be executed. But I should think it would be advisable for you to get the approved draft verified once again before it is made over for engrossment."

Mr. De contended that defendants 1 and 2 will be bound by the action of Mr. Dasgupta who was their Manager in charge of the coal and minerals. In this connection he relied upon the cases of 'John Samuel Swrire v. Robert Francis', (1877) 3 A C 106 and 'Barwick v. English Joint Stock Bank', (1848) 2 Ex. 259. In my opinion, those two cases are distinguishable. It has not been established in the present case that Mr. Dasgupta had any authority to enter into an agreement to lease coal lands for mining purposes. A person in charge of coal and minerals cannot be presumed to be one who has authority to alienate or enter into an agreement to alienate a portion of the estate.

(10) In reply, it was rightly argued by Mr. Dutt for defendants 1 and 2 that it has not been pleaded by the plaintiffs that Mr. Dasgupta had any authority to enter into an agreement to lease immovable properties of the estate. He directed our attention to paragraph 10 of the plaint where reference has been made to the letter Ex. 3 (z) 8. Mr. Dutt further pointed out to us that it has

been specifically pleaded in paragraph 16 of the written statement that defendants 1 and 2 had not authorised any body either expressly or impliedly to accept, ratify or conclude on their behalf any proposal or agreement to grant mining lease or for the matter of that to make agreement for grant of any kind. Thus, the contention of Mr. De cannot be accepted that the letter Ex. 3 (z) 8 will be deemed to have clothed his clients with a right which could be enforced in the present action. But even if Mr. De's contention be accepted that an agreement by Mr. Dasgupta will bind defendants 1 and 2, the suit is bound to fail, as was rightly argued by Mr. Dutt, because the alleged draft for the instrument of lease, Ex. 2, referred to in the letter Ex. 3 (z) 8, relates to the execution of a lease by a ward of the Court of Wards, which admittedly, cannot be enforced in the present action. It is not the case of the plaintiffs that the letter Ex. 3 (z) 8 made reference to any other draft than Exhibit 2; on the contrary, paragraph 10 of the plaint refers to this very draft on the basis of which the plaintiffs have based their main relief in the present action. Thus, in any view of the matter, the plaintiffs cannot succeed at all in the present action and their suit has been rightly dismissed by the Courts below.

(11) The result is that the judgment and the decree of the Court of appeal below are upheld, this appeal fails and is dismissed with costs.

(12) JAMUAR, J.: I agree.

K. S. *Appeal dismissed.*

A. I. R. (39) 1952 Patna 141 [C. N. 54.]

JAMUAR AND RAI, JJ.

Adya Krishna Prasad and others, Petitioners v. Siolal Chamar and others, Opposite Party.

Civil Revision No. 270 of 1950, D/- 22-11-51.

(a) *Court-Fees Act (1870), S. 12 — Revision against order as to Court-fee — Civil P. C. (1908), S. 115.*

It is the settled practice of the Patna High Court not to allow a defendant to come in revision against the order of the Court below on the question of Court-fee. Hence, where the lower Court holds that the Court-fee paid by the plaintiff is sufficient, the defendant cannot urge in revision that the Court-fee is not sufficient. (Para 5)

Anno: Court-fees Act, S. 12, N. 13.

(b) *Court-Fees Act (1870), S. 17 — Distinct subjects — Suit for redemption of mortgage and mesne profits — S. 17 does not apply.*

A suit for redemption of a usufructuary mortgage with a claim for past and future mesne profits does not embrace two or more distinct subjects and cannot come within the purview of S. 17, Court-Fees Act. AIR (7) 1920 Pat 656, Ref. (Para 5)

Anno: Court-Fees Act, S. 17, N. 2, 9.

(c) *Suits Valuation Act (1887), S. 8 — Suit for redempiton of possessory mortgage — Valuation.*

In a suit for redemption of a usufructuary mortgage, the valuation for purposes of jurisdiction would be the amount payable to the mortgagee and not the amount of gain to the mortgagor. AIR (35) 1948 P C 36, Rel. on. (Para 5)

Anno: Suits Valuation Act, S. 8, N. 14.

Tarkeshwar Nath and Rajeshwari Prasad, for Petitioners; A. N. Chatterji and M. M. Singh, for Opposite Party.

Cases referred to:

('48) AIR (35) 1948 P C 36: (ILR (1947) Lah 727) (Pr 5)

('19) 4 Pat L J 703: (AIR (7) 1920 Pat 656) (Pr 5)

ORDER.: Defendants 15, 15 (a), 15 (b), 16 and 17 have moved this Court in revision against the order dated the 23rd of March 1950, passed by the Munsiff, 2nd Court, Siwan, whereby he held that he had jurisdiction to entertain the suit, and that the Court-fee paid was sufficient.

(2) The plaintiffs filed the suit for redemption in which the above order was passed. The redemption suit was valued by them at Rs. 400/- and Court-fee was paid on that valuation in accordance with the provisions of Section 7 (ix) of the Court-Fees Act. In the plaint as filed, the plaintiffs had also claimed mesne profits to the tune of Rs. 1,744/- and future mesne profits. The Court below has held that the Court-fee paid in accordance with the provisions of Section 7 (ix) of the Court-Fees Act was sufficient, and that he had jurisdiction to entertain the suit.

(3) Mr. Tarkeshwar Nath, appearing for the petitioners, contended before us that, by inclusion of the claim of Rs. 1,744/-, the suit goes beyond the jurisdiction of the Munsiff, 2nd Court, Siwan, who has jurisdiction to try suits up the value of Rs. 1,000/- only. He submitted that, if subsequently it is found that the Munsiff had no jurisdiction, all the proceedings taken before him will be set aside, and his clients will be put to loss unnecessarily. He, therefore, suggested that, if the plaintiffs reduced the claim for mesne profits to such an amount as to bring the suit within the jurisdiction of the Munsiff, the question of want of jurisdiction will not arise. The learned Advocate for the plaintiffs opposite party, has, in accordance with that suggestion, filed a petition for amendment of the plaint, by which the claim for mesne profits has been tentatively reduced to Rs. 500/- from the original figure of Rs. 1,744/-. We have permitted the plaintiffs to amend the plaint in the light of the petition for amendment filed on their behalf. The plaint will, therefore, be amended by the order of this Court.

(4) Mr. Tarkeshwar Nath then pointed out to us that the schedule attached to the plaint showing the account of mesne profits also should be amended. The learned Advocate for the plaintiffs opposite party requested us to ignore the schedule containing the account of mesne profits attached to the plaint as having been deleted, with permission to his clients to adduce evidence regarding it in future. They are allowed to do so.

(5) Mr. Tarkeshwar Nath further contended that the valuation of the suit, inspite of the amendment will not be Rs. 400/- only, but it should be raised to Rs. 900/-, and the plaintiffs should be directed to pay Court-fee on the total amount of valuation. In our opinion, this argument is not available to the petitioners as it is a settled practice of this Court not to allow a defendant to come in revision against the order of the Court below on the question of Court-fee. The petitioners have, therefore, no right to urge at this stage that the Court-fee paid is insufficient. So far as the question of valuation of the suit is concerned, the decision of their Lordships of the Judicial Committee in the case of 'SIR MOHAMMAD AKBAR KHAN v. Mt. Motai', AIR (35) 1948 P C 36, settles the point. In that case, it was held that, in a suit for redemption the valuation for the purposes of jurisdiction should be the amount payable to the mortgagee, and not the amount of gain to the mortgagor. In the present case, it is clear that the sum of Rs. 400/- was secured by the usufructuary mortgage. The mortgagees were not entitled, in this suit, to any amount higher than Rs. 400/-. In that view of the matter, the valuation of the suit for the purposes of jurisdiction also had been rightly given at Rs. 400/-. Mr. Tar-

keshwar Nath tried to distinguish the case of 'SIR MOHAMMAD AKBAR KHAN v. Mt. Motai', AIR (35) 1948 P C 36, by submitting that in that case there was no claim for mesne profits. According to him, the inclusion of the claim for mesne profits in this case brings it within the purview of Section 17 of the Court-Fees Act. We are, however, not inclined to agree with Mr. Tarkeshwar Nath. The present suit does not include two or more distinct subjects. It was argued on behalf of the petitioners that "distinct subject" has been held to mean "distinct causes of action" in the case of 'BRIJ KRISHNA Das v. Murli Rai', 4 Pat L J 703. But that was not a redemption suit. In the present case, however, the plaintiffs have given only one cause of action. In that view of the matter, the present suit cannot be said to come within the purview of Section 17 of the Court-Fees Act.

(6) In our opinion, there is no merit in the contention of Mr. Tarkeshwar Nath.

(7) The result is that the revision petition is rejected, and the rule is discharged. The plaintiffs opposite party are entitled to their costs: hearing fee one gold mohur.

K.S. *Rule discharged.*

A. I. R. (39) 1952 Patna 142 *[C. N. 55.]*

JAMUAR AND RAI, JJ.

Singeshwar Prasad and another, Appellants v. Mt. Surja Devi, Respondent.

A. F. O. O. No. 233 of 1949, D/- 16-11-1951.

(a) *Succession Act (1925), S. 384 (1) — Order refusing to revoke certificate — No appeal lies — (Appeal treated as revision) AIR (18) 1931 All 242 (2) and AIR (30) 1943 Bom 50, Relicd on.* (*Para 3*)

Anno: Succession Act, S. 384, N. 3.

(b) *Civil P. C. (1908), S. 115 — Application for revocation of succession certificate — No date fixed for hearing applicant — Application rejected without hearing applicant — Order held without jurisdiction — (Succession Act (1925), S. 383.)* (*Para 6*)

Anno: Civil P. C., S. 115, N. 12, 18; Succession Act, S. 383, N. 1.

Lala Atul Chandra, for Appellants; Gopal Prasad, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('31) AIR (18) 1931 All 242 (2): (130 Ind Cas 3) (Pr 3)

('43) AIR (30) 1943 Bom 50: (ILR (1943) Bom 25) (Pr 3)

JAMUAR, J.: This is an appeal against an order of the District Judge of Saran, dated the 11th June, 1949, in Revocation Case No. 51 of 1949.

(2) The facts relevant to this appeal are these. On the 18th September 1947, One Mt. Suraj Devi had filed an application for the grant of a succession certificate in respect of a certain Provident Fund money lying in deposit in the name of her deceased husband. The application was allowed on the 6th February 1948. Thereafter the appellants before us who are alleged to be the brothers of the deceased husband of Mt. Suraj Devi, filed an application on the 31st May 1949 for revocation of the succession certificate granted to Mt. Suraj Devi. This application was rejected by the learned District Judge on the 11th June 1949 and it is against this order that the present appeal has been presented.

(3) Mr. Gopal Prasad who appears for the respondent has taken a preliminary objection that no appeal lies. He has referred to Section 384 of the Indian Succession Act which is the section which provides for appeals. Sub-section (1) of that Section is as follows:

> "Subject to the other provisions of this Part, an appeal shall lie to the High Court from an order of a District Judge granting, refusing or revoking a certificate under this Part, and the High Court may, if it thinks fit, by its order on the appeal, declare the person to whom the certificate should be granted and direct the District Judge, on application being made therefor, to grant it accordingly, in supersession of the certificate, if any, already granted."

The argument is that an appeal has been provided against an order granting, refusing or revoking a certificate, but not against an order refusing to revoke a certificate, Mr. B. C. De who appears for the appellants contended that an appeal lies and in support of his argument he referred to the Civil Procedure Code. Under Order XLIII, Rule 1 (r) of the Code of Civil Procedure an appeal is provided from an order passed under Rule 1 of Order XXXIX. Rule 1 of Order XXXIX provides that under certain conditions "the Court may by order grant a temporary injunction." The contention of Mr. De is that the provisions of Order XLIII, Rule 1 (r) have been interpreted to mean that even where a Court refuses to grant a temporary injunction the order is appealable. Hence by that analogy he contends that when under Section 384 of the Indian Succession Act an order revoking a certificate has been made appealable, an order refusing to revoke a certificate has been made appealable, an order refusing to revoke a certificate is also appealable. I am unable to accept this contention. Clearly, under Rule 1 of Order XXXIX a Court may grant a temporary injunction or may refuse it and both orders have been made appealable under Rule 1 (r) of Order XLIII of the Code. Such however, is not the case with regard to the provisions of Section 384, sub-section (1) of the Indian Succession Act. This view finds support from decisions of the Allahabad and the Bombay High Courts. Reference may be made to the cases of 'KRISHNA KUMARI v. Naubehar Singh', AIR (18) 1931 All 242 (2) and 'AHMED EBRAHIM v. Government of the Province of Bombay', AIR (30) 1943 Bom 50.

(4) In this view of the matter, I am of the opinion that no appeal lies.

(5) Mr. De, however, asks us to treat this appeal as an application in civil revisional jurisdiction and we have examined the order complained against in that light.

(6) As stated above, the application for revocation was filed on the 31st May 1949 and it was ordered to be put up on the 2nd June 1949. On the 2nd June 1949, the Court below called for the record of the original succession certificate case by the 11th June 1949 and ordered the applicants to file the necessary requisites for the issue of notice. On the 3rd June 1949 the applicant in the Court below filed a petition praying for the issue of a temporary injunction restraining Mt. Suraj Devi from withdrawing the Provident Fund money lying in deposit in the name of her deceased husband and this application was ordered to be put up with the record of the original succession certificate case. No date was fixed either for the hearing of the original application for revoca-

tion of the succession certificate or for the hearing of the application for the issue of a temporary injunction. It appears, however, from the order-sheet that the learned District Judge took up the application for revocation of the succession certificate on the 11th June 1949 and ultimately rejected that application. It nowhere appears if any intimation had been given to the applicants of the fact that the application for revocation of the succession certificate would be taken up on the 11th June 1949 and from a perusal of the order-sheet it does not appear that any such date had been fixed for that purpose. Neither does it appear that the appellants were heard on the 11th June 1949 before the order was passed. In the circumstances I am of opinion that the order passed by the learned District Judge on that date is an order passed without jurisdiction and it is necessary to interfere with that order in our revisional jurisdiction.

(7) The order of the District Judge dated the 11th June 1949 is accordingly set aside and the case is remanded to him for disposal according to law; and pending orders by the District Judge Mt. Suraj Devi is restrained from withdrawing the Provident Fund Money which she seeks to withdraw. In the circumstances there will be no order for costs.

(8) RAI, J.: I agree.

R.G.D. *Revision allowed.*

A. I. R. (39) 1952 Patna 143 *[C. N. 55 (1).]*

DAS AND SARJOO PROSAD, JJ.

Chandiprasad, Appellant v. Awadh Narain Jha and others, Respondents.

A. F. A. D. No. 1324 of 1948, D/- 9-11-1951.

(a) *Tenancy Laws — Bihar Tenancy Act (8 (VIII) of 1885), Ss. 26-F, 170 (3) — Sale of holding in execution of rent decree — Landlord purchasing same — Sale set aside on compromise by plaintiff transferee of holding depositing amount and landlord withdrawing same — Landlord is deemed to have recognised plaintiff's tenancy by implication of law but not by mere fact of withdrawal of deposit.*

If the landlord accepts rent from the transferee of the holding of a raiyot without insisting upon the payment of the landlord's fee for the transfer as required by law, there would be recognition of the tenancy of the transferee. Similarly, if the landlord allowed the transferee to deposit the amount of sale in execution of his rent decree and the costs of execution thereof without insisting upon the payment of the landlord's fee, it would amount to waiver of his right to realise the fee on the part of the landlord. Under S. 170 (3), a transferee of a holding from whom the landlord is entitled to receive the landlord's registration fee but who has not paid the same or deposited the same with the Collector, is not entitled to make a deposit for setting aside the sale. The provision was the same after the amendment of the Act in 1934. It, therefore, necessarily follows that when the landlord auction-purchaser at the rent execution sale allowed the plaintiff to deposit the sale money and expenses under the terms of the compromise petition for setting aside the sale, and the plaintiff did make the deposit as transferee of the holding, the landlord would be deemed to have waived his right to receive the registration fee. There being no other bar to the recognition of the tenancy by the landlord, it must be held that the landlord did recognise the tenancy of the plaintiff. But this result cannot be said to follow from the mere fact of withdrawal of the deposit by compromise. (*Paras 4 and 5*)

(b) *Civil P. C. (1908), S. 47, O. 21, R. 92 — Tenant transferring holding to plaintiff — Landlord recognising transfer — Rent suit by landlord against original tenant — Decree and execution — Plaintiff neither party to suit nor to execution — Remarks in execution against plaintiff's interest — Suit by plaintiff held neither barred by S. 47 nor by O. 21, R. 92.* (*Para 6*)

Anno: Civil P. C., S. 47, N. 72; O. 21, R. 92, N. 5.

(c) *Limitation Act (1908), Art. 142 — Applicability.*

A suit for a declaration of title and confirmation of possession, in other words, for recovery of possession of the lands, comes under the specific provisions of Art. 142. AIR (17) 1930 P C 193, Distinguished. (*Para 7*)

Anno: Limitation Act, Arts 142 & 144, N. 2.

B. C. De, J. P. Choudhry and G. N Mukherji, for Appellant; K. K. Sinha, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('30) 57 Ind App 214: (AIR (17) 1930 P C 193) (Pr 7)

('17) 2 Pat L J 478: (AIR (4) 1917 Pat 597) (Pr 6)

('18) 3 Pat L J 579: (AIR (5) 1918 Pat 483) (Pr 6)

('32) 11 Pat 257: (AIR (19) 1932 Pat 192) (Pr 4)

('40) AIR (27) 1940 Pat 21: (190 Ind Cas 787) (Pr 4)

SARJOO PROSAD, J.: In the suit to which this appeal relates, there are various sets of defendants, the appellant being the defendant fifth party. The suit was for declaration of title and confirmation of possession in respect of a certain area of land comprised in Khatas 46 and 55. These Khatas belonged to the head of certain family, and later came to be inherited by three different branches of the family including the branch of one Hiraman, defendant No. 1. On the pleadings, it is not disputed that the disputed lands formed a separate unit of tenancy between Hiraman defendant No. 1 and the landlords. The plaintiffs in April 1932 purchased these lands from Hiraman It appears that the landlords instituted a suit for rent for the lands in question impleading the original tenants, and obtained a decree for rent. This was in February 1934, and in execution of the said decree the landlords got the lands sold and purchased themselves in November 1935. An application under Order 21, Rule 90, Civil Procedure Code was filed by the plaintiffs who had purchased the disputed area, for setting aside the sale in favour of the landlord-decree-holders, and in that proceeding a compromise petition was eventually filed by virtue of which the plaintiffs were allowed to make a deposit of a certain sum of money within a certain period in order to have the sale and delivery of possession set aside. This the plaintiffs did, and therefore, the terms of the compromise took effect resulting in cancellation of the sale in favour of the landlords. The landlords, however, instituted another suit for rent, being Rent Suit No. 1405 of 1937. This time again it was against the original tenant and not against the plaintiffs who were the transferees. In that rent suit, the landlords obtained a decree in December 1937, and in execution thereof they got the lands sold in May 1938. The lands were purchased by the defendants fourth party at the auction sale, and the defendants fourth party subsequently assigned their

interest to the appellant. In that execution case, delivery of possession was also said to have been effected in February 1939. The plaintiffs, however, claim to have remained in possession of the area purchased by them, and they allege that because they were not party either to the rent suit or to the execution proceedings, their interest in the lands was unaffected by any such sale in execution of the said decree. The plaintiffs, however, state that there was some adverse order passed against them in a proceeding under Section 144, Criminal Procedure Code, and therefore, they instituted the present suit. The most material part of their averment is that as a result of the compromise arrived at in the proceeding under O. 21, R. 90, Civil P.C., between the landlords and themselves in which they deposited the money required for setting aside the sale and which the landlords eventually withdrew, their tenancy was recognised by the landlords. This was all the greater reason why the subsequent suit for rent against the original tenant could not effect the plaintiffs' interest in the disputed lands.

(2) The appellant, on the other hand, contended that there was no recognition of the plaintiffs as tenant; and in the compromise effected in the proceeding under O. 21, R. 90, Civil P.C., aforesaid, the landlords did not concede to the plaintiffs any more than the right to deposit the decretal dues, or the amount for which the sale had been effected. In addition to this defence, there were other defences to the action which it is hardly necessary to mention except the defence as to the suit being barred under S. 47 of the Code of Civil Procedure, and also by the general and special law of limitation.

(3) The two Courts below have decreed the plaintiffs' suit and held that the effect of the compromise in May 1937, in relation to the proceeding under O. 21, R. 90, Civil P.C., amounted to a recognition of the tenancy by the landlords. They have, therefore, held that the subsequent suit for rent and the decree obtained thereunder had only the effect of a money decree, and could not, in any manner, prejudice the interest of the plaintiffs. It has been further found that the plaintiffs were dispossessed within two years of the date of the action, and therefore, there was no question of limitation in the case either under the general or under the special law of limitation, and it has been held that the suit was not barred either under S. 47, or under O. 21, R. 90 of the Code of Civil Procedure.

(4) Mr. B. C. De has placed before us a copy of the compromise petition filed in the proceeding under O. 21, R. 90, Civil P.C. The petition is to the effect that if the petitioner (meaning the plaintiffs) paid Rs. 161/- on account of the entire sale money and expenses to the decree-holder on the 30th Asarh 1344, then the auction-sale dated the 4th of November 1935 should be declared as cancelled and the delivery of possession should be set aside; but if, on the other hand, the petitioners did not pay the entire amount as required by the terms of the compromise, then the sale and delivery of possession would remain in force. Prima facie, on the terms of this application there is nothing to indicate that the landlord auction-purchaser agreed to recognise the tenancy of the plaintiffs-petitioners in regard to the purchase made by them. All that is said is that the plaintiffs were given a right to deposit the amount of the sale money and expenses within a certain period, and on such deposit being made, the sale was to be set aside. It has been accordingly contended by Mr. De on behalf of the appellant that the view of the Court below as to the interpretation of this compromise petition is incorrect. The Court below while considering the terms of this compromise petition observed as follows:

> "In the present case, it was not merely a mechanical withdrawal, but a withdrawal preceded by a contract between the plaintiff as the purchaser of a part of the holding and the landlord who had obtained a decree against the original recorded raiyats. Such a contract is an active participation of the landlord in a dealing with the plaintiff, as the purchaser of a part of the holding. To say that this does not amount to recognition and to tolerate the same landlord who has entered into a contract with the purchaser, and who in pursuance of the contract has taken the decretal amount, and has given up the holding purchased by him; to say that after all this, the landlord can still bring a proper rent suit, ignoring this purchaser, is the most inequitable proposition."

Mr. De is justified in contending that if on the face of the compromise petition there is nothing to show that there was any recognition of the tenancy, the mere fact that the landlord permitted the plaintiffs to deposit the decretal dues and also the expenses incurred cannot necessarily imply that the landlord recognised the tenancy as such. The learned District Judge as shown above seems to rest his decision on the ground of inequity. But he evidently omits to notice that the question of recognition does not depend on any such equitable principle at all. Either the landlord has actually recognised the tenancy or such recognition is imputed to him by law. Mere withdrawal of the money so deposited by a person did not necessarily amount to recognition of the tenancy of that person. In this connection our attention has been drawn to two decisions of this Court. In DINA NATH v. DINA NATH', 11 Patna 257; AIR (19) 1932 Pat 192, it was pointed out that if the money deposited by a person claiming to be a tenant in execution of an ex parte decree for rent is withdrawn by the landlord under protest, it does not amount to a recognition of the tenancy as regards the person making the deposit. This decision appears to have been followed in 'INDERJIT PRATAB v. SURAJ NARAIN', AIR (27) 1940 Pat 21 by Dhavle, J., sitting alone. The facts of these cases may be distinguishable, because there the landlord withdrew the money deposited under protest. The learned Counsel, however, argues that S. 170, Sub-section (3) of the Bihar Tenancy Act, itself provides that the judgment-debtor or any person whose interests are affected by the sale, other than a transferee of a holding from whom the landlord is entitled to receive the landlord's registration fee and who has neither paid the landlord's registration fee to the landlord nor deposited the same with the Collector, may pay money into Court under this section. It is, therefore, contended that on the strength of this provision it is open to "any person" whose interests are affected by the sale to deposit the money. Such a person need not necessarily be the tenant and the mere fact that the money has been allowed to be deposited by such a person will not mean that the tenancy of the depositor has been recognised by the landlord. These criticisms, as I have said, have great force. In my opinion, if the decision were to rest merely on the fact that the money deposited by the plaintiffs under the compromise had been withdrawn by the landlord, it would be difficult to hold, as it has been erroneously held by the Court below, that there was any recognition of the tenancy. The decree of the Court below, however can be supported on a different line of reasoning.

(5) Admittedly, the plaintiffs had purchased the disputed lands which formed a separate unit of tenancy in April 1932. As purchasers they filed an application under Order 21, Rule 90, Civil Procedure Code for setting aside the sale. In the meantime, it may be pointed out, certain amendments to the Bihar Tenancy Act had come into force giving a right of transfer to occupancy tenant subject to the payment of certain fees to the landlord: 'Vide' the Bihar Tenancy (Amendment) Act VIII of 1934. Section 26-B of the said Act provided that subject to the other provisions of the Act an occupancy raiyat shall have power to transfer his holding or any portion thereof together with the right of occupancy therein by sale, exchange, gift, etc. Under Section 26-D of the Act, the landlord in case of such transfers was entitled to receive from the transferee as a condition of his consent a fee called the landlord's transfer fee, and a certain proportion of the transfer fee was indicated in the provision. The other relevant section of the amending Act is Section 26-F which enacted that if the landlord's fee were paid in accordance with the provisions of the Act, the landlord or his agent or every co-sharer or his agent should be deemed to have given his consent to the transfer. Therefore, by virtue of these amendments the transferee became entitled to be recognised as tenant of the land transferred in his favour, provided he paid the landlord's fee as required by the law. Now, the question then arises whether the landlord could waive his right to realise the fee from the transferee and recognise the tenancy. There can be no doubt that if the landlord accepts rent from the transferee without insisting upon the payment of the landlord's fee for the transfer as required by law, there would be recognition of the tenancy of the transferee. Similarly, if the landlord allowed the transferee to deposit the amount of sale in execution of his rent decree and the costs of execution thereof without insisting upon the payment of the landlord's fee, it would amount to waiver of his right to realise the fee on the part of the landlord. Under Section 170 (3) of the Bihar Tenancy Act, a transferee of a holding from whom the landlord is entitled to receive the landlord's registration fee but who has not paid the landlord's registration fee or deposited the same with the Collector, is not entitled to make a deposit for setting aside the sale. The provision was the same under the Act of 1934. Therefore, the plaintiffs as transferees were not entitled to make a deposit under the law except on the assumption that the fees had been paid or that the landlords had remitted them. It, therefore, necessarily follows that when the landlord auction purchasers allowed the plaintiffs to deposit the sale money and expenses under the terms of the compromise petition for setting aside the sale, and the plaintiffs did make the deposit as transferees of the holding, the landlords waived their right to receive the registration fee. There being no other bar to the recognition of the tenancy by the landlords, it must be held that the landlords did recognise the tenancy of the plaintiffs. Mr. De contends that in such cases, there should have been a definite provision to that effect introduced in the compromise petition itself, and in the absence of such a term, there should be an adverse interest against the plaintiffs. In my opinion, there is no substance in this argument. It was not necessary to mention all these in the compromise petition itself, because under the law, as it stood, there was a good transfer in favour of the plaintiffs subject to the recognition of their tenancy by the landlords; and the landlords were bound to recognise the tenant if the landlords' registration fee had been deposited or paid to them, or if they had waived their right to such payment. The only inference possible in the circumstances is that they waived their right to the realisation of the registration fee and as such accepted the tenancy of the plaintiff transferees. It is true that this aspect of the case was not presented to the Court below, but having regard to the state of the law discussed above, the conclusion is irresistible.

(6) The other point which has been urged by the appellant is that a separate suit did not lie, because the plaintiffs were in a position of the representative of the original tenants against whom a decree in Rent Suit No. 1405 of 1937 had been passed, and whatever objection might have been available to them should have been raised in the execution proceeding itself and not in a separate suit. In this connection, reliance has been placed upon two decisions of this Court in 'BHIKHIA JHA v. BRIJ BIHARI', 2 Pat L J 478 and 'PANCHRATAN v. RAM SAHAY', 3 Pat L J 579. In these cases it was held that the purchaser of the whole or part of an occupancy holding not transferable by custom is a representative of the judgment-debtor and is entitled to object under Section 47 of the Code of Civil Procedure. It is not necessary to examine these cases in detail because they relate to a stage when occupancy holdings were not transferable except by custom. In those cases it could be very well conceded that the transferee had no independent right of his own except of a claim through the original tenant, his transferor, and as such he might well be regarded as a representative of the judgment-debtor who was a party to the decree. The position has been substantially altered by the change in the law under which an occupancy holding can be transferred, and the transferee can acquire an independent right of his own by virtue of the transfer in question. Therefore, if the transfer was an effective transfer before the institution of the suit: in that case the suit instituted by the landlord against the original tenant could not affect the interest of the transferee, and the transferor could not be regarded as a representative of the judgment-debtor in such a suit. These cases, therefore, have no application to the case with which we are concerned at present. It is to be remembered that here the transfer was in April 1932, long before the institution of Rent Suit No. 1405 of 1937, and if the transfer in favour of the plaintiffs had come to be recognised by the landlords, as I have held above it had been recognised, then I do not see how the bar of Section 47 or Order 21, Rule 92, Civil P.C., could apply to the present case.

(7) Another point which has been urged by learned Counsel for the appellant is that the suit should be held to be barred under Article 120 of the Limitation Act. I should observe that the finding of the lower appellate Court is that the dispossession of the plaintiffs, if any, was in October 1944, the suit having been filed in April 1946. Therefore, not even the special limitation Schedule III of the Bihar Tenancy Act applies to the case much less any limitation under Article 120 of the Limitation Act. Mr. De has drawn our attention to a decision of the Judicial Committee of the Privy Council in 'JITENDRA NATH v. MONMOHAN', 57 Ind App 214. In that case, it appears that the landlord had obtained a decree for rent making the original tenants and their heirs defendants to the suit, and in execution of such a decree had applied for a sale of the tenure under Chapter XIV of the Bengal Tenancy Act, 1885. The transferees then sued for a declaration of their interests in the lands and also to restrain the sale. It was held that in such a case Article 120 of the Limitation Act would apply, and the period of limitation for the suit would be six years

from the date when the right to sue accrued, that is, the date when the landlord applied for sale and not the date of the decree. There can be no doubt that a suit of this nature for which there is no specific Article under the Limitation Act would be governed by the residuary Article 120 of the Limitation Act, and their Lordships held accordingly. The present case is a case for a declaration of title and confirmation of possession, in other words, for recovery of possession of the lands. Such a case comes under the specific provisions of Article 142 of the Limitation Act, and I do not see how Mr. De can press to his aid the aforesaid decision of the Judicial Committee, in order to make us hold that in the circumstances of the present case the residuary Articles, viz., Article 120, would apply. In my opinion, there is no substance in this contention at all.

(8) For the above reasons, I would dismiss the appeal and affirm the decree of the Court below with costs to the plaintiffs-respondents.

(9) DAS, J.: I agree.

R.G.D. *Appeal dismissed.*

A. I. R. (39) 1952 Patna 146 *[C. N. 55 (2).]*

RAMASWAMI AND SARJOO PROSAD, JJ.

Balbhadra Jha and others, Appellants v. Sir Kameshwar Singh and others, Respondents.

A. F. O. D. No. 66 of 1946, D/- 10-8-1951.

Civil P. C. (1908), O. 21, R. 94 — Construction of sale certificate — Erroneous description of property — Effect — (Deed — Construction.)

It is a well-established principle that if the description of a property is sufficient to render certain what is intended, the addition of a wrong name or of an erroneous statement as to quantity, occupancy or erroneous enumeration of particulars will have no effect. (1876) 6 Ch. D. 436 and (1843) 152 E R 767, Rel. on.

The question as to what is purchased at the sale in execution must depend essentially upon the recital in the sale certificate which is a document of title. If the recital is clear and unambiguous, it is not open to the parties to refer to the recital in any other document or to any other evidence to construe the recitals. But where the entire description of the property as given in the sale certificate does not fit in with the description of any particular property of the judgment-debtor, it has to be found which part of the recital is the true and correct description of the property sold and which is an incorrect or false description.

'Held that the description of the property in the sale certificate by share was correct that the subsequent addition of the area, the share of the sadar Jama and the valuation was erroneous and did not affect that which had been conveyed with certainty before. (*Paras 5, 9*)

Anno: Civil P. C., O. 21, R. 94, N. 6.

S. N. Dutta, M. N. Pal, A. C. Rai and P. Jha, for Appellants; B. C. De; S. P. Srivastava, Rajeshwar Pd. and Gaurishankar Pd. for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

(1876) 6 Ch D 436: (36 L T 341) (Pr 3)
(1843) 152 E R 767: (11 M & W 183) (Pr 4)

RAMASWAMI, J.: The substantial question to be determined in this appeal is whether defendant No. 1, Maharaja of Darbhanga had purchased 4 annas kham share of Touzi No. 543 of village Palimohan in execution of a mortgage decree.

(2) The plaintiffs brought the suit on the allegation that Kuarji Jha owned 8 annas share in Touzi No. 543 of village Palimohan, that he had executed on 18th June 1919, a mortgage bond in favour of Maharaja of Darbhanga for Rs. 3,000 with respect to 1 anna share of the Touzi, that on 2nd March 1922, Kuarji Jha executed a registered deed of gift in favour of his son Balbhadra Jha, plaintiff No. 1, and Bhikhia Jha, father of defendant No. 2, wherein Kuarji made a gift of 4 annas 10 gandas out of 8 annas share to plaintiff No. 1 and the remaining 3 annas 10 gandas share to Bhikhia Jha. On 20th August 1930 the Maharaja of Darbhanga instituted a mortgage suit in respect of the mortgage bond, obtained a final decree, and in execution thereof he purchased 1 anna share of Touzi No. 543 which had an area of 20 acres 56 poles and which paid a proportionate revenue of Rs. 13/12/3. On a subsequent date the Maharaja of Darbhanga wrongly obtained mutation of his name in register D with respect to 4 annas share in Touzi No. 543 out of the share of 4 annas 10 gandas recorded in the name of Balbhadra Jha in the said Touzi. The plaintiffs alleged that as a result of the execution sale the Maharaja of Darbhanga was entitled only to 1 anna share out of the Touzi, that plaintiffs and defendants 2nd party were equally liable to the extent of 1 anna share mortgaged, that only 10 gandas out of the plaintiffs' share of 4 annas 10 gandas share should have gone to the Raj. The plaintiffs therefore claimed that they were entitled to the share of 3 annas 10 gandas and that a decree for joint possession should be passed in favour of the plaintiffs along with defendant No. 1, Maharaja of Darbhanga. The Maharaja of Darbhanga contested the suit on the ground that 1 anna pokhta share equivalent to 4 annas kham share of Touzi No. 543 was mortgaged by Kuarji Jha, that the same milkiat share was purchased in the execution proceeding and that the mutation in the Land Registration case was rightly made. Defendant No. 2 resisted the suit on the ground that he was not liable to the extent of half the mortgage debt and the plaintiffs have no cause of action. Upon these contentions, the learned Sub-Judge held that the Maharaja of Darbhanga had purchased 4 annas kham share of Touzi No. 543 of village Palimohan in execution of the mortgage decree and that he was rightly recorded for 4 annas share out of the 4 annas 10 gandas share previously recorded in the name of the plaintiffs in the Land Registration Department. The Sub-Judge further held that the defendant 2nd party was liable to the proportionate extent of his share for the mortgage decree but the plaintiff was not entitled to recover possession of any share of the milkiat from defendant 2nd party in the present suit.

(3) In support of this appeal Mr. Dutt addressed the argument that upon the proper construction of the sale certificate it ought to be held that the Maharaja of Darbhanga had purchased only 1 anna kham share of Touzi No. 543 of village Palimohan containing 20 acres 56 poles of land and of which the proportionate land revenue was Rs. 13/12/3. Learned Counsel referred to the sale certificate in which the property is described as follows:

"1 anna pokhta share, the kham share whereof is 4 annas out of 4 annas 10 gandas kham share out of the entire 16 annas kham patti formed by collectorate partition in village Palimohan, pargana Bachhaur bearing Touzi No. 553, the area of entire 16 annas whereof is 330 acres 5 poles and the area of the share of the judgment-debtor is 20 acres 56 rods, the sadar jama of entire 16 annas is Rs. 220/7/3 and the share of the judgment-debtor is Rs. 13/12."

It is contended by the learned Counsel that upon a simple calculation of the area and the land revenue given it was manifest that only 1 anna kham share of Touzi No. 543 was purchased by Maharaja of Darbhanga. In the sale proclamation the property is likewise described as:

> "1 anna pokhta share which is equivalent to 4 annas kham share out of 4 annas 10 gandas out of 16 annas pokhta share in the patti formed by Government partition in mauza Palimohan pergana Bachhaur, bearing Touzi No. 543, the area of the 16 annas (patti) is 330 acres 5 poles and the area of proportionate share of the judgment-debtor is 20 acre 56 R. The sadar jama of 16 annas is Rs. 220/6/3 and the proportionate share of the judgment-debtor is Rs. 13/12 which will be sold. Approximate value Rs. 2,000."

On behalf of the respondents Mr. De referred to the mortgage deed, Exhibit D, and the final decree, and pointed out that in these documents the property is described as 1 anna pokhta share which is equivalent to 4 annas kham share bearing Touzi No. 543 situated in village Palimohan. Learned Counsel stressed the argument that there is no mention of the area of the land and the proportionate jama of the milkiat share in these documents. Learned Counsel argued that the statement as regards the proportionate jama and the area of land and approximate value were erroneous and the description of the property as 1 anna pokhta share equivalent to 4 annas kham share of Touzi No. 543 was leading description and ought to prevail. In my opinion the argument of the learned Counsel is well founded. The principle is well established that if the description of a property is sufficient to render certain what is intended, the addition of a wrong name or of an erroneous statement as to quantity, occupancy or erroneous enumeration of particulars will have no effect. For instance in 'TRAVERS v. Blundell', (1876) 6 Ch D 436, a testator gave all that part of Righby's estate purchased by him consisting of closes A, B, C, D, E and F., with the timber and coal mines, to trustees in trust for his son, J. O., for life, with remainder to the use of J. O's children as he should by deed or will appoint, and in default of appointment to the use of J. O's right heirs. J. O. by his will, after reciting the devise in his father's will (but without enumerating the closes), appointed all that part of the property devised by his father's will and therein described as that part of Righby's estate purchased by his said father consisting of A, C, B and F with the timber, but not including the mines to his two sons T and J; and he appointed the mines under the land which he had appointed to T and J to his four other children. The two omitted closes, D and E lay between the other four. A special case having been filed to obtain the opinion of the Court whether the two closes D and E passed under the appointment to T and J., it was held (affirming the decision of the Master of the Rolls), that the corpus of the estate devised by the father was sufficiently designated in the son's will, that the enumeration of the four closes instead of the six was a false demonstration which might be rejected; and that the whole of the six closes passed under the appointment.

(4) The same principle is enunciated in 'LLEWELLYN v. Earl of Jersey', (1843) 152 E R 767, in which a deed conveyed a piece of land, forming part of a close, by reference to a schedule annexed. The schedule described the land, in a column headed: "No. on the plan of the Briton Ferry Estate", as "153 b;" in a second column, headed "Description of premises", as "a small piece marked on the plan"; in a third column as being in the occupation of J. E.; and in a fourth, as "34 purchase." At the time of the contract, a line was drawn upon the plan as the boundary line dividing the piece 153 b from the rest of the close of which it formed a part. The plan was drawn to a scale, but, upon measurement of the land; was found incorrect; and 153 b contained, within the line so drawn, less than 34 perches according to the actual measurement of the plan and 27 perches only according to the actual measurement of the land. Upon these facts it was held by the Court of Exchequer that the statement that the piece of land conveyed contained 34 perches, were merely false demonstration, the prior portion of the description being sufficient to convey it, and that the deed passed only the portion of land actually marked off on the plan, as measured by the scale. At p. 189, Parke, B., states:

> "Then the other rule of law applies, that as soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it; according to the maxim 'false demonstratio non nocet.' Is there then that convenient certainty in this case? As to the plan no question is made, and the black line is admitted to have been put upon it with the intention of pointing out what was contracted for the plan also appears, on the face of it, to be drawn to a scale, and it is incorporated, on the principle already mentioned, with the deed. Three of the boundaries were already fixed, and nothing remained to be fixed but the boundary to the west, which may be fixed immediately by drawing a line upon the land, corresponding according to the scale, with that drawn upon the plan. Thus the portion conveyed is perfectly described, and can be precisely ascertained, and no difficulty arises except from the subsequent statement, that it contains 34 perches. That, however, becomes merely a false description of that which is conveyed with convenient certainty before; and resembles the case in 'SHEPPARD'S TOUCHSTONE, of the meadow in D., described as containing ten, when in fact it contained twenty acres. It is a mere false demonstration and does not affect that which is already sufficiently conveyed."

(5) In view of the principle established by the authorities it is manifest that in the present case the property purchased by the Maharaja of Darbhanga is adequately described in the sale certificate, Exhibit J. as:

> "1 anna pokhta share, the kham share whereof is 4 annas of the entire 16 annas khas patti of village Palimohan bearing Touzi No. 543."

and that the subsequent addition of the area, the share of the sadar Jama and the valuation is erroneous and will not affect that which has been conveyed with certainty before.

(6) In the course of the debate reference was made by the learned Counsel to recitals in the ekrarnama, Exhibit 12, dated 18th June 1919, executed by Balbhadra Jha and Bhikhia Jha, land revenue chalans, Exhibits 1 series, and the register of rent suits, Exhibits M series. In my opinion these documents are of little relevance in determining the question at issue in the present appeal.

(7) It was not seriously contested by Mr. S. N. Dutt that the Maharaja of Darbhanga was entitled to realise the mortgage debt by the sale of the milkiat share belonging to the plaintiffs alone. But it was argued by the learned Counsel that plaintiffs ought to be granted a decree for recovering possession of the proportionate share of defendant No. 3 which is liable to satisfy the mortgage debt. The

argument is wholly untenable, for it is obvious that the remedy of the appellants is to file a suit for contribution against defendant No. 3 and they cannot get a decree for recovery of possession of the proportionate share of defendant No. 3 in the present suit. The argument of the learned Counsel on this point must fail.

(8) For the reasons already assigned I hold that the decree granted by the lower Court is correct and that this appeal must be dismissed with costs.

(9) SARJOO PROSAD, J.: I agree. The question as to what was purchased at the sale in execution must depend essentially upon the recital in the sale certificate (Ex. J) which is a document of title. If the recital had been clear and unambiguous, it was not open to the parties to refer to the recital in any other document or to any other evidence in the case to construe the recitals. But it is common ground that the entire description of the property as given in the sale certificate does not fit in with the description of any particular property of the judgment-debtors. It has, therefore, to be found which part of the recital is the true and correct description of the property sold and which is an incorrect or false description. (1) The recital in the sale certificate has been quoted in the judgment of my learned brother. If the recital of:

> "one anna pokhta share, the kham share whereof is 4 annas out of 4 annas 10 gandas kham share out of the entire 16 annas kham patti formed by collectorate partition in village Palimohan, pargana Bachhaur bearing Touzi No. 543."

stands then the other description of the property, viz:

> "the area of entire 16 annas whereof is 330 acre 5 poles and the area of the share of the judgment-debtor is 20 acres 56 rods, the sadar jama of entire 16 annas is Rs. 220/7/3 and the share of the judgment-debtor is Rs. 13/12/-" must go. The area in the share of the judgment-debtor is not consistent with the share sought to be sold as described in the document; if it were the recital as to the share it should have been:
>
> "one pie pokhta share the kham share whereof is one anna out of the entire 16 annas kham patti, etc."

So either of these two descriptions have to be discarded. It has to be held either that the description of the property by the 'share' is the paramount description or the description of the property by the 'area' is the true and paramount description. In view of this ambiguity in the sale certificate, it is permissible to look to other evidence to find out what was really intended to be sold because this ambiguity can be resolved only by reference to other materials in the case.

(10) The sale was in execution of a mortgage decree. The mortgage deed (Ex. D) describes the hypothecated property as :

> "one anna pokhta share which is equal to 4 anna kham share bearing Tauzi No. 543 situate in village Palimohan, etc."

There is no reference to any area in the mortgage bond. The preliminary and final mortgage decrees (Exs. B and B-1) on the basis of the said bond delineate the mortgage property in the same terms as the mortgage bond. In none of these documents there is any mention of the area comprised in the said shares. It was this final mortgage decree in execution whereof the property was sold and there can be no doubt that on a perusal of these documents what was sought to be sold was the share of the judgment-debtors and not any block or area of land. It is true that in the application for execution (Ex. 2), the further descriptions which occur in the sale certificate were also added. It might be also conceded that it is open to a decree-holder to proceed against a smaller share of the mortgaged property; but the significant fact is that the share in the execution petition has been correctly mentioned according to the recital in the mortgage bond and the decrees based thereon. The subsequent description which is given in the execution petition was not given with a view to curtail that share and to put limitations upon it but to make it more specific and detailed. Therefore, if these descriptions are found to be inconsistent with the description as to the 'share' they have to be discarded as false demonstration and the paramount description as to the 'share' must prevail. The description by the jama was altogether out of place if the intention was to sell only an area of land, and in any case nobody alleges that any proportionate jama had been fixed in the collectorate for this particular share. On a review of these materials I feel no hesitation in agreeing with my learned brother that the property purchased was adequately described in Ex. J., the sale certificate as:

> "one anna pokhta share, the kham share whereof is 4 annas, of the entire 16 annas kham patti of village Palimohan, bearing Touzi No. 543."

and that the subsequent addition of the area, the proportionate sadar Jama and the valuation was erroneous.

(11) The appeal, therefore, must fail and should be dismissed with costs.

D.R.R. *Appeal dismissed.*

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*A. I. R. (39) 1952 Patna 148 [C. N. 55 (3).]

REUBEN AND NARAYAN, JJ.

State of Bihar, Appellant v. Santo Kumar Mitra and others, Respondents.

A. F. O. O. No. 14 of 1950, D/- 19-12-1951.

†✠ *(a) Criminal Law Amendment Ordinance (1944), S. 1 — Ordinance is still alive — Indian Independence Act (1947), S. 18 (3) — Constitution of India, Art. 372 (1) — India (Provisional Constitution) Order (1947), Schedule)*

S. 18 (3) of the Indian Independence Act and Art. 372 (1) of the Constitution of India have kept the Criminal Law Amendment Ordinance alive, and it is wrong to assume that because of the omission of the ninth Schedule (to the Government of India Act, 1935, which contains S. 72 under which the Ordinance was promulgated) as indicated in the Schedule attached to the India (Provisional Constitution) Order, 1947, this emergency Ordinance had ceased to operate. **(Para 5)**

(b) Criminal Law Amendment Ordinance (1944), S. 11 — Order vacating 'ad interim' attachment — Appeal against order is competent. AIR (33) 1946 Lah 406, Ref. to. **(Para 6)**

Government Pleader, for the State; P. R. Das, Revati Raman Singh; L. K. Choudhry; Nandlal Untwallia; A. K. Chatterji and Ray Paras Nath, for Respondents.

Cases referred to:

('47) 1947 F C R 141: (AIR (34) 1947 FC 38:48 Cri L J 886) (Pr 5)

('49) 1949 F C R 309: (AIR (36) 1949 F C 143) (Pr 5)

('51) State of Tripura v. Province of West Bengal: (AIR (38) 1951 S C 23) (Pr 5)

('46) AIR (33) 1946 Lah 406: (48 Cri L J 136) (Pr 6)

NARAYAN, J.: This appeal is directed against an order of the Judicial Commissioner of Chota Nagpur in a miscellaneous case in which the ques-

tion arose whether Ordinance No. XXXVIII (38) of 1944 was still in force. The facts are within a short compass, and they are as follows:

(2) On 1-9-1949, a first information had been lodged with the police in which the allegation was that there had been a defalcation of about 15 lacs of Government money. This information was lodged against the respondents Nos. 1, 2 and 3 before us, namely, Santo Kumar Mitra, Sudhir Kumar Bose and Anthony Kujur. Santo Kumar Mitra was the Head-clerk and Accountant of the Vaccine Institute, Namkum, and the other two respondents were his Assistants working under him in that institute. On 12-9-1949, the Province of Bihar filed a petition under Section 3 of Ordinance No. XXXVIII (38) of 1944 which is called by the name of the Criminal Law Amendment Ordinance in which it was stated that these respondents had withdrawn a sum of over Rupees 15 Lacs from the Ranchi Treasury and were guilty of offences under Sections 406, 409, 417, 420 and 120-B of the Indian Penal Code with regard to the said Government money, these offences being scheduled offences under Ordinance No. XXXVIII (38) of 1944, which will hereinafter be referred to as the Ordinance.

The petition of the Government was supported by the necessary affidavits, and the prayer in this petition was for the attachment of the money and the other properties of the opposite parties (the three respondents mentioned above) which the Government believe had been procured by them by the commission of the above-mentioned offences. In accordance with the prayer made by the Government an order for 'ad interim' attachment of the properties and the money mentioned in the schedule attached to the application was passed and notices were issued to the persons who were likely to claim those properties. As appears from the judgment of the learned Judicial Commissioner several claim cases were filed, and they are still awaiting decision. The most important point that was raised before the learned Judicial Commissioner was that the Ordinance had lapsed and was no more in existence, and this contention has found favour with the learned Judicial Commissioner. Though it was argued before him that the Ordinance had come to an end on the 1st of April 1946 or on the 30th September 1946, this contention was repelled by him. But he was of opinion that from the 15th of August 1947 when the Indian Independence Act came into force this Ordinance ceased to have any effect. In the result, therefore, he vacated the order of 'ad interim' attachment which had been passed by him.

(3) The State of Bihar have therefore appealed against the order of the learned Judicial Commissioner, and the learned Government Pleader who has appeared on behalf of the State before us has urged that the view taken by the learned Judicial Commissioner is absolutely erroneous and that he was not justified in vacating the order of 'ad interim' attachment.

(4) Mr. P. R. Das, who has appeared for some of the respondents has tried to support the view of law taken by the learned Judicial Commissioner and the conclusion at which he has arrived. And Mr. A. K. Chatterji who has appeared for respondent No. 3 before us has contended that no appeal lies against the judgment of the learned Judicial Commissioner vacating the order of 'ad interim' attachment.

(5) The Ordinance in question was made and promulgated by the Governor-General in exercise of the powers conferred on him by Section 72 of the Government of India Act 1935 and as set out in the Ninth Schedule to the Government of India Act. Section 42 of the Government of India Act empowered the Governor-General to promulgate such ordinances as the circumstances appeared to him to require when the Federal Legislature (which never came into existence), was not in session. And Section 72 of the Ninth Schedule to this Act empowered the Governor-General to make and promulgate ordinances for the peace and good government of British India, or any part thereof in cases of emergency, and it further laid down that any ordinance so made, shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature.

The operation of the words "for the space of not more than six months from its promulgation" was suspended by the India and Burma (Emergency Provisions) Act, 1940, and Sub-section (3) of Section 1 of this Act lays down that Section 72 of the Government of India Act shall, as respects Ordinances made during the period specified in Section 3 of this Act, the India and Burma (Emergency Provisions) Act, 1940, have effect as if the words "for the space of not more than six months from its promulgation" were omitted, and Section 3 of the Act, 1940, lays down that the period referred to in the preceding sections is the period beginning with the date of the passing of this Act and ending with such date as His Majesty may by Order in Council declare to be the end of the emergency which was the occasion of the passing of this Act.

By His Majesty's Order in Council the 1st of April 1946 was declared as the date when the emergency referred to in the India and Burma (Emergency Provisions) Act, 1940, would come to an end. It is not disputed that the emergency was notified to have come to an end on the 1st of April 1946. It is an argument with which we are now very familiar that because the emergency came to an end on the 1st of April 1946 the emergency ordinances also automatically came to an end on that date. But it is conceded by Mr. Das that because of the decision of the Federal Court in 'J. K. GAS PLANT MANUFACTURING CO., (RAMPUR), LTD. v. EMPEROR', 1947 F C R 141 this sort of argument cannot any more be advanced. As pointed out by their Lordships:

> "the emergency on the happening of which an Ordinance can be promulgated is separate and distinct from and must not be confused with the emergency which occasioned the passing of the Act and the clear effect of the words of the Act on Section 72 is that Ordinances promulgated under that sub-section during the period specified in Section 3 of the Act are subject to no time limit as regards their existence and validity, unless imposed by the Ordinances themselves or other amending or repealing legislation, whether by Ordinance or otherwise."

It cannot also be doubted that the ordinances promulgated by the Governor-General had the force of law as an Act passed by the Indian Legislature, and even Sub-section (6) of Section 311 of the Government of India Act, 1935, says that any reference in this Acts or laws or Provincial Acts or laws, or to Acts or laws of the Federal or a Provincial Legislature, shall be construed as including a reference to an ordinance made by the Governor-General or a Governor-General's Act or, as the case may be, to an ordinance made by a Governor or a Governor's Act. It will not be out of place to refer here to the India (Central Government and Legislature) Act, 1946, Section 5 of which Act has reference to the duration of laws passed by virtue of a Proclamation of Emergency. Section 5 is in these terms:

"A law made by the Indian Legislature whether before or after the passing of this Act, during the continuance in force of the Proclamation of Emergency, being a law which that Legislature would not, but for the issue of such a Proclamation, have been competent to make, shall not cease to have effect as required by Sub-section (4) of section one hundred and two of the Government of India Act, 1935, except to the extent to which the said Legislature would not, but for the issue of that Proclamation, have been competent to make it, and accordingly, in the said Sub-section (4) for the words "shall cease to have effect" there shall be substituted the words "shall, to the extent of the incompetency, cease to have effect." ."

The Indian Independence Act came into force on the 15th of August 1947, and Sub-section (2) of Section 8 of this Act lays down as follows:

"Except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion under Sub-section (1) of this Section, each of the new Dominion and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935; and the provisions of that Act, and of the Orders in Council, rules and other instruments made thereunder, shall, so far as applicable, and subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor-General under the next succeeding section, have effect accordingly."

Sub-section (3) of Section 18 is most important for our present purpose, and it lays down:

"Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf."

Section 9 of this Act lays down that the Governor-General shall by order make such provision as appears to him to be necessary or expedient — (a) for bringing the provisions of this Act into effective operation; (c) for making omissions from, additions to, and adaptations and modifications of, the Government of India Act, 1935, and the orders in Council, rules and other instruments made thereunder, in their application to the separate new Dominions; (d) for removing difficulties arising in connexion with the transition to the provisions of this Act; and for various other objects which are not relevant for our present purpose. By virtue of these powers conferred on the Governor-General several orders were promulgated by him on the 14th of August 1947, and as pointed out by the Federal Court in 'MIDNAPUR ZAMINDARY CO., LTD. v. PROVINCE OF BENGAL', 1949 F C R 309, and by the Supreme Court in 'THE STATE OF TRIPURA v. THE PROVINCE OF EAST BENGAL', (AIR (38) 1951 S C 23), decided on the 4th of December 1950, the orders promulgated on the 14th of August 1947 by the Governor-General of India in exercise of the powers conferred under Section 9 of the Indian Independence Act 1947 and containing provisions especially designed to remove the difficulties arising in connection with the transition to the new situation created by the partition are binding on both the Dominion of India and the Dominion of Pakistan. One of such orders is the India (Adapatation of Existing Indian Laws) Order, 1947, in which the existing Indian Law has been defined as follows:

"existing Indian law" means any Act, Ordinance, Regulation rule, order or bye-law which immediately before the appointed day has the force of law in the whole or any part of the territories which as from that day form the territories of the Dominion of India, but does not include any Act of Parliament, or any Order in Council, rule or other instrument made under an Act of Parliament, or the General Clauses Act, 1897."

Another important order is the India (Provisional Constitution) Order 1947, with which we are mainly concerned in this appeal. Section 3 (1) of this Order lays down as follows:

"As from the appointed day, the Government of India Act, 1935, including the provisions of that Act which have not come into force before the appointed day, and the India (Central Government and Legislature) Act, 1946, shall, until other provision is made by or in accordance with a law made by the Constituent Assembly of India, apply to India with the omissions, additions, adaptations and modifications directed in the following provisions of this paragraph and in the Schedule to this Order."

It would appear from the Schedule attached to this Order that Section 42 of the Government of India Act 1935 was recast and the Ninth Schedule to the Government of India Act, 1935, which contains Section 72 under which the Ordinance with which we are concerned in this case was promulgated was omitted. Because of the omission of the Ninth Schedule under this Order and because of the recasting of Section 42 it has been urged before us that the intention was not to keep alive the Ordinances which had been promulgated under the Government of India Act, 1935, after the passing of the Indian Independence Act, 1947. And the learned Judicial Commissioner has greatly relied on the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948, published in the Gazette of India March 23, 1948, which in his opinion goes to indicate that the Ordinance with which we are concerned in this case ceased to have any effect from the 15th of August 1947.

But the view taken by him seems to me to be erroneous and the argument in support of that view appears to me to be quite fallacious. That the Ordinance in question continued to exist as the law of the land till the appointed day, that is, the day on which the Indian Independence Act came into force, has not been disputed and could not be disputed. The two provisions of the Indian Independence Act already referred to by me should, in my opinion, leave no room for doubt that the old law of British India which existed immediately before the appointed day was to continue as the law of each of the new Dominions, save as otherwise expressly provided in the Act or except in so far as other provision was made by or in accordance with the law made by the Constituent Assembly of the Dominions.

The controversy, therefore, narrows down to this as to whether on account of the omission of the Ninth Schedule as indicated in G. G. O. 14 dated the 14th August 1947 known as the India (Provisional Constitution) Order, 1947, the Ordinance in question ceased to have force. And it has also to be seen if the construction that has been placed on the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948, by the learned Judicial Commissioner is correct. The answer appears to me to be a simple one. Section 18 (3) of the Indian Independence Act

and Article 372 (1) of the Constitution of India have kept the Ordinance alive, and it is wrong to assume that because of the omission of the Ninth Schedule as indicated in the Schedule attached to G. G. O., 14, dated the 14th August 1947 this emergency Ordinance had ceased to operate. And I have already quoted the observation of the Federal Court to the effect that Ordinances promulgated under the Government of India Act are subject to no time-limit as regards their existence and validity unless imposed by the Ordinances themselves or other amending or repealing legislation.

The change with regard to Section 42 and the omission of the Ninth Schedule means nothing more than this that if henceforward an ordinance has to be promulgated, it would be by virtue of the new Section 42 which is the substitute for the old Section 42. If it was not considered necessary to retain the Ninth Schedule that does not mean that the ordinances promulgated under Section 72 of this Schedule in the past ceased to have force after 14-8-1947 or 15-8-1947. A careful reading of the Indian Independence (Adaptation of Central Acts and Ordinances), Order, 1948, which is G. G. O., 37, dated the 23rd March 1948 will show that the intention was to keep alive not only the Ordinances mentioned in this Order but also the other Ordinances. The preamble to this Ordinance is contained in two paragraphs, paragraph 1 referring to Sub-section (3) of Section 18 of Indian Independence Act, 1947, and paragraph 2, referring Sub-section (1) of Section 9 of that Act. Sub-section (2) of Section 3 of this Order appears to me to be important, because, in my opinion, it clearly shows that other Ordinances which have not been mentioned in the Schedule attached to this Order had also been kept alive. If certain ordinances are particularly mentioned in this Schedule, that is because certain alterations in the language of those Ordinances were considered essential on account of the attainment of the independence or the partition of the country. Sub-section (2) lays down as follows:

> "Whenever the expression "the whole of British India", or the expression "British India" (otherwise than in the expression "the whole of British India") occurs in a Central Act or Ordinance, 'whether in an Act or Ordinance specified in the Schedule to this Order or not', then, unless that expression is by that Schedule expressly directed to be otherwise modified, or to be omitted, there shall be substituted for the expression first-named the expression "all the Provinces of India", and for the expression second-named the expression "the Provinces."

The words underlined (here single quoted) by me have especially to be noted, and to my mind they clearly establish that the reference to particular Ordinances in this Order does not mean that only those Ordinances had been kept alive. It was considered necessary to lay down that wherever the expression "the whole of British India", or the expression "British India" occurred in an Ordinance whether that Ordinance was specified in the Schedule to the Order or not, there shall be substituted the expression "all the Provinces of India" or the expression "the Provinces." The words "whether in an Act or Ordinance specified in the Schedule to this Order or not" could not be used in this Subsection if the Acts or Ordinances mentioned in this Schedule were the only Acts or Ordinances kept alive. In fact this provision was meant to apply not only to the Act or Ordinances mentioned in the Order but also to other Acts and Ordinances. Even in this Order of the 23rd March 1948 there is an Ordinance of 1944 mentioned, namely, Ordinance No. XLII(42) of 1944, and it is not difficult to understand why this Ordinance No. XLII (42) of 1944 came to be specially mentioned. This is a Post-Office National Savings Certificates Ordinance, and because of the partition of India it was considered necessary to amend Sub-section 4 of the Ordinance by inserting the following words:

> "or if that area is in Pakistan, by the Postmaster-General for such area in India as the Central Government may by general or special order specify in this behalf."

Similarly, it was considered necessary to mention Ordinance No. XXX (30) of 1943 which is the Military Nursing Services (India) Ordinance, 1943. In this Ordinance the expression "Commander-in-Chief, India" had to be substituted for the expression "Commander-in-Chief of His Majesty's Forces in India." It is thus obvious that only such Acts and Ordinances came to be especially mentioned in the Schedule attached to this Order with regard to the language of which some changes were considered essential on account of the new situation having been created. This Adaptation Order by no means lends any support to the view that by the omission of the Ninth Schedule it was meant to end the Ordinances promulgated under Section 72. Section 18 (3) and Section 8 (2) of the Government of India Act could not be modified by these Adaptation Orders, and the only reasonable inference on a perusal of G. G. O., 14, dated 14-8-1947 is that whatever alteration or omission was made, was made for the future, and that the omission of the Ninth Schedule did not mean the abrogation of the Ordinances promulgated under Section 72. The conclusion arrived at by the learned Judicial Commissioner cannot, therefore, be supported, and I would hold, in disagreement with him, that Ordinance No. XXXVIII (38) of 1944 is still good law. By Act No. XIV (14) of 1950 a new section has been added to this Ordinance.

(6) Mr. Chatterji, who appeared for respondent No. 3, faintly contended that this appeal was incompetent because the order of the learned Judicial Commissioner vacating the 'ad interim' attachment was only an interlocutory order, and he relied on a decision of the Lahore High Court in 'K. SATWANT SINGH v. PROVINCIAL GOVERNMENT OF THE PUNJAB', AIR (33) 1946 Lah 406. But under Section 11 of the Ordinance the Provincial Government or any person who has shown cause under Section 4 or Section 6 or has made an objection under Section 4 or has made an application under Section 8 or Section 9 if aggrieved by any order of the District Judge under any of the foregoing provisions of this Ordinance may appeal to the High Court within thirty days from the date on which the order complained against was passed. The Order so far as the Provincial Government is concerned is a final order because on the view that the Ordinance had ceased to exist the learned Judicial Commissioner held that no attachment could be ordered in this case. As pointed out even in the Lahore case cited by the learned Counsel a right to appeal has been conferred by Section 11 on the Provincial Government if the Government feels aggrieved by the District Judge's order allowing an objection raised by the person whose money or property has been attached. Their Lordships have further observed that if a preliminary issue has been decided against the Crown and the case has been finally disposed of so far at least as the District Judge is concerned, the Crown or the Provincial Government has a right of appeal under Section 11 of the Ordinance. The contention, therefore, has got no force whatsoever and must be overruled.

(7) In the result, therefore, this appeal is allowed and the order of the learned Judicial Commissioner vacating the order of 'ad interim' attachment on the ground that the Ordinance has lost its force is set aside.

(8) There will be no order as to the costs of this appeal.

(9) REUBEN, J.: I agree.

V.R.B. *Appeal allowed.*

A. I. R. (39) 1952 Patna 152 *[C. N. 55 (4).]*

JAMUAR AND RAI, JJ.

Bhukhal Tewari, Petitioner v. Ramdayal Sah and others, Opposite Party.

Civil Revisions Nos. 184 and 185 of 1950, D/- 16-11-1951.

Civil P. C. (1908), O. 21, R. 100 — Applicant aggrieved by delivery of possession to auction-purchaser, but coming to know of delivery when actually dispossessed — Application under R. 100 held maintainable.

Where on reading the application as a whole, it appears that the applicant was aggrieved by the delivery of possession to the auction-purchaser in execution of a mortgage decree, though he came to know of the delivery subsequently when the auction-purchaser actually went and interfered with his possession the application was held maintainable under the provisions of O. 21, R. 100: AIR (16) 1929 Pat 553; AIR (18) 1931 Mad 534; AIR (37) 1950 Cal 555; AIR (13) 1926 Cal 377; AIR (10) 1923 Cal 601; AIR (20) 1933 Cal 246, Distinguished. *(Para 8)*

Anno: Civil P. C., O. 21, R. 100, N. 3.

N. N. Sen for Petitioner; P Jha and H. P. Singh, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('23) 50 Cal 311: (AIR (10) 1923 Cal 601) (Prs 4, 7)

('26) 30 Cal W N 163: (AIR (13) 1926 Cal 377) (Prs 4, 6)

('32) 36 Cal W N 965: (AIR (20) 1933 Cal 246) (Prs 4, 8)

('38) AIR (25) 1938 Cal 192: (175 Ind Cas 127) (Pr 8)

('50) 85 Cal L J 155: (AIR (37) 1950 Cal 555) (Prs 4, 8)

('31) AIR (18) 1931 Mad 534: (132 Ind Cas 301) (Prs 4, 6)

('29) AIR (16) 1929 Pat 553: (117 Ind Cas 634) (Prs 4, 5)

RAI, J.: Both these revision applications at the instance of the auction-purchaser, are directed against the order of Mr. S. M. Ahmad, Second Munsiff, Chapra, allowing applications of the opposite party filed under Order XXI, Rule 100, Civil Procedure Code.

(2) The facts relevant for the decision of the above two cases may shortly be stated as follows: The petitioner in execution of a mortgage-decree purchased the disputed plot and was given delivery of possession on the 25th of June 1949. On the 23rd of July 1949 two petitions under Order XXI, Rule 100 of the Code of Civil Procedure were filed before the executing Court, one at the instance of Ramdayal Sah and the other at the instance of Mts. Nabijan and Alijan. The case of the applicants as mentioned in their petition was that on the 20th of July 1949 while weeding the maize crop on the lands in question they were forbidden to do so by Bhukhal Tewari who informed them that he had purchased the land in execution of a mortgage decree and had been given delivery of possession over the same. The applicants were thus dispossessed by him. Thereafter, an inquiry was made and they came to know that Bhukhal Tewari had purchased the land in dispute at an auction-sale and was given delivery of possession on the 25th of June 1949. They further asserted that they cannot be ousted from the land in dispute, and prayed to be put back in possession of the same. The auction-purchaser resisted the claim of the applicants on the ground that the sale deeds of the year 1927 relied on by the applicants were farzi, fraudulent and without consideration, and that the property had all along remained in possession of the judgment-debtor, who had rightly been dispossessed by the delivery of possession and as such the applicants were not entitled to any relief at all. The executing Court after considering the evidence of the parties came to the conclusion that the applicants were in possession of the property in dispute in their own right on the date of the delivery of possession and that they should not have been dispossessed. On these findings the applications were allowed and the applicants were ordered to be put back in possession of the lands in question.

(3) Mr. Sen on behalf of the petitioner contended that the application as framed was not maintainable at all under the provisions of Order XXI, Rule 100 (1), Code of Civil Procedure, which runs as follows:

> "(1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession."

In support of his contention he relied upon several reported decisions which I shall consider presently. But before I do that, it is necessary for me to quote in extenso the relevant passages from the application in both the miscellaneous cases. On examination of the record, I find that the wordings in the application under Order XXI, R. 100, Civil P.C., in both the miscellaneous cases are almost identical. So I propose to quote some paragraphs from the application in Miscellaneous Case No. 127 of 1949. The applicant in his petition under paragraphs 3, 4 and 6 stated as follows:

> "3. That on 20-7-1949, the applicant was weeding maize when opposite party No. 2 came and stopped the applicant saying that he has purchased the land in auction-sale in a decree of Babu Ram Charter Prasad. The applicant protested that he is a vendee of the J.D's and has been coming in possession but the opposite party No. 2 paid no heed and turned out the applicant by force from the said field. Thus dispossessed the applicant.
>
> 4. That the applicant came to Chapra and enquired about the decree and dakhaldehani and came to know the following facts:
>
> (1) That Opposite Party No. 1 obtained a mortgage decree in Mort. S. No. 82/109 of 42/43 on the basis of a mortgage bond, dated 5-5-1933 and got the decree executed in Ex. Case No. 154 of 1946 and the Opposite Party No. 2, purchased the property in the execution sale and took dakhaldehani on 25-6-1949.
>
> (2) That the applicant was not a party to the mortgage suit or the execution case.
>
> 6. That the applicant was not a party to the mortgage suit so the decree is not binding upon him. He cannot be ousted from his land in execution and dakhaldehani of such decree."

With reference to paragraph 3 of the application Mr. Sen contended that the dispossession took place on the 20th of July 1949 and not on the 25th of June 1949, on which date the delivery of possession was given and as such the application was not maintainable under the provisions of Order XXI, Rule 100, Civil P.C. I am however, not inclined to accept this submission of Mr. Sen. In paragraph 3 of the petition the applicant simply stated the circumstances in which he came to know of the delivery of possession and it was on that date that the auction-purchaser went and exercised actual possession over the land in dispute. In paragraph 4 the applicant does say that the dakhaldehani was given on the 25th of June 1949. In paragraph 6 of the application he more clearly expresses his grievance and contends that delivery of possession should not have been given as against him. He thereby respects the delivery of possession.

(4) In support of his contention Mr. Sen, relied upon the cases of 'SATYANARAIN MULLICKS v. JINSI SAH', AIR (16) 1929 Pat 553; 'APPA RAO v. VENKAPPA', AIR (18) 1931 Mad 534; 'HARE KRISHNA v. JAMINI SUNDARI', 85 Cal LJ 155; 'AMBICA CHARAN v. RAM PROSAD', 30 Cal WN 163; 'ATARMOYI DASI v. RAMANANDA', 50 Cal 311 and 'KIRON SASHI DASI v. THE OFFICIAL ASSIGNEE OF CALCUTTA', 36 Cal W N 965.

(5) Now, the case of 'SATYANARAIN MULLICK v. JINSI SAH', AIR (16) 1929 Pat 553, is distinguishable. In that case a Division Bench of this Court considered the applicability of Article 11-A of the Indian Limitation Act to the facts of that case. The article runs thus:

Description of suit.	Period of limitation	Time from which period begins to run.
"11A. By a persons against whom an order has been made under the Code of Civil Procedure, 1908, upon an application by the holder of a decree for the possession of immovable property or by the purchaser of such property sold in execution of a decree, complaining of resistance of obstruction to the delivery of possession thereof, or upon an application by any person dispossessed of such property in the delivery of possession thereof to the decree-holder or purchaser, to establish the right which he claims to the present possession of the property comprised in the order."	One year.	The date of the order.

(6) The relevant portion of the judgment in that case runs thus:

"The only point taken by the learned Advocate for the appellant who is defendant 1 in the present appeal is a point which does not appear to have been taken in either of the Courts below. His contention is that the application of the plaintiffs under Order 21, Rule 100, having been dismissed on 6th september 1923 he was bound to bring a suit within one year from that date under the provisions of Article 11-A, Limitation Act, and the suit having been brought more than a year after the order of dismissal of the application under O. 21, R. 100, it was barred by limitation. Now in order to attract the provisions of Art. 11-A, it was necessary first to establish that the plaintiff who had made the application under O. 21, Rule 100 had been dispossessed of the property in the course of the delivery of possession to defendant No. 1. There is nothing on the record to show that he was as a matter of fact dispossessed in the course of the delivery of possession. The allegation in the plaint was distinctly made that although an application was made under O. 21, R. 100, the plaintiffs continued in possession and that they were actually dispossessed in Bhado 1331. There was no denial of this fact, the case of the defendant being that they were as a matter of fact never in possession of the property since after the death of the widow and that in fact defendant 2 was in possession. Both the Courts below have found that the plaintiff's story of possession and dispossession was true. Upon that finding it is clear that the suit cannot be barred .....I am of opinion that the plain terms of Article 11-A go to show that that article applies only to cases where a person who had been actually dispossessed of the property and who makes an application under O. 21, R. 100 and that application is dismissed and then bring a suit for the establishment of his title and his right to present possession, and such suit has to be brought within a year from the date of the order."

In my opinion, on the authority of this case it cannot be said that the present application was not maintainable.

(6) The case of 'APPA RAO v. VENKAPPA', AIR (18) 1931 Mad 534, is also distinguishable. In that case it was found that the persons who had filed the application under Order XXI, Rule 100, Civil Procedure Code, had been set up as occupancy tenants at the instance of the judgment-debtor after the delivery of possession. In that view of the matter, they could not be said to have been dispossessed by the delivery of possession because on the findings they had no existence at the time. At one place in the judgment of his Lordship Ramesam, J., it is said:

"But if on the other hand, I am satisfied that, taking advantage of their not being parties, the defendant's men are now set up some time after the execution proceedings as an after thought to put forward a case of tenancy, to put a further spoke in the wheel, and to prevent the decree-holder from reaping the benefit of his decree, I ought to interfere and set aside the lower Court's order."

Then his Lordship discussed several other irregularities and set aside the order of the Court below and dismissed the application filed under Order XXI, Rule 100, Civil Procedure Code. The case of 'AMBICA CHARAN v. RAM PROSAD', 30 Cal W N 163, also has no bearing upon the point under consideration. In that case a landlord, in execution of a decree for rent against the tenant, purchased the holding and took delivery of possession. A transferee from the tenant filed an application under Order XXI, Rule 100, Civil P.C., which was allowed on the 26th of June 1917. In May 1920 the landlord filed a title suit, impleading the transferee as party defendant, for a declaration that the tenant had no right to sell the holding and for recovery of possession. Before the High Court it was urged by the defendants that the suit was barred by limitation. It was held in that case that it was not barred as the plaintiff had filed the suit not in the capacity of the auction-purchaser but in the capacity of the landlord, and that it was not hit by the provisions of Article 11-A of the Indian Limitation Act.

(7) Another case relied upon by Mr. Sen was the case of 'ATORMOYI DASI v. RAMANANDA', 50 Cal 311. But in that case the point for consideration was whether Art. 11A of the Indian Limitation Act barred the suit filed by the respondent on the 16th of July, 1917. An application filed under O. XXI, R. 100, Civil P. C., had been dismissed on the 17th of April, 1915 on the ground that as the applicant was in possession he had no right to file the application. In my opinion, the judgment in t' at case can be of no help to Mr. Sen's client.

(8) The case of 'KIRON SASHI Dasi v. The Official Assignee of Calcutta', 36 Cal W N 965 cited by Mr. Sen has nothing to do with the point under consideration in the present case. It is therefore unnecessary for me to deal with this case in detail. Mr. Sen also relied upon the case of 'HARE KRISHNA v. JAMINI SUNDARI DASI', 85 Cal L J 155 which has not followed an earlier decision of a single Judge of the same Court in the case of 'RAJENDRA KISHORE PAL v. ASIRULLA', AIR (25) 1938 Cal 192 which had held,

> "The question was whether dispossession was by a decree-holder or auction-purchaser as such, and not whether the dispossession actually took place after disposal of any execution case started at the instance of the decree-holder or auction purchaser."

In 'HARE KRISHNA RANA's Case the facts were as follows. One Gostha, the predecessor in interest of the plaintiff of that suit, along with Kedar, defendant No. 5 of that suit, had purchased 8 annas share in a patani tenure. They as owners of 8 annas patani interest sued for rent one Satish Adhikary who was the owner of a Sub-Tenure. The rent suit was decreed, and in execution of that decree of the said Gostha, and Kedar, purchased the sub-tenure at an auction sale dated the 15th of February 1924. Delivery of possession was given to the auction-purchaser on the 24th of May 1924. Kedar who was the owner of the 8 annas share of the Sub-tenure had previously borrowed some money from Narendra, defendant No. 3, who obtained a decree for recovery of the amount due to him. On the 16th of August 1935 Narendra in execution of his decree purchased the entire sub-tenure on the allegation that the entire sub-tenure had belonged to Kedar alone. Narendra got delivery of possession on the 19th of May 1936. Six months' afterwards Gostha filed an application under O. XXI, R. 100 in respect of the half share in the sub-tenure which was claimed by him on the allegation that he was dispossessed by Narendra on the 6th of November, 1936, that is, long after the date of delivery of possession to the auction-purchaser. The application under O. XXI, R. 100, Civil P. C., was dismissed on the 5th of April, 1937. Thereafter, the plaintiff instituted the suit within one year of the 5th of April, 1937, for declaration of his title to 8 annas interest in the sub-tenure. The question arose whether the suit was maintainable or not. While considering this question Mookerjee, J. held as follows:

> "The first question which arises for decision is whether an application made by Gostha in 1936 having been dismissed and no suit having been brought within one year from the date of dismissal, the present suit is barred under Article 11-A of the Limitation Act. On behalf of the plaintiffs-appellants it is contended that the application which purported to be under Order 21, Rule 100 of the Code was not maintainable in law and therefore there is no scope for the application under the provisions contained in Art. 11A of the Limitation Act. The ground upon which the application under O. 21, R. 100, of the Code is sought to be avoided is that on Gostha's own showing the alleged dispossession was not in course of the execution proceeding but much later thereafter. Under R. 100 no application is maintainable unless dispossession takes place as a direct result of the execution proceedings.
>
> Mr. Janah appearing on behalf of the defendant, on the other hand, contends that under R. 100 there is no reference to dispossession being limited to one in course of the execution proceedings. The terms as contained in R. 100 are very general and the application of the rule ought not to be limited by practically introducing words which are not to be found there. If the provisions contained in R. 100 were to be interpreted as standing by themselves there is room for argument, as contended for by the defendant. R. 100, however, cannot stand by itself. Whether the siut is barred by limitation or not has to be decided on Art. 11A of the Limitation Act."

Thereafter, the learned Judge referred to the provisions of Art. 11A of the limitation Act and held that the bar under that article could have applied only if the suit had been filed by the plaintiff claiming to have been dispossessed by the delivery of possession, but as that was not the allegation in the plaint of that suit, it was not liable to be dismissed. While dealing with the argument of the lawyers of the parties Mookerjee, J. referred to the case of 'RAJENDRA KISHORE PAL v. ASIRULLA', AIR (25) 1938 Cal 192 and came to the conclusion that the opinion expressed in that Judgment was mere obiter dictum. In my opinion, the case of 'HARE KRISHNA' also does not support the contention of Mr. Sen that the present application should have been thrown out as not maintainable. Mookerjee, J. in that case was more concerned with the bar of limitation rather than the maintainability of an application under O. XXI, R. 100, Civil P. C. On the contrary, at one place in his judgment he made it clear that

> "if the provisions contained in R. 100 were to be interpreted, as standing by themselves, there is room for argument, as contended for by the defendant."

Thus none of the cases relied upon by Mr. Sen go to support his contention that the present application was not maintainable under the provisions of O. XXI R. 100, Civil P. C. In the present case, on reading the application as a whole, it does appear that the applicant was aggrieved by the delivery of possession though he came to know of it subsequently when the auction-purchaser actually went and interfered with his possession. In my opinion, the present application was maintainable under the provisions of O. XXI, R. 100, Code of Civil Procedure.

(9) But, even if the argument of Mr. Sen were to prevail, I am not inclined to exercise my revisional jurisdiction in this case and interfere with the order of the Court below.

(10) The result is that the applications fail and are dismissed with costs. Hearing fee: one gold mohur in each case.

(11) JAMUAR, J. I agree.

R.G.D. *Revision dismissed.*

A. I. R. (39) 1952 Patna 154 *[C. N. 55 (5)]*

IMAM J.

Begam Rai and others, Petitioners v. The State.

Criminal Revision No. 380 of 1951, D/- 5-11-51.

(a) Criminal P. C. (1898), S. 203 — Complainant and opposite party, a zarapeshagidar, both producing rent receipts from landlord — Entry in favour

of opposite party in cadestral survey — Magistrate held justified in dismissing complaint, being of opinion that the matter was one of civil dispute. (Para 2)

Anno: Criminal P. C., S. 203 N. 2.

(b) Criminal P. C. (1898), S. 200 — Non-examination of complainant on oath is not illegality but only irregularity.

Section 200 requires examination of the complainant on solemn affirmation. But the failure to do so is in irregularity and not an illegality justifying the reversal of the order dismissing the complaint. AIR (16) 1929 Pat 473 (FB), Foll.; AIR (21) 1934 Pat 156 and AIR (23) 1936 Pat 145, Ref, AIR (28) 1941 Pat 144, Distinguished. (Para 3)

Anno: Cr. P. C., S. 200 N. 16.

Jaleshwar Prasad and B. Rai, for Petitioners; Sailesh Chandra Sinha, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('30) 9 Pat 707: (AIR (16) 1929 Pat 473: 30 Cri L J 1056 FB) (Pr 3)

('34) 15 Pat L T 17: (AIR (21) 1934 Pat 156: 35 Cri L J 1309) (Pr 3)

('36) AIR (23) 1936 Pat 145: (37 Cri L J 289) (Pr 3)

('41) AIR (28) 1941 Pat 144: (42 Cri L J 358) (Pr 3)

ORDER: This is an application against the order of the District Magistrate of Saran directing further enquiry into a complaint which was dismissed by the Sub-divisional Magistrate of Siwan. The complaint having been filed, the magistrate had asked the parties to appear before him on the 10th of October, 1950. On that date as he was unable to deal with the matter, he adjourned the question of consideration of the complaint until the 16th of November, 1950, when both parties were present and were heard. Both the parties produced rent receipts from the landlords and submissions were made. The magistrate, being of the opinion that the matter was one of a civil dispute, dismissed the complaint. That order was set aside by the District Magistrate on the ground that there had been no examination of the complainant on solemn affirmation as required under S. 202 (200?) of the Code of Criminal Procedure and further that since the complainant had been declared by a civil Court to be an heir of the recorded tenant, it was not necessary for him to get delivery of possession through Court, which according to the District Magistrate appeared to be the view of the Sub-divisional Magistrate.

(2) There can be no question on the record that the complainant must be regarded as the heir of the recorded tenant. There can, however, be no question either that the petitioner No. 1 Begam Rai was recorded in the cadastral survey as being in possession of the land in question as zarpeshgidar. Both the parties produced rent receipts respectively in support of their case of possession. The Sub-divisional Magistrate thought that there was nothing to show that the complainant had got delivery of possession over the land in dispute. His order does not indicate, as the District Magistrate seems to think, that he was insisting upon the complainant getting delivery of possession through Court. Even today, I am not informed that the zarpeshgi under which Begam Rai came to be in possession has been redeemed. Until that zarpeshgi is redeemed, Begam Rai is in possession and entitled to the usufruct of the property, and if any crop has been cut by him, he certainly is entitled to it and not the complainant, although the latter may be the heir of the recorded tenant. It seems to me that when there is an entry in favour of Begam Rai in the cadestral survey and he produced rent receipts before the Subdivisional Magistrate, that officer was fully justified in supposing that the dispute between the parties was in the nature of a civil dispute. On the merits, therefore, the District Magistrate ought not to have, in my opinion, ordered further enquiry.

(3) So far as the question of non-examination of the complainant on solemn affirmation is concerned, S. 200 of the Code of Criminal Procedure does require examination of the complainant on solemn affirmation. It has been decided, however, by this Court in the Full Bench case of 'BHARAT KISHORE LAL v. JUDHISTIR MODAK', 9 Pat 707 that the failure to do so is an irregularity and not an illegality. A similar view to that taken in the Full Bench case has been expressed by Rowland, J. in the case of 'RAGHUNANDAN LAL v. EMPEROR', 15 Pat L T 17. A similar view has been expressed by James, J. in the case of 'RAMJAS MARWARI v. PURULIA MUNICIPALITY', AIR (23) 1936 Pat 145. The decision on which Mr. Sinha relied for the complainant, namely 'SAIDU KHAN v. GAYA PRASAD', AIR (28) 1941 Pat 144, is to my mind not relevant, apart from the question that as a single Judge Dhavle, J. could not overrule the decision of the Full Bench of this Court in the case of 'BHARAT KISHORE LAL SINGH DEO', 9 Pat 707. It seems to me, therefore, although the Subdivisional Magistrate would have been well advised to have conformed to the provisions of the Code of Criminal Procedure and examined the complainant on oath, his failure to do so did not amount to such an illegality as to necessitate the reversal of his order of dismissal of the complaint.

(4) So far as the dismissal of the complaint on the merit was concerned, it seems to me that the view taken by the Sub-divisional Magistrate was more correct and there was no need to interfere with that order for the reasons stated by the District Magistrate.

(5) I would accordingly allow the application, set aside the order of the District Magistrate ordering further enquiry and restore the order the Subdivisional Magistrate of Siwan dismissing the complaint.

R.G.D. *Revision allowed.*

A. I. R. (39) 1952 Patna 155 *[C. N. 55 (6).]*

REUBEN AND NARAYAN JJ.

Mt. Bibi Ganshul Fatma and others, Appellants v. Badri Singh and another, Respondents.

A. F. A. D. No. 626 of 1948, D/- 29-11-1951.

Tenancy Laws—Bihar Tenancy Act (8 of 1885), S. 171 — Usufructuary mortgagee of part of holding becoming statutory mortgagee under S. 171 — Liability to account for rents and profits of property in his possession — T. P. Act (1882), S. 76.

Where a usufructuary mortgagee in respect of a part of a holding deposits the amount of the rent in respect of the holding in accordance with the provisions of S. 171, Bihar Tenancy Act and obtains possession of the remaining portion of the holding, a statutory mortgage is created in his favour under S. 171. But the rights and liabilities of the mortgagor and mortgagee will be governed by the law which applies to mortgages in general. A mortgagee in possession being liable to account for the rents and profits of the mortgaged property, the statutory mortgagee would also be liable for rent and profits of the holding which has come into his possession under the statutory mortgage created by the operation of S. 171. Under S. 171 (1) (c) he would be entitled to retain pos-

session of it as such until the debt with the interest due thereon has been discharged either by the deposit of the mortgage-money or by showing that the debt has been satisfied by the enjoyment of the usufruct of the property.

Hence, where the mortgagor brings a suit for redemption and accounts on the ground that the debt had been satisfied out of the usufruct he would be entitled to a preliminary decree for redemption and accounts even if he has not deposited the amount of the statutory mortgage. AIR (25) 1938 Pat 94, dist.; AIR (23) 1936 Pat 629; AIR (18) 1931 Cal 493, Rel. on. (*Para 5*)

Anno: T. P. Act, S. 76 N. 13.

Janak Kishore, for Appellants; Krishna Prakash Sinha, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('31) 35 Cal W N 678: (AIR (18) 1931 Cal 493) (Pr 5)

('36) 15 Pat 481: (AIR (23) 1936 Pat 629) (Pr 5)

('38) AIR (25) 1938 Pat 94: (173 Ind Cas 721) (Pr 5)

NARAYAN, J.: This is a plaintiffs' appeal arising out of a suit in which the main prayer was that a preliminary decree for rendition of accounts be passed in favour of the plaintiffs. The facts are these: Plaintiff No. 1 had a holding with an area of 5 bighas 8 kathas 16 dhurs of which the annual rental was Rs. 10-10-6. Out of this holding he gave 2 bighas 1 katha 17 dhurs in usufructuary mortgage to the defendants for a consideration of Rs. 335 by a document which was executed on the 2nd September 1927. Thereafter, the landlord obtained two rent decrees with regard to this holding. one of which was for Rs. 53-9-6 and the other for Rs. 75. The defendants as mortgagees deposited the amounts payable under the decrees and, in accordance with the provisions of S. 171 of the Bihar Tenancy Act, obtained possession of the remaining portion of the holding. The possession of the remaining portion of the holding was delivered to the defendants on the 18-1-1943 and on the 1st of September 1943 the plaintiff No. 1 sold the entire holding to the plaintiffs Nos. 2 & 3.

(2) The plaintiffs' allegation was that the entire dues of the defendants had been satisfied from the income of the property and that after a proper accounting the plaintiffs would now be entitled to recover Rs. 1387-4-0 from the defendants. The main relief sought, as already pointed out, was a preliminary decree for rendition of accounts and a declaration to the effect that the usufructuary mortgage as well as the statutory mortgage created by the deposit under S. 171 of the Bihar Tenancy Act had been satisfied. It was also prayed that possession of the property be delivered to the plaintiffs Nos. 2 and 3.

(3) The claim was resisted by the defendants, and their contention was that the plaintiffs were not entitled to the possession of the property until they deposited the entire amount which they were liable to pay to the defendants. The defendants further alleged that on a proper accounting it is they who would be entitled to get a sum of Rs. 1602-2-9 from the plaintiffs.

(4) The Court of first instance dismissed the suit and the Court of appeal below confirmed the decision of the learned Additional Subordinate Judge.

(5) The lower appellate Court was of opinion that until the plaintiffs deposited the entire amount of the decree with interest thereon they were not entitled to possession of the holding, and the learned Additional District Judge relied on a decision of this Court in 'RAM LAL v. THAKUR DAS', AIR (25) 1938 Pat 94. In our opinion a decree for rendition of accounts should have been passed in this case in as much as the settled view appears to be that, whenever there is a deposit under S. 171 of the Bihar Tenancy Act and the mortgagee making the deposit takes possession on the property, a statutory mortgage is created in his favour. In fact, therefore, there were two mortgages in this case to be satisfied, one being the usufructuary mortgage and the other being the statutory mortgage which had been created on account of the operation of S. 171 of the Bihar Tenancy Act. As pointed out by a Division Bench of this Court in 'MUNGE LAL v. SAGARMAL', 15 Pat 481, though S. 171 of the Act provides that the payment of money to save a holding or tenure from sale will create a mortgage by the operation of the law in favour of the man who pays the money, the rights and liabilities of the mortgagor and the mortgagee will have to be governed by the law which applies to mortgages in general. In 'RAJESWAR PRASAD v. RAJANI NATH', 35 Cal W N 678, it was pointed out that when a person makes a payment under S. 170 of the Bengal Tenancy Act, he is, under S. 171(1)(c) entitled as a mortgagee to possession of the tenure or holding in respect of which the payment is made and, under S. 171(2) he has also a further remedy to sue for the enforcement of the statutory mortgage after giving up possession of the tenure or holding concerned, and that, if such a person avails himself of the second remedy and brings a suit for the enforcement of his mortgage, he sues in a proper form and a 'preliminary decree for accounts' in such a suit will be a correct decree. There can therefore be no doubt that, if by the operation of the law a statutory mortgage is created, then there must be an accounting between the mortgagor and the mortgagee. A mortgagee in possession is liable to account for the rents and profits of the mortgaged property, and a person making a deposit under S. 171 of the Bihar Tenancy Act will consequently be liable for the rents and profits of the property which have come into his possession under the statutory mortgage created by the operation of S. 171 of the Bihar Tenancy Act. The facts of 'RAM LAL JHA's Case appear to me to be distinguishable. That was a civil revision matter and it arose out of a petition by the mortgagee who had deposited the amount which had been decreed against the recorded tenant. Possession had been delivered to him in accordance with the provisions of S. 171 of the Bihar Tenancy Act and, after possession had been delivered to him, the judgment-debtor filed a petition offering to deposit the amount which had been paid by the petitioner less the amount which he (the judgment-debtor) claimed should have been paid as his share of the rent and less the price of crops which he alleged the petitioner had enjoyed while he was in possession. The Court below, on this application, directed the judgment-debtor to be put back into possession on payment of the decretal amount less the amount claimed as the petitioner's share of the rent and less the price of the crops which had been assessed by the Court at Rs. 3 per bigha. His Lordship Agarwala, J. (as he then was) found that the Court had arrived at this figure without any evidence whatsoever and that it was wholly wrong for the Court to fix arbitrarily the rate of Rs. 3 per bigha as the price of the crop. There is no doubt an observation to the effect that:

"The section quite explicitly states that it is the amount deposited to prevent the sale which shall be deemed to be a debt from the decree-holder to the person making the deposit and that it is only on repayment of this debt that the judg-

ment-debtor shall be entitled to regain possession,"

and his Lordship set aside the order of the Court below because the amount had not been deposited in that case. The question as to whether on account of the creation of statutory mortgage there was a liability for accounts was not before his Lordship in the strict sense, and undoubtedly his Lordship set aside the decision of the Court below also because he was of the opinion that the rate of Rs. 3 per bigha had been arbitrarily fixed. S. 171 (1)(c) says that

"he shall be entitled to possession of the tenure or holding as mortgagee of the tenant, and to retain possession of it as such until the debt, with the interest due thereon, has been discharged."

The term used is "discharged" and the debt can be discharged either by the deposit of the mortgage-money or by showing through accounting that the debt has been satisfied by the enjoyment of the usufruct of the property. With the greatest respect, I should say that if his Lordship intended to lay down the principle that in every case there should be a deposit of the mortgage-money, that is not the correct view of the law.

(6) It may be noted that the respondents had filed a petition in this case stating that thumb impression of appellant No. 1 on the 'vakalatnama' was forged, and their prayer was that an inquiry be held with regard to the same. The appellant No. 1 is now dead and this petition is not pressed.

(7) In the result, therefore, this appeal is allowed, the judgment and decree of the lower appellate Court are set aside and it is directed that a preliminary decree for redemption and accounts be passed in favour of the plaintiffs in this case. The present appellants will recover their costs of this appeal and the appeal to the lower appellate Court, and the costs of the trial Court will follow the final result.

(8) REUBEN, J.: I agree.

K.S. *Appeal allowed.*

A. I. R. (39) 1952 Patna 157 *[C. N. 55 (7).]*

DAS AND SARJOO PRASAD JJ.

Shaikh Banka, Appellant v. Shaikh Bartul and others, Respondents.

A. F. A. D., No. 1342 of 1948, D/- 6-11-1951.

Tenancy Laws — Bihar Tenancy Act (8 (VIII) of 1885), S. 103B — Record of rights — Presumption of correctness attaching to later entry cannot be rebutted by earlier entry — Evidence Act (1872), S. 35.

An entry in the record of rights prepared at the time of the cadastral survey in 1898 recorded that M was in possession of certain land as 'shikmidar'. A later entry made in respect of the same lands in the record of rights prepared at the time of revisional survey in 1918 recorded M as 'Kashtkar'.

'Held', that the earlier entry made at the time of cadastral survey cannot by itself rebut the presumption of correctness attaching to the later entry. AIR (16) 1929 Pat 460 (FB); AIR (14) 1927 Pat 164, Rel. on; AIR (9) 1922 Pat 548, Ref. *(Para 4)*

Anno: Evi. Act, S. 35 N. 12, 19.

Rajkishore Prasad and Ramanugrah Prasad, for Appellant; K. B. Chatterji, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('22) 1 Pat 167: (AIR (9) 1922 Pat 548) (Pr 3)
('27) 6 Pat 342: (AIR (14) 1927 Pat 164) (Pr 3)
('30) 9 Pat 347: (AIR (16) 1929 Pat 460 FB) (Pr 3)

JUDGMENT: This second appeal by the plaintiff arises out of a suit in ejectment in respect of two plots of land, Nos. 519 and 545, recorded in revisional survey Khata No. 959. The only question which requires an answer in this appeal is whether an earlier entry made in the record of rights prepared at the time of the cadastral survey will by itself and in law rebut the presumption of accuracy attaching to a later entry made in respect of the same lands in the record of rights prepared at the time of the revisional survey. The Courts below have answered this question in the negative, and have further held that there is no reliable evidence which rebuts the presumption of accuracy attaching to the entry made in respect of the lands in dispute in the record of rights prepared at the time of the revisional survey.

(2) It appears that in the record of rights prepared at the time of the cadastral survey the lands were recorded as the 'Kasht' lands of an indigo factory and one Mekhar Dusadh was recorded as Shikmidar in possession. The interest of the indigo factory was purchased by one Mahadeo Rai, and at the time of the revisional survey the lands were recorded as the kasht lands of one Mekhur Dusadh. Defendant No. 3, as the heir of Mekhur Dusadh, transferred the lands to defendants 1 and 2 by a sale deed dated the 10th of January, 1936. The plaintiff, who is the appellant before us, purchased the lands by means of two sale deeds from Mahadeo and his heirs. The case of the appellant is that the lands were the kasht lands of Mahadeo, and Mekhur had only a 'shikmi' right which could not be transferred.

(3) This case of the appellant is in direct opposition to the entry made in the revisional record of rights, and the contention of learned counsel for the appellant is that the entry in the cadastral survey record of rights by itself rebuts the presumption arising out of the entry made in the later record of rights prepared at the time of the revisional survey. I may state here that the cadastral survey entry was made in 1898 and the revisional survey entry in 1918. Learned Counsel for the appellant has relied on the decision in 'RAGHUNATH MISRA v. RAM BAHERA', 1 Pat 167, where with regard to an entry in respect of some 'rafa tankidars' it was stated that the entry in the provincial Settlement records was sufficient to rebut the presumption arising from the entry in the records of the Revisional Settlement inasmuch as there was no procedure by which the status of the plaintiffs could have been changed from that of 'rafa-tankidars' to that of 'tankidars' in the interval between the two settlements. This decision was subsequently considered by another Division Bench of this Court in 'ABHIRAM v. CHINTAMANI', 6 Pat 342 where one of the Judges stated that the decision in 1 Pat 167 was not correct. The decision in 6 Pat 342 and the reasons for that decision were approved in a Special Bench decision of this Court in 'TENGAROO SUKUL v. CHATTU BHAR', 9 Pat 347 where it was clearly laid down that the presumption of correctness attaching to the later record of rights could not in law be rebutted merely by a contrary entry in an earlier record of rights. That was a case in which the question arose as to whether the land was 'zirat' land of the landlord or 'Kaimi kasht' land of the tenant. The cadastral record of rights showed the land to the zirat land, whereas the entry in the revisional record of rights showed the land as 'Kaimi kasht' land of the tenant. It was held that the presumption of accuracy attaching to the later entry was not rebutted by the entry made in cadastral record of rights.

(4) The position is the same in the present case. The entry in the revisional record of rights shows

that Mekhur Dusadh was the 'kashtkar' of the lands in question. The earlier entry made at the time of the cadastral survey cannot by itself rebut the presumption of correctness attaching to the later entry.

(5) Mr. Rajkishore Prasad appearing for the appellant has been unable to refer us to any other evidence in the record which would rebut the presumption of correctness attaching to the later entry. The Courts below have referred to the other evidence in the record, which is really in support of the later entry, namely, that the lands were the kasht lands of Mekhur Dusadh.

(6) The appeal has no merit and must be dismisssed with costs.

K.S. *Appeal dismissed.*

A. I. R. (39) 1952 Patna 158 *[C. N. 55 (8)]*

JAMUAR AND RAI JJ.

Chandrasekhar Prasad Sinha, Petitioner v. Inderdeo Prasad Mahton and another, Opposite-Party.

Civil Revn. No. 714 of 1950, D/- 22-11-1951.

(a) Bihar and Orissa Local Self-Government Act (1885), S. 138(a) — Rules under — Bihar District Board Election Petitions Rules, 1939, Rr. 3, 5, 7, 10 — Election petition together with list of corrupt practices filed within time as prescribed in R. 25 — List not verified as required by R. 7(2)(a) — Petition is not maintainable — Court cannot allow verification of list after prescribed time.

Rule 7(2) of the Bihar District Board Election Petition Rules enjoins the filing of a separate list, duly signed and verified, setting forth full particulars of any corrupt practice which the petitioner alleges, along with the election petition. Even if the election petition contains certain particulars of corrupt practices the rule regarding the filing of a list with the petition cannot be disregarded. Hence where the election petition as also the list of corrupt practices is filed within the period prescribed by R. 5(1) but the verification of the list is not made within the time prescribed by R. 5(1), the petition cannot be said to have been presented in accordance with the rules and therefore is not maintainable under R. 3 and must be dismissed summarily under R. 10. The mere fact that the Courts on its own motion allowed the list to be verified beyond the prescribed period cannot cure the defect. The reason is that R. 7(2)(b) which empowers the Election Commissioner to allow the particulars in the list to be amended does not empower him to allow the curing of defects such as want of verification of the list (Paras 9, 10 and 11)

(b) Bihar District Board Election Petition Rules (1939), R. 2(d) — Corrupt practice — Undue influence when constitutes corrupt practice — Proof.

Under R. 2(d) read with Part 1 of the Bihar District Board Election Petition Rules, "Undue influence" can only be a "corrupt practice" if there is proved to be any direct or indirect interference or attempt to interfere on the part of (1) a candidate, or (2) his agent, or (3) of any other persons with the connivance of the candidate or his agent, with the free exercise of any electoral right.

Where the evidence disclosed that the acts alleged were done by the sympathisers and persons who were interested in the candidate but it was not shown that they were done with the connivance of the candidate or his agent, it cannot be said that the corrupt practice has been proved. (Para 12)

Harinandan Singh and K. B. N. Singh, for Petitioner; R. S. Chatterji, for Opposite Party.

JAMUAR, J.: This application is directed against an order dated the 28th August, 1950, passed by the Additional Election Commissioner, Darbhanga, declaring the election of Babu Chandrasekhar Prasad Sinha to the District Board of Darbhanga void.

(2) In May-June 1949, there was held an election from the Mohaddinagar Thana Constituency to the District Board of Darbhanga. Indradeo Prasad Mahton, Chandrasekhar Prasad Sinha and Ram Ahlad Thakur were candidates from that constituency. Indradeo Prasad Mahto was a Congress nominee, whereas the other two were independent candidates. The polling began on the 30th May, 1949, and ended on the 2nd June 1949. The results were announced on the 7th June, 1949, when the Returning Officer declared Chandrasekhar Prasad Sinha as having been duly elected, he having obtained the largest number of votes. The result was published in the Bihar Gazette dated the 20th July, 1949.

(3) Subsequent to that Indradeo Prasad Mahton filed an election petition for a declaration that the election of Chandrasekhar Prasad Sinha was void on the ground that he, his agents, friends, relations, sympathisers and supporters at his instance and instigation and with his consent or connivance had created a reign of terror by committing murders and by indiscriminately assaulting voters and passers-by, so as to create an atmosphere of general intimidation, and had prevented the voters from exercising their legitimate rights of franchise. It was asserted that in these circumstances, not only were the results at the poll affected but that the entire election was vitiated, and should be declared void.

(4) Chandrasekhar Prasad Sinha only contested the petition on denying all the allegations made therein. He also took the plea that the petition, which was filed, was not maintainable and was time-barred.

(5) I have already said that the learned Additional Election Commissioner, who heard the petition, allowed it and gave the declaration sought in the petition, and it is against that decision that the present application has been filed.

(6) Certain rules have been framed called the Bihar District Board Election Petition Rules, 1939, in exercise of the powers conferred upon the Governor of Bihar by S. 138(a) of the Bihar and Orissa Local Self-Government Act 1885. These rules have been published in the Bihar Gazette dated July, 12, 1939, in Notification No. 3481-L. S. G. dated the 8th July, 1939.

(7) Mr. Harinandan Singh, who appeared for the petitioner, firstly contended that the election petition filed in the case was not maintainable under these rules, and should have been summarily dismissed. In order to deal with this point it is necessary to examine some of the rules;

"3. No election shall be called in question except by an election petition presented in accordance with these rules.

5.(1) An election petition against a returned candidate shall be presented to the Election Commissioner within 14 days from the date of the publication in the Bihar Gazette of the name of such candidate under S. 9 of the Act.

7. (1) An election petition shall contain a statement in concise form of the material facts on which the petitioner relies and shall, where necessary be divided into paragraphs numbered consecutively. It shall be signed by the petitioner and verified in the manner prescribed for the verification of pleadings in the Code of Civil Procedure, 1908.

(2) (a) The petition shall be accompanied by a list, signed and verified in like manner, setting forth full particulars of any corrupt practice which the petitioner alleges, including as full a statement as possible as to the names of the parties alleged to have committed any corrupt practice

and the date and place of the commission of each such practice.

(b) The Election Commissioner may, upon such terms as to costs and otherwise as he may direct, at any time allow the particulars included in the said list to be amended, or order such further and better particulars in regard to any matter referred to therein to be furnished as may in his opinion be necessary for the purpose of ensuring a fair and effectual trial of the petition.

Provided that the Election Commissioner shall not by means by any such amendment allow particulars to be furnished of any corrupt practice other than a corrupt practice set forth in the list furnished by the petitioner under clause (a) of Sub-r. (2).

"10. (1) If there is any failure to comply with any of the provisions of R. 5, Sub-r. (1) and Cl. (a) of Sub-r. (2) of R. 7, and Rr. 8 and 9, the Election Commissioner shall summarily dismiss the petition."

(8) The facts upon which the argument that the election petition prescribed in the present case was not maintainable are these. As I have stated above, the result of the election was published in the Bihar Gazette on the 20th July, 1949. The election petition was presented on the 1st August, 1949. The list of corrupt practices was filed on the 2nd August, 1949, but this list had not been verified as required by Cl. (a) of Sub-r. (2) of Rule 7, quoted above. But the Court, by its own motion ordered the list to be verified, and this was done on the 10th August, 1949. The learned Advocate for the petitioner contended that according to R. 3, no election could be called in question unless the election petition presented was in accordance with the rules. Clause (a) of Sub-r. (2) of R. 7 provides that the election petition must be accompanied by a list signed and verified in like manner as the election petition itself which has to be verified in the manner prescribed for the verification of pleadings in the Code of Civil Procedure. No doubt, the election petition as also the list of corrupt practices, which was filed on the next day, had been filed within the period prescribed by Sub-r. (1) of R. 5; but the verification of the list was not made within the period prescribed by Sub-r. (1) of R. 5. It was, therefore, argued that since the election petition was not filed within the prescribed period accompanied by a properly verified list of corrupt practices, the petition cannot be said to have been presented "in accordance with these rules", and hence the election, as provided by Rr. 3 could not be called in question. Clearly, the argument has force.

(9) The reply, however was two-fold. First it was contended that the election petition itself contained the material particulars regarding the corrupt practices alleged, and therefore, it was unnecessary to file any further list of corrupt practices. Since such an election petition had been filed within the prescribed period, it was argued, it was superfluous to file a further list. Hence, we were asked to ignore the unverified list filed on the next day. The contention was that in these circumstances, the election petition must be held to have been presented in accordance with the rules I do not think I can accept this argument. Clause (a) of Sub-r. (2) of R. 7 provides that the election petition

"Shall be accompanied by a list, signed and verified in like manner, setting forth full particulars of any corrupt practice which the petitioner alleges."

Since this clause enjoins the filing of a separate list, I do not think that even if the election petition contains certain particulars of corrupt practices, the rule regarding the filing of a list with the petition can be disregarded.

(10) The other line of argument in reply was with reference to Cl. (b) of Sub-r. (2) of R. 7 which empowers the election Commissioner to allow the particulars in the list "to be amended". The contention was that Cl. (b) gives wide powers to the election Commissioner so that even if he gave time for verification of the list beyond the prescribed period, he was within his rights so to do. Clause (b) in my opinion, provides for the amendment of the particulars already included in the list or for the inclusion of further and better particulars in regard to any matter already referred to in the list. I do not think that this gives power to the election Commissioner to allow the curing of defects and as want of verification of the list. The argument was sought to be supported from the provisions of the Civil P. C. regarding amendment of plaints. It was contended that the omission to verify a plaint is a mere irregularity which could be cured at a later stage, and that such a plaint could not be rejected 'in limine'. There is in my view, a clear distinction between the procedure provided in the Civil P. C. for the admission of plaints and the procedure provided by the District Board Election Petitions Rules, 1939, for the admission of election petitions. Whereas there is no provision on the Civil P. C. for the rejection of plaints 'in limine' for want of verification and the like, there is a definite provision in the Election petitions Rules for the rejection of an election petition, if it is not presented in accordance with the rules, as is apparent from R. 3, quoted above. In that connection, reference must also be made to sub-r. (1) of R.10 which has also been quoted above. In accordance with this sub-rule, failure to comply with Cl. (a) of sub-r. (2) of R. 7 will entitle the Election Commissioner to dismiss the petition summarily.

(11) In these circumstances, in my view, the election petition not having been presented in accordance with the District Board Election Petitions Rules 1939, was not maintainable. The petition should have been summarily dismissed as the Election Commissioner had no jurisdiction to investigate and hear the matter further. His order, therefore, is clearly revisable by this Court.

(12) The second argument in support of the petition was that the election was not liable to be declared void or to be set aside, as the corrupt practice alleged had not been proved. A corrupt practice has been defined in R. 2, Cl. (d) as meaning "any of the practices specified in Parts I and II of the Schedule to these rules" Mr. Chatterji, who appeared for the opposite party and who argued in support of the order conceded that he could only rely upon the allegation of 'undue influence" as explained in Part I of the Schedule. Part I of the Schedule contains the various kinds of corrupt practices, and one of them is undue influence, and it is explained as follows:

"Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of a candidate or his agent or of any other person with the connivance of the candidate or his agent with the free exercise of any electoral right."

Shortly, the undue influence must be on the part of a candidate or his agent or of any other person with the connivance of the candidate or his agent. There is no allegation of any undue influence on the part of the candidate or his agent, and it was so conceded in the Court below. There is one passage in the judgment of the Court below to the effect that certain criminal acts were committed by the agents, as the Court below has stated;

"As the murders and assault had concern with the election and as they were not committed for

or on behalf of the petitioner the irresistible conclusion is that they were committed for and on behalf of the contesting respondent by his men, agents sympathisers or in any case by those who were interested in him and I hold accordingly."

It was said that this is a finding regarding agents also; but there is no specific allegation either in the petition or in the list of corrupt practices that there was any such act on the part of the agents. "Undue influence" can only be a "corrupt practice" if there is proved to be any direct or indirect interference or attempt to intefere on the part of (1) a candidate, or (2) his agent, or (3) of any other persons with the connivance of the candidate or his agent, with the free exercise of any electoral right. No evidence has been shown to us of any such act on the part of (1) the candidate, or (2) his agent. The finding is that it was on the part of the sympathisers and men who were interested in the candidate. But that can only be if that is done "with the connivance of the candidate or his agent". There is no finding that it was with the connivance of the candidate or his agent. That being so, in my opinion even the corrupt practice alleged cannot be said to have been proved.

(13) I would accordingly allow this application and set aside the order of the Additional Election Commissioner. The petitioner is entitled to his costs; hearing fee two gold mohurs.

(14) RAI, J.: I agree.

K.S. *Order set aside.*

A. I. R. (39) 1952 Patna 160 *[C. N. 55 (9).]*

DAS AND SARJOO PROSAD, JJ.

Bhagwati Charan, Appellant v. Hirday Singh and another, Respondents.

A. F. A .D. No. 1515 of 1948, D/- 8-11-1951.

(*a*) *Hindu Law — Widow — Alienation — Legal necessity — Proof of — Purchaser not acting bona fide — Effect.*

In a suit by a Hindu reversioner for declaration that a sale-deed executed by the Hindu widow is not binding on him, the real question to be considered is whether the sale itself is justified by necessity; if the purchaser has acted honestly and made the enquiry as to the existence of necessity for the sale, he is not bound to account for the application of the price. But this principle cannot apply to a case where it has not been shown that it was necessary for the widow to sell the property to discharge the debt, mentioned in sale-deed and particularly when the finding is that the purchaser made no bona fide enquiry and was not acting as an honest purchaser. AIR (14) 1927 PC 37, Ref. (*Para 4*)

(*b*) *Specific Relief Act (1877), S. 42 — Sale by Hindu widow — Suit by reversioner during lifetime of widow for declaration that it was not binding on him — Maintainability — (Hindu Law — Widow — Alienation.)*

A suit by a Hindu reversioner during the lifetime of a widow, for a declaration that a sale-deed executed by her is not binding on him is maintainable and is not barred by the provisions of S. 42 Specific Relief Act merely because the plaintiff has not asked for the relief of possession. The reason is that the reversioner not being entitled to immediate possession, it is not open to him to ask for such relief. The fact that the plaintiff has alleged possession and dispossession in the plaint is immaterial. (*Para 5*)

Anno: Specific Relief Act, S. 42, N. 9.

U. N. Sinha, for Appellant; Nand Lall Untwalia, for Respondents.

Case referred to:

('27) 54 Ind App 79: (AIR (14) 1927 P C 37) (Pr 4)

DAS, J.: This is a second appeal by defendant No. 1. The suit out of which this appeal has arisen was for a declaration that two sale-deeds executed by one Mt. Radhika Kuer in favour of the defendants were not binding on the plaintiffs. The suit was decreed in respect of one of the sale-deeds only, namely, the sale-deed in favour of defendant No. 1, executed on the 17th of January 1944. The suit was dismissed in respect of the claim relating to the other sale-deed in favour of defendant No. 2. Hence, this appeal by defendant No. 1 alone. The sale-deed in favour of the appellant purported to be for a consideration for Rs. 2,000/- only. The consideration consisted of the following items; (1) a sum of Rs. 800/- stated to be due to the appellant on the foot of a 'sudbharna' bond executed by Naga Singh, husband of Mt. Radhika Kuer, the 'sudhbharna' bond being of the date, 27th of August 1940; (2) another sum of Rs. 800/- said to be due to the appellant from Mt. Radhika Kuer on the basis of a handnote executed by her dated the 18th of June 1943; (3) a sum of Rs. 57/8/- being the interest on the aforesaid handnote; (4) a sum of Rs. 320/- said to be due to one Sudkhnandan on a handnote stated to have been executed by Mt. Radhika Kuer on the 24th of June 1943; and (5) a sum of Rs. 22/8/- stated to be the interest on the handnote of Sukhnandan.

(2) Several questions arose for decision in the Courts below. One of the questions was whether Mt. Radhika Kuer was a concubine of Naga Singh or his wife. Another question was whether the plaintiffs were the reversioners of Naga Singh. On these two questions, the Courts below found: (1) that Radhika Kuer was the married wife of Naga Singh, and (2) that the plaintiffs were the reversioners of Naga Singh. These findings have not been challenged before us. The appeal must, therefore, be considered and decided on the basis of the two findings mentioned above.

(3) The Courts below also concurrently found that, except for the sum of Rs. 800/- which was due to the appellant from Naga Singh on the foot of the sudbharna bond, no consideration had passed for the sale-deed. They hold that the appellant had failed to prove passing of consideration for the handnote stated to be in his favour; they also held that Mt. Radhika Kuer did not borrow any money from Sukhnandan, nor was sukhnandan paid by the appellant. The Courts below also held that the appellant made no bona fide enquiry, and, therefore, he was not an honest purchaser; in other words, they held that the sale as a whole was not justified by legal necessity. On these findings, the Courts below gave a decree in favour of the plaintiffs with regard to the sale-deed in favour of the appellant dated the 17th January 1944.

(4) Mr. U. N. Sinha, appearing for the appellant, has urged the following points before us. He has, firstly, contended that the principle laid down by the Privy Council in 'SRI KRISHNA DAS v. NATHU RAM', 54 Ind App 79, should be applied in the present case, and it should be held that the sale was justified, inasmuch as the sum of Rs. 800/- which was due to the appellant from Naga Singh by reason of the 'Sudbharna' bond was paid. As was observed by their Lordships of the Judicial Committee in the decision referred to above, the real question to be considered is whether the sale itself is justified by necessity, if the purchaser has acted honestly and made the enquiry as to the existence of necessity for the sale, he is not bound to account for the application of the price. Learned Counsel for the appellant has taken us through both the judgments on this point and having

perused those judgments, I am satisfied that the Courts below clearly found that the sale itself was not justified by any necessity. Firstly, they found that no part of the consideration had been paid except the sum of Rs. 800/- which was due to the appellant on the foot of the 'sudbharna' bond. They held that the so-called handnote in favour of the Sukhnandan was fictitious. They further held that no consideration had been proved for the so-called handnote in favour of the appellant; nor had the appellant acted as an honest purchaser. In view of these findings, it seems clear to me that the principle laid down in 'KRISHAN DAS's case', 54 Ind App 79 (PC), cannot be applied. It is true that the question whether the sale is justified by necessity or not is not one of the arithmetical calculation only, but in a case where it has not been shown that it was necessary for the widow to sell the property to discharge the 'sudbharna' debt, and particularly when the finding is that the purchaser made no bona fide enquiry and was not acting as an honest purchaser, there is no room for the application of the principle laid down in 'Krishan Das's case', 54 Ind App 79 (PC). The first point urged on behalf of the appellant must, therefore, be overruled.

(5) Secondly, it is contended that the suit was barred by reason of the provisions of Section 42 of the Specific Relief Act. Here, again, I think that the contention is not worthy of acceptance. The plaintiffs-respondents, who are the reversioners of Naga Singh, have no right to immediate possession. It is not in dispute that Mt. Radhika Kuer, widow of Naga Singh, is still alive. Naga Singh had a sister Mt. Rajballi who is also alive. It is true that in the plaint, the plaintiffs had stated that they got possession of the land sometime previously because Mt. Rajballi did not care for possession. They brought the suit on the allegation that they had been dispossessed subsequently. In spite of that allegation of possession and dispossession, it is clear that the plaintiffs respondents have no immediate right to possession. Therefore, it was not open to them to ask for a relief for recovery of possession. In that view of the matter, it is impossible to hold that the suit was barred by reason of the provisions of Section 42 of the Specific Relief Act.

(6) These were the two main contentions urged on behalf of the appellant, and both these contentions fail. Learned Counsel for the appellant has then pointed out to us that the declaratory decree which had been made in favour of the plaintiffs-respondents does not make it clear that the appellant is entitled to be paid back the sum of Rs. 800/- which was paid to Mt. Radhika Kuer. Though the sale as a whole is not justified by necessity, there is, I think, an equity in favour of the appellant, and the declaration should make it clear that when the succession opens after the death of Mt. Radhika Kuer and Mt. Rajballi, the appellant will be entitled to be paid back the sum of Rs. 800/- which was paid for redeeming the Sudbharna bond in favour of the appellant. As a matter of fact, the decree prepared in the Courts below does not make this clear, though in the body of the judgment it is made clear that a sum of Rs. 800/- was paid in satisfaction of the dues of the Sudbharna bond of the 27th August 1940. This should now be made clear in the decree prepared here.

(7) Subject to the direction given above with regard to the preparation of the decree, this appeal is dismissed with costs in favour of the plaintiffs-respondents.

(8) SARJOO PROSAD, J.: I agree.

K.S. *Order accordingly.*

1952 Pat./21 & 22

A. I. R. (39) 1952 Patna 161 *[C. N. 55 (10).]*

LAKSHMIKANTA JHA C. J. AND CHATTERJI J.

Siaram Singh and another, Appellants v. Jugutdeo Singh and others, Respondents.

A.F.A.D. No. 1101 of 1948, D/- 9-11-1951.

† (a) *Civil P. C. (1908), O. 1, R. 9 and O. 34, R. 1 — Mortgage suit — Parties — Failure to add interested parties -- Suit, if can proceed.*

The combined effect of O. 1, R. 9, and O. 34, R. 1, in so far as mortgages are concerned, is that all persons whose rights and interests may be adjudicated upon and determined in the suit ought to be added as parties, but that failure to add one or more such persons should not have the effect of defeating the suit if the Court, in their absence, can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. If the rights of the parties actually before the Court can be determined in the suit leaving the rights and interests of others unaffected then, even though the other parties might properly have been added, the Court should determine the matters in controversy between the parties actually present. In order to decide whether a suit can proceed in the absence of certain proper parties, two tests have been laid down; (1) can the rights of the parties on the record be fully determined in their absence; and (2) can that determination be made necessarily affecting the rights of those absent. AIR (9) 1922 Pat 651; AIR (18) 1931 Pat 164; AIR (26) 1939 Pat 49; AIR (33) 1946 Pat 225; Relied on; AIR (3) 1916 Pat 310 Commented. (Para 7)

Anno: O. 34, R. 1 N. 4, 5, 19; O. 1, R. 9, N. 6.

(b) *Civil P. C. (1908), O. 34, R. 11 — Pendente lite interest — It is in domain of contract unless contract is unconscionable — Contract rate at 24 p. c. p. a. reduced to 9 p. c. p. a.*

Payment of interest from the date of the suit till the date fixed for redemption is in the domain of contract, while the interest payable subsequent to the date fixed for redemption is in the domain of judgment. Order 34, R. 11, which was inserted by the Amending Act of 1929, gives a discretion to the Court. In exercise of this discretion the Court may allow or refuse pendente lite interest. If however the Court does allow interest under Cl. (a)(i) of the rule the interest at the contractual rate, if any, should be given. But this does not mean that where the Court considers that the contractual rate is unconscionable or excessive, it is still bound to allow interest at the excessive rate. Where the Court, in the circumstances of the case, is of opinion that the interest is excessive, the contract must be deemed to be unenforceable and it is in the discretion of the Court to allow such interest as it thinks proper. AIR (23) 1936 P C 63; AIR (27) 1940 F C 20; AIR (27) 1940 F C 7, Relied on; AIR (28) 1941 Pat 378; AIR (37) 1950 Pat 391 Referred to.

24 p. c. p. a. contractual rate of interest was held excessive and in view of the provisions of Bihar Tenancy Act it was reduced to 9 p. c. p. a. and interest subsequent to the period of redemption was allowed at 6 p. c. p. a. (Para 11)

Anno: Civil P. C., O. 34, R. 11 N. 2.

Harnarain Prasad, for Appellants; Lakshmi Narain Sinha, Girijanandan Prasad, Bindabasini Prasad Sinha and T. P. Singh, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('27) 54 Ind App 1: (AIR (14) 1927 P C 1) (Pr 11)

('36) 63 Ind App 114: (AIR (23) 1936 PC 63) (Pr 11)
('40) AIR (27) 1940 FC 7: (1940 FCR 31) (Pr 11)
('40) AIR (27) 1940 FC 20: (1940 FCR 61) (Pr 11)
('16) 1 Pat L J 468: (AIR (3) 1916 Pat 310) (Pr 7)
('23) 2 Pat 175: (AIR (9) 1922 Pat 651) (Pr 7)
('31) 10 Pat 341: (AIR (18) 1931 Pat 164) (Pr 7)
('39) 18 Pat 141: (AIR (26) 1939 Pat 49) (Pr 7)
('41) 22 Pat L T 317: (AIR (28) 1941 Pat 378) (Pr 11)
('46) AIR (33) 1946 Pat 225: (222 Ind Cas 439) (Pr 7)
('50) AIR (37) 1950 Pat 391 (Pr 11)

CHATTERJI, J.: This is an appeal by the plaintiffs in a suit to enforce a simple mortgage dated the 4th May, 1931.

(2) The mortgage in question was executed by the predecessor of defendants 1 and 2 (defendants first party) in favour of Bechan, deceased father of defendants 8 and 9 (defendants fourth party), for Rs. 175/- repayable by the 15th of Baisakh, 1339 Fasli (April-May 1932) with interest at 2 per cent. per mensem. The plaintiffs are the transferees of the entire mortgaged interest from Bechan's sons defendants 8 and 9 under a 'bechinama' dated the 26th October, 1943. It is, however, now conceded that the mortgage, though executed in favour of Bechan alone, was taken by him on behalf of the joint family consisting of himself and his brother Birju. Defendants 3 to 6 (defendants second party) and defendant No. 7 (defendants third party) are subsequent transferees of portions of the mortgaged property. The suit was instituted on the 4th February, 1944, claiming Rs. 350/-, that is, Rs. 175 as principal and Rs. 175/- as interest; the remaining interest due was given up in view of the provisions of the Bihar Money Lenders Act.

(3) The suit was contested by defendant No. 3 alone (who will be referred to hereinafter as the defendant). His defence, so far as material to this appeal, was that by a partition between the mortgagee Bechan and his brother Birju, a half share in the mortgage bond in suit was allotted to Birju, since deceased, and therefore his son Jadu was a necessary party. The plaintiffs accordingly amended their plaint and impleaded Jadu as defendant No. 10 on the 19th December, 1944, by which date the period of limitation had expired. Thereupon the defendant took the further plea that the suit was barred by limitation.

(4) The learned Munsif who tried the suit held that Jadu was not a necessary party and the suit was not barred by limitation. He accordingly decreed the suit for the entire amount. It is difficult to understand how he passed the decree for the entire amount although, on the defendant's own case, the plaintiffs acquired only a half share in the mortgage money.

(5) On appeal by the defendant, the learned Subordinate Judge held that Jadu was a necessary party, and he not having been impleaded within the period of limitation, the suit was barred by time. He accordingly allowed the appeal and dismissed the suit. Hence this second appeal by the plaintiffs.

(6) It is argued by Mr. Harnarain Prasad on behalf of the appellants that admittedly there being a partition between Bechan and Jadu's father Birju by which each got a half share in the mortgage money, Jadu was not a necessary party and, therefore, the suit could not be dismissed on the ground of limitation. Mr. Haranarain Prasad concedes that the plaintiffs are not entitled to more than a half share in the mortgage money, that being the share allotted to the plaintiffs' vendors' father Bechan on partition.

(7) The learned Munsif held that the suit is barred by limitation, relying upon a decision of this Court 'GIRWAR NARAIN v. Mt. MAKBULUNNISSA', 1 PAT L J 468. There it was held that O. 1, R. 9 of the Code of Civil Procedure is subordinate to O. 34, R. 1; and a mortgage being indivisible, if all the parties entitled to a share in the money due on the mortgage are not upon the record the suit must be dismissed in its entirety. In that case one of the persons interested in the mortgage security was impleaded after the expiry of the period of limitation and, therefore, the suit was dismissed on the ground of limitation. This decision was considered in 'SITAL PRASAD v. ASHO SINGH', 2 Pat 175. In that case Sir Dawson Miller, C. J., who delivered the judgment with which Mullick, J. agreed, held that the combined effect of O. 1, R. 9, and O. 34, R. 1, Code of Civil Procedure, in so far as mortgages are concerned, is that all persons whose rights and interests may be adjudicated upon and determined in the suit ought to be added as parties, but that failure to add one or more such persons should not have the effect of defeating the suit if the Court, in their absence, can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. It was further held that if the rights of the parties actually before the Court can be determined in the suit, leaving the rights and interests of others unaffected, then, even though the other parties might properly have been added, the Court should determine the matters in controversy between the parties actually present. This decision has been consistently followed by this Court in later cases, 'MT. WALEYATUNNISSA BEGAM v. MT. CHALAKHI', 10 Pat 341, 'MUHAMMAD YUNUS v. CHAMPAMANI BIBI', 18 Pat 141 and 'RAMCHARITAR SAO v. BAWAN PRASAD', AIR (33) 1946 Pat 225. In the last-mentioned case, upon a review of all the relevant decisions on the point, it was held that in order to decide whether a suit can proceed in the absence of certain proper parties, two tests have been laid down:

> "(1) Can the rights of the parties on the record be fully determined in their absence; and (2) can that determination be made necessarily affecting the rights of those absent."

It may be observed that in 'MT. WALEYATUNNISSA BEGUM v. Mt. CHALAKHI', 10 Pat 341 it was pointed out that the proposition laid down in 'GIRWAR NARAIN v. Mt. MAKBULUNNISSA', 1 Pat L J 468 was too broadly stated.

(8) In the light of the aforesaid later decisions, let us now consider whether Jadu was a necessary party. Admittedly there was a partition between Bechan and Jadu's father Birju by which each of them got a half share in the mortgage money. In fact, this defence was taken by the defendant himself and he proved the partition deed. It is, therefore, clear that as between the plaintiffs on the one hand and the mortgagor defendants, including their transferees, on the other, the matter actually in controversy is whether the plaintiffs are entitled to recover a half share in the mortgage money. This question can be fully determined in this suit in the absence of Jadu and without affecting his interest. It is faintly suggested by Mr. Girijanandan Prasad, on behalf of the respondents, that the mortgagors might be exposed to a fresh suit by Jadu. But, in the circumstances of the present case, that contingency can never arise. In the first place, the claim of Jadu, if any, on the basis of the mortgage, is barred by limitation. In

the second place, Jadu himself filed a written statement admitting that he had received his share of the money.

(9) In my view Jadu was not at all a necessary party. The suit, therefore, cannot be held to be barred by limitation.

(10) The plaintiffs are entitled to a half share in the mortgage money, that is to say, Rs. 87/8/- as principal together with Rs. 87/8/- as interest up to the date of the institution of the suit, total Rs. 175/-.

(11) Then remains the question of interest 'pendente lite' and interest subsequent to the date fixed for redemption. O. 34, R. 11, Code of Civil Procedure, which governs the matter, provides:

"11. In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:
(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage
(i) On the principal amount found or declared due on the mortgage, — at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable.....
(b) subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable....."

The word "may" suggests that it is discretionary with the Court to order payment of interest under this rule. But if the Court does order payment of interest, the interest on the principal till the date fixed for redemption will be payable at the rate fixed, or, where no such rate is fixed, at such rate as the Court deems reasonable. In 'JAGANNATH PROSAD v. SURAJMAL', 54 Ind App 1 (PC) and 'KUSUM KUMARI v. DEBI PRASAD', 63 Ind App 114(PC) their Lordships of the Privy Council pointed out that payment of interest from the date of the suit till the date fixed for redemption is in the domain of contract, while the interest payable subsequent to the date fixed for redemption is in the domain of judgment. The first of these cases — the second is not exactly in point — was considered by the Federal Court in 'JAIGOBIND v. LACHMI NARAIN RAM', AIR (27) 1940 FC 20, and their Lordships of the Federal Court pointed out that Order 34, rule 11, Code of Civil Procedure, which was inserted by the Amending Act of 1929, gives a discretion to the Court. In exercise of this discretion, the Court may allow or refuse 'pendente lite' interest. If, however, the Court does allow interest, it seems to me that under Cl. (a)(i) of the rule the interest at the contractual rate, if any, should be given. But this does not mean that where the Court considers that the contractual rate is unconscionable or excessive, it is still bound to allow interest at that excessive rate. Where the Court, in the circumstances of the case, is of opinion that the interest is excessive, the contract must be deemed to be unenforceable, and it is in the discretion of the Court to allow such interest as it thinks proper. It is apparently in this view that the Federal Court in the said decision as also in 'SUBHANAND v. APURBA KRISHNA', AIR (27) 1940 FC 7, did not allow the contractual rate of interest from the date of the suit till the date fixed for redemption. Following the said Federal Court decisions this Court in 'MADHO PRASAD v. MUKUTDHARI SINGH', 22 Pat L T 317, and 'SURENDRA NATH v. DIGAMBAR', AIR (37) 1950 Pat 391, allowed reduced rate of interest on the ground that the contractual rate was unconscionable or excessive. In the present case, in our view 24 per cent. per annum is excessive and this contractual rate cannot be allowed. Keeping in view the provisions of the Bihar Money Lenders Act, we think 9 per cent. per annum simple interest may be allowed. It should be made clear that interest on the principal sum of Rs. 87/8/-, calculated at 9 per cent. per annum from the date of the bond to the date of the suit, exceeds Rs. 87/8/- and, therefore, the plaintiffs are entitled to Rs. 175/- as principal and interest up to the date of the suit.

(12) As regards interest subsequent to the period of redemption, it will be allowed at 6 per cent. per annum on the total decretal amount.

(13) I would accordingly allow the appeal and pass a preliminary decree in favour of the plaintiffs for Rs. 175/- till the date of institution of the suit with interest on the principal sum of Rs. 87/8/- at 9 per cent. per annum from the date of the institution of the suit till the expiry of two months from today, which I would fix as the period of redemption. The total decretal amount including costs will carry interest at 6 per cent. per annum from the date of the expiry of the period of redemption until realisation. The plaintiffs will be entitled to proportionate costs in the trial Court. As regards the costs of the lower appellate Court and of this Court, I would make no order, success being equally divided. Let a preliminary decree for sale be drawn up in the above terms.

(14) LAKSHMIKANTA JHA, C. J.: I agree.

R.G.D. *Appeal allowed.*

A. I. R. (39) 1952 Patna 163 [C. N. 55 (11).]

RAMASWAMI AND SARJOO PROSAD JJ.

Firm Jitanram Nirmalram, Petitioner v. Commr. of Income-tax, B and O, Opposite Party.

Misc. Judicial Cases Nos. 38 and 39 of 1949, D/-23-2-1951.

(a) Income-tax Act (1922), (before its amendment in 1948), S. 34 — Notice — Validity — "Definite information" — Meaning.

The phrase "definite information" in S. 34 cannot be construed in a universal sense; its meaning must depend on and must necessarily vary with the circumstances of each case. It is necessary that the information should be more than mere gossip or rumour. But it need be information of fact, nor need it be information of actual escape of tax. So far as the word "discover" in S. 34 is concerned it only requires that the Income-tax officer should have formed an honest and reasonable beilef upon material which could reasonably support such belief. In the nature of things, it cannot amount to a conclusion of certainty.

(Para 11)

The applicant (assessee) had filed a petn. on 10th April 1944 before the Commr. of Income-tax for recomputation of his liability under the Excess Profits Tax Act. The Commr. had thereupon asked for a report from the Income-tax Officer who was also in charge of collection and assessment of Excess Profits Tax. The officer accordingly recomputed the tax liability of the applicant and communicated the result to the applicant on 18th July 1944. The applicant made his suggestions to the Income-tax Officer on 24th July 1944. Thereafter on 27th July 1944 the Income-tax Officer issued a notice under S. 34 of the Act and at the same time submitted his final report about recomputation of the excess profits to the Commr. of Income-tax. The final order of the Commr. was made on 15th September 1944. Held that it could not be contended that on 27th July 1944 when the Income-tax Officer issued notice under S. 34

there was no "definite information" which had come into his possession in consequence of which he "discovered" that the income had escaped assessment or had been underassessed. AIR (32) 1945 Mad 329; AIR (31) 1944 Pat 338, Disting. (*Para 7*)

(b) *Income-tax Act (1922), S. 34 — Notice under, defective — Jurisdiction to assess liability if affected.*

S. 34, though a part of the Act, imposes no charge on the subject and it is merely part of the machinery of the assessment. The liability to pay the tax is founded on Ss. 3 and 4 of the Income-tax Act, which are the charging Sections. The jurisdiction to assess the liability to pay tax cannot on principle depend on the validity of the notice. It is not necessary in all cases in order to enable the Income-tax Department to receive the money that there should be an assessment actually served on that sum which is ultimately paid. (1926) 10 Tax Cas 88; (1932) 16 Tax Cas 1; 9 Tax Cas 445 and AIR (34) 1947 FC 32, Rel. on. (*Para 12*)

B. N. Jain and Tarkeshwar Pd, for Petitioner; S. N. Dutt, for Opposite Party.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('47) 1947-15 ITR 302: (AIR (34) 1947 FC 32) (Pr 16)
('45) 1945-13 ITR 242: (AIR (32) 1945 Mad 329) (Pr 8)
('44) 1944-12 ITR 341: (AIR (31) 1944 Pat 338) (Prs 8, 10)
(1925) 9 Tax Cas 445: (1925-1 KB 86) (Pr 15)
(1926) 10 Tax Cas 88: (95 LJKB 165) (Pr 13)
(1932) 16 Tax Cas 1: (144 LT 84) (Pr 14)
(1926) Williams v. Henry Williams Ltd. Court of Appeal 3rd Nov. 1926 (Not reported) (Pr 14)

RAMASWAMI J.: This reference is made by the Income-tax Appellate Tribunal under S. 66(2) of the Indian Income-tax Act.

(2) The applicant was assessed under the Excess Profits Tax Act in respect of the chargeable accounting periods corresponding to 1941-42 and 1942-1943. He subsequently filed an application before the Commissioner of Income-tax under S. 20 of the Excess Profits Tax Act for re-calculation of the amounts. The Commissioner asked for a report from the Income-tax Officer who made recomputation and communicated the result to the applicant on 18th July 1944. The applicant made certain suggestions on 24th July 1944. Three days after the Income-tax Officer issued notice under S. 34 of the Income-tax Act which is to the following effect:

> "Whereas in consequence of definite information which has come into my possession I have discovered that your income assessable to income-tax for the year ending 31st March 1943 has (a) escaped assessment, I therefore propose to assess the said income that has escaped assessment. I hereby require you to deliver to me not later than 28-8-44 or within 30 days of the receipt of this notice, a return in the attached form of your total income and total world income assessable for the said year ending 31st March 1943."

The final report was submitted to the Commissioner by the Income-tax Officer on 31st July 1944. On 15th September 1944 the Commissioner passed final order to the effect that there was deficiency of profits and the applicant was not liable to excess profits tax for the years in question. After the receipt of S. 34-notice the applicant filed the requisite returns and his representative stated that the applicant had no objection to the total income being increased by Rs. 29,842 for 1942-43 and by Rs. 19682 for 1941-42. The Income-tax Officer accordingly made statement on these amounts. Against the order of the Income-tax Officer the applicant preferred appeals to the Appellate Assistant Commissioner but was unsuccessful. The applicant again preferred appeals to the Income-tax Appellate Tribunal but the appeals were dismissed.

(3) Pursuant to an order of the High Court under S. 66(2) of the Income-tax Act, the Appellate Tribunal has propounded the following question for determination of the High Court: "Whether in the circumstances of the case, the proceeding under section 34, Income-tax Act, was validly started?"

(4) It appeared to us in the course of argument that the question should be reframed as follows so as to bring out the real issue between the parties: "Whether in the circumstances of the case, the proceeding under S. 34, Income-tax Act, was valid?"

(5) The answer to this question depends upon the construction of S. 34 of the Indian Income-tax Act, 1922, which enacts:

> "If in consequence of definite information which has come into his possession the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act the Income-tax Officer may, in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, at any time within eight years, and in any other case at any time within four years of the end of that year serve on the person liable to pay tax on such income, profits or gains, or in the case of a company, on the principal Officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-s. (2) of S. 22."

(6) On behalf of the applicant the argument was addressed that the notice under S. 34 was not valid since on the date of issue of the notice the final order of the Commissioner of Income-tax with respect to recalculation of the profits of the applicant had not been made. Learned counsel pointed out that it is a necessary condition for the issue of notice under S. 34, that the Income-tax Officer should discover "in consequence of definite information which has come into his possession" that "the incomes or profits or gain have escaped assessment in any year, or have been under-assessed, or have been assessed at too low a rate." It was contended that in the circumstances admitted in the present case the Income-tax Officer could not have discovered on 27th July 1944 that income of the applicant has escaped assessment for the years in question. In my opinion the argument addressed by the learned counsel is untenable and cannot succeed; for it is not questioned in the present case that the applicant had filed a petition on 10th April 1944 before the Commissioner of Income-tax for recomputation of his liability under the Excess Profits Tax Act. The Commissioner had thereupon asked for a report from the Income-tax Officer who was also in charge of collection and assessment of excess profits tax. The Officer accordingly recomputed the tax liability of the applicant and communicated the result to the applicant on 18th July 1944. The applicant made his suggestions to the Income-tax Officer on 24th July 1944. Thereafter the Income-tax Officer issued a notice under

S. 34 of the Act and at the same time submitted his final report about re-computation of the excess profits to the Commissioner of Income-tax. It is true that the final order of the Commissioner was made on 15th September 1944.

(7) But it is impossible to accept the argument of the learned counsel that on 27th July 1944 when the Income-tax Officer issued notice under S. 34 there was no "definite information" which had come into his possession in consequence of which he "discovered" that the income had escaped assessment or had been under-assessed. For it is not possible to assume that the order of the Commissioner was the sole item of information upon which the Income-tax Officer issued notice under S. 34. On the contrary it is clear from the facts which preceded the issue of the notice that the Income-tax Officer had gathered information as a result of his own calculation that a part of the income of the applicant had escaped assessment.

(8) In support of his argument learned counsel referred to 'COMMR. OF INCOME-TAX, MADRAS v. LAKSHMANA IYER', 1945-13 ITR 242 (Mad), and 'FAZAL DHALA v. COMMR. OF INCOME-TAX', B & O, 1944-12 ITR 341 (Pat). But these authorities are not of much assistance to the applicant.

(9) In the Madras case the Chief Justice indeed laid stress on the fact that the application of S. 34 must depend upon the particular circumstances of each case and even definite information with regard to the state of the law would bring the section into operation. Upon the special facts of that case the High Court held that there was no "definite information" in the possession of the Income-tax Officer when he served the notice under S. 34. It appears that the share of profits falling to a minor who had been admitted to the benefits of a partnership in which his father was a partner was under a wrong conception of law, not included in the father's assessment for the year 38-39 it was however included in the following year 39-40 and this inclusion was held to be proper by the High Court in September 1941. In March 1940 the Income-tax Officer had served a notice on the assessee under S. 34 in respect of the son's share of profits which had escaped assessment in 1938-39. But the Income-tax Appellate Tribunal held that the Income-tax Officer was not entitled to reopen the assessment for the year 1938-39 because he had already applied his mind to an identical question and had adjudicated upon it. It is manifest that the facts of the present case are widely different.

(10) In 'FAZAL DHALA'S CASE', 1944-12 ITR 341 (Pat), the assessee was assessed for the year 1937-38 on 4th September 1937 but proceedings under S. 34 were started on 7th May 1938 on the ground that the income of the Madras branch of the assessee had escaped assessment and these proceedings terminated on 30th November 1938. On 30th August 1938 the assessee was assessed for the year 1938-39. On 29th July 1939, a notice under S. 34 was issued to him stating that his income had partially escaped assessment and the final assessment was made on 10th August 1943. The assessee contended that as the only reason for the Income-tax Officer to start proceedings under S. 34 in respect of the year 1938-39 was that the income of the Madras branch had not been assessed and as this fact was present in the mind of the Income-tax Officer on 30th August 1938 when the assessment for 1938-39 became final, the notice under S. 34 issued on 29th July 1939 was not valid in law. Upon the facts of that case it was held by the High Court that the notice under Section 34 of the Indian Income-tax Act issued on 20th July 1939 was not tenable in law. It should be noticed that the Appellate Tribunal had found that at the time the Income-tax Officer started proceeding under S. 34 he had in mind the existence of the Madras branch of the business and there was no material to hold that the Income-tax Officer had some other reason which induced him to issue the notice.

(11) It is manifest that the circumstances of the present case are wholly different. It is obvious that the phrase "definite information" in S. 34 cannot be construed in a universal sense; its meaning must depend and must necessarily vary with the circumstances of each case. It is necessary that the information should be more than mere gossip or rumour. But it need not be information of fact nor need it be information of actual escape of tax. So far as the word "discovers" in S. 34 is concerned it only requires that the Income-tax Officer should have formed an honest and reasonable belief upon material which could reasonably support such belief. In the nature of things, it cannot amount to a conclusion of certainty. Upon the facts stated in this case it is manifest that the notice under S. 34 has been validly issued.

(12) Even if we assume for a moment that the notice under S. 34 is defective it is impossible in my opinion to hold that the proceedings are illegal or that excess assessment made is null and void. It is of importance to state that S. 34, though a part of the Act, imposes no charge on the subject and it is merely part of the machinery of the assessment. The liability to pay the tax is founded on sections 3 and 4 of the Income-tax Act, which are the charging sections. The jurisdiction to assess the liability to pay tax cannot on principle depend on the validity of the notice. I do not think it is necessary in all cases in order to enable the Income-tax Department to receive the money that there should be an assessment actually served of that sum which is ultimately paid.

(13) In 'WHITNEY v. COMMISSIONERS OF INLAND REVENUE', (1926) 10 Tax Cas 88, Lord Dunedin stated: "My Lords, I shall now permit myself a general observation. Once that it is fixed that there is a liability it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determinies what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, 'ex hypothesi', has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay".

(14) In 'W. H. COCKERLINE & CO. v. COMMRS. OF INLAND REVENUE', (1932) 16 Tax Cas 1 Lord Hanworth after quoting the above passage from Lord Dunedin's judgment states:

"Lord Dunedin, speaking, of course, with accuracy as to these taxes, was not unmindful of the fact that it is the duty of the subject to whom a notice is given to render a return in order to enable the Crown to make an assessment upon him; but the charge is made, in consequence of the Act, upon the subject; the assessment is only for the purpose of quantifying it. In a passage in Lord Justice Sergeant's judgment in the Case of WILLIAMS' he says this: 'I cannot see that the non-assessment prevents the incidence of the li-

ability, though the amount of the deduction is not ascertained until assessment. The liability is imposed by the charging section, namely S. 38' —which is Excess Profits Duty—'the words of which are clear. The subsequent provisions as to assessment and so on are machinery only. They enable the liability to be quantified, and when quantified to be enforced against the subject, but the liability is definitely and finally created by the charging section and all the materials for ascertaining it are available immediately.' With the greatest respect to the learned Judge, I think he has attached quite undue importance to the machinery of assessment and recovery and too little importance to the creation and the charge of the liability."

(15) In 'ATTORNEY GENERAL v. ARAMAYO', (1925) 9 Tax Cas 445 the whole Court held that there may be a waiver as to the machinery of taxation which inures against the subject.

(16) The principle has been accepted in 'CHATTURAM v. COMMISSIONER OF INCOME-TAX' BIHAR', 1947-15 ITR 302 (FC) in which the assessees were residents in the Chotanagpur Division in the Province of Bihar. This area was declared to be a "partially excluded area" by an order in Council dated 3rd March 1936. On or about the 20th April, 1940, the assessees were served with a notice under S. 22(2) of the Income-tax Act for furnishing a return for the accounting year 1939-40. On the 22nd April, 1940, a notice under S. 22(1) was published in the newspapers requiring persons generally to submit the returns in the prescribed form. On the 26th May, 1940, the Governor of Bihar by Notification under S. 92(1) of the Government of India Act, 1935, directed that the Indian Income-tax (Amendment) Act, 1939, the Income-tax Law Amendment Act, 1940, and the Indian Finance Act, 1940, should be deemed to have been applied to the Chotanagpur Division with effect retrospectively from the dates on which the said Acts came into force in other parts of the Province of Bihar. The assessees were assessed to income-tax on the 9th March, 1941.

(17) The assessees contended that the assessment proceedings initiated and completed against them were invalid and that neither the Notification nor the Regulation was competent in law to validate those proceedings. It was argued before the Federal Court that the notices under S. 22(1) and (2) of the Income-tax Act were already issued before the Notification of 26th May 1940. It was maintained that the notices were the foundation of the jurisdiction of the Income-tax Officer and since at the material time the Finance Act of 1940 was not operative in the area in question the Governor by his Notification could not give jurisdiction to the Income-tax Officer in respect of his 'ultra vires' notices.

(18) The contention was rejected by the Federal Court on the ground that it was based on a misunderstanding of the jurisdiction of the Income-tax Act. At p. 307 Kania J. (as he then was) observed:

"This contention is founded on a misunderstanding of the jurisdiction of the Income-tax officer and the operation of the Income-tax Act. The income-tax assessment proceedings commence with the issue of a notice. The issue or receipt of a notice is not, however, the foundation of the jurisdiction of the Income-tax Officer to make the assessment or of the liability of the assessees to pay the tax. It may be urged that the issue and service of a notice under S. 22(1) or (2) may affect the liability under the penal clauses which provide for failure to act as required by the notice. The jurisdiction to assess and the liability to pay the tax, however, are not conditional on the validity of the notice."

(19) For the reasons stated I am of opinion that in the circumstances of the case the proceeding under S. 34 of the Income-tax Act was valid and the question of law referred by the Income-tax Appellate Tribunal should be answered in the affirmative. The assessee must pay the costs of this reference. Hearing fee Rs. 250.

(20) SARJOO PROSAD J.: I agree. The only point which has been urged before us, as it was urged before the tribunal, is that the notice issued under S. 34 of the Income-tax Act was not valid; the ground of attack being that the order of the Commissioner of Income-tax under which the recomputation of the profits of the applicant was finalised having been passed in September 1944 notice under S. 34 could not be issued in July 1944 because the Income-tax Officer could not anticipate that the order of the Commissioner would be. The notice, therefore, it is alleged wrongly states that certain sums of money had escaped assessment at the time when the notice was issued. There appears to be some fallacy underlying this argument. There is no doubt that the sums of money indicated in the notice had escaped assessment during the periods in question, namely, 1941-42 and 1942-43 although the discovery is actually made by the income-tax officer at the time when the matter is referred to him for report. He then discovered that these amounts of 'income' had been wrongly included in 'excess profits' and therefore had escaped assessment. There is nothing to show that this was an erroneous inference arrived at by the Income-tax Officer and the fact that this position was not disputed by the assessee when the matter actually came up for assessment before the revenue authorities indicates that the inference of the Income-tax officer was correct. The notice thus contained the statement of an existing fact even on the date of the notice under S. 34 of the Act. Therefore there is nothing wrong with the notice at all. So far as the legal aspect of the question is concerned my learned brother has already very fully discussed the matter and I have nothing to add to that.

V.B.B. *Answer accordingly.*

A. I. R. (39) 1952 Patna 166 *[C. N. 55 (12).]*

LAKSHMIKANTA JHA C. J. AND CHATTERJI J.

Bankey Singh and others, Appellants v. Jhingan Singh and others, Respondents.

A. F. O. D., Nos. 31 of 1947 and 278 and 279 of 1948, and 195, 196 and 197 of 1947, D/- 3-8-1951.

(a) Interpretation of Statutes — Constitutionality of Act — Determination of — Duty of Court.

In deciding the question of the validity of an enactment, it is well-settled that the Court must start with a presumption in favour of its constitutionality. It is therefore, the duty of the Court to uphold an Act of the legislature, if it be possible, without doing any violence to the meaning of the words used therein, to bring it into harmony with any of the provision of the Constitution. AIR (38) 1951 S.C. 41 Relied on; AIR (26) 1939 FC 1 and AIR (37) 1950 S.C. 27 Ref. (Paras 14, 15)

(b) Tenancy Laws — Barahiya Tal Lands (Declaration of Possession) Act (XXVI (26) of 1950) Ss. 2, 3 — Constitution of India, Seventh Schedule, List III, Entry 13 — Act does not relate to arbitration.

The State Legislature is, no doubt, competent to legislate on the topic of "arbitration". But an examination of the provision of the Bihar Act does not show that any law relating to "arbitration" has been enacted. There is nothing in S. 2 or S. 3 of the Act which relates to arbitration and it would be doing violence to the meaning of the words used in the Act if it be held that it is a law, either in form or in substance, with respect to "arbitration". (Para 16)

(c) *Tenancy Laws — Barahiya Tal Lands (Declaration of Possession) Act (XXVI (26) of 1950), S. 2 — Constitution of land, Seventh Schedule, List II, Entry 18 — Act does not relate to land.*

('Per Jha C. J., Chatterji, J. dissenting'): *Entry 18 gives widest power to the legislature of the State in Part A or Part B of the First Schedule of the Constitution to regulate the relation of landlord and tenant in respect of any land by an appropriate legislation. But an examination of the provision of S. 2 of the Act does not show that the State Legislature has enacted any law relating to land. The enactment is concerning rights of persons but does not concern the land itself. In substance and spirit, the Act undertakes to take the property of the landlords and transfer it to the tenants. A statute of this kind, therefore, cannot be said to be a law at all, much less a law relating to land.* (Para 19)

'Per Chatterji J.': *It is true that the heading of the Act shows that it was an Act "to declare the possession of certain raiyats on certain lands of Barahiya Tal". But truly speaking the Act purports to declare raiyati rights over lands. The lands were the real cause of dispute, and if the Act was passed in order to put an end to that dispute it is difficult to hold that it is not a legislation relating to "land".* (Para 55)

(d) *Constitution of India Art. 19(5) — Principle of.*

The underlying principle of Cl. (5) of Art. 19 is that the individual right of full enjoyment of proprietary interest may be restricted in the larger interests of the general public or for the protection of the interests of any Scheduled Tribe, provided the restrictions imposed are reasonable. If therefore, a law imposes any restriction which is not in the interests of the general public or for the protection of the interests of any Scheduled Tribe, such a law must be held to be unconstitutional even if reasonable. (Para 22)

† (e) *Constitution of India, Arts. 19, 31 — Act transferring A's property to B — Validity.*

From the examination of Art. 19 (1) (f) read with (5) thereof and Art. 31 Cls (1), (2) and (3) it is clear that no property can be acquired or taken possession of, nor any restraint, reasonable or otherwise, imposed on the proprietary right of any person in the interest of any individual or individuals. In other words, the State cannot deprive a person of his proprietary right or impose a restraint (reasonable or not) on his right of enjoyment to benefit on individual or individuals. It follows, therefore as a necessary corollary, that if by any legislative enactment property of A is transferred to B, such enactment cannot be said to be valid and constitutional and must be ignored as if it did not exist, because the Constitution does not empower the legislature to make such a law. (Para 26)

(f) *Constitution of India, Art. 245 — Legislative powers of State — Limitation on.*

Though generally the State legislature has under Art. 245 plenary power to legislate with respect to any matter within its own ambit, its enactment must be incompetent and void if in exercising that power it directly affects any right guaranteed by Part III of the Constitution and transgresses the limitations within which the legislation is permissible under the provisions of that Part. (Para 27)

† (g) *Tenancy Laws — Barahiya Tal Lands (Declaration of Possession) Act (XXVI (26) of 1950), Ss. 2, 3—Constitution of India, Art. 19—Validity—Sections are 'ultra vires'.*

Even assuming that the Bihar Act is a legislation with respect to agricultural land, Ss. 2 and 3 of the Act cannot be said to be constitutional because they offend the provisions of Art. 19(1)(f), read with Art. 19 (5) of the Constitution and are in the nature of an expropriatory legislation, because certain landlords' right of enjoyment of the rents and profits issuing from the bakasht lands has been directly curtailed and restricted by the legislature by creating a tenancy to benefit certain specified tenants who do not constitute a class. AIR (38) 1951 S C 118 and A I R (38) 1951 Cal 85, Rel. on. (Paras 28, 39)

(h) *Tenancy Laws — Barahiya Tal Lands (Declaration of Possession) Act (XXVI (26) of 1950), S. 3 — Validity — Section is 'ultra vires' — (Constitution of India, Seventh Schedule, List II, Entry 65 and List III Entry 46).*

Although the State legislature has power to reopen past controversies and make laws, even restrospectively or repeal a state or modify it, or even to pass a validating Act, it has no power to reverse the decisions of any Court because such a power, in its nature, is essentially judicial and has not been conferred on the legislature by the Constitution, either expressly or impliedly. The provisions of S. 3 of the Act are, therefore, void and ultra vires the State legislature. AIR (31) 1944 FC 1 Explained. (Para 35)

(i) *Tenancy Laws — Barahiya Tal Land (Declaration of Possession) Act (XXVI (26) of 1950), S. 3 — Validity — Section is 'ultra vires' — (Constitution of India, Art. 14)*

Art. 14 of the Constitution does not forbid the State to classify the citizens into groups and legislate for them. But the classification must not be unreasonable and arbitrary. (1885) 113 U. S. 27; (1897) 165 U. S. 150 and AIR (38) 1951 S. C. 41 Ref. (Pr 43)

Applying this test S. 3 of the Act is found to offend the provisions of Art. 14. The Act makes differential treatment between the landlords and tenants for whose benefit it is intended. The landlords, including the plaintiffs, are forbidden to seek relief in Court but there is no such limitation imposed upon the tenants, including the defendants, or any other landlord of the locality. Thus there is a complete denial of equality before the law to the landlords governed by the Act which is, therefore 'ultra vires' the State Legislature. (Paras 45, 46)

(j) *Limitation Act (1908), Art. 141 — Trespass during life time of widow — Starting of limitation.*

Even if the trespassers come in possession in the lifetime of the widow, limitation cannot run against the plaintiffs until they became entitled to possession after the death of the widow. (Para 50)

Anno: Lim. Act, Art. 141 N. 21.

Lal Narain Sinha and Medni Prasad Singh, for Appellant; Dr. Sultan Ahmed, Guneshwar Prasad, Ramdeo Singh, L. N. Sinha, N. Chatterji, for D. R. in M. A. 195; A. C. Mitra for D. R. in M. A. 197 and Ishwari Nandan Singh, for D. R. In F. A. 31 of 1947; F. A. 278 and 279 of 1948, for Respondents. The Govt. Pleader, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred comes after the Indian Cases).

('47) 1947 FCR 77: (AIR (34) 1947 PC 72) (Pr 18)
('39) 1939 FCR 18: (AIR) (26) 1939 FC 1) (Pr 14)
('44) 1944-6 FCR 61: (AIR (31) 1944 FC 1: 45 Cri L J 413) (Prs 33, 36, 39)
('50) AIR (37) 1950 S C 27: (51 Cri L J 1383) (Prs 14, 22, 27)
('51) AIR (38) 1951 S C 41: (1950 SCR 869) (Prs 14, 45)
('51) AIR (38) 1951 S C 118: (1950 SCR 759) (Pr 39)
('51) AIR (38) 1951 SC 69: (1951 SCR 51) (Pr 30)
('51) 55 Cal W N 433: (AIR (38) 1951 Cal 85) (Pr 40)
38 Com-W L R 153 (Pr 36)
(1879) 99 US 727: 25 Law Ed 504 (Prs 19, 34)
(1885) 113 U S 27: (28 Law Ed 923) (Pr 43)
(1887) 120 U S 68: (30 Law Ed 578) (Pr 43)
(1897) 165 U S 150: (41 Law Ed 666) (Prs 43, 45)

LAKSHMIKANTA JHA, C. J.: First Appeal No. 31 of 1947 arises out of Title Suit No. 62 of 1944 in which the plaintiffs seek recovery of 9.64 acres of land as 7 annas 13 gandas and odd from co-sharer landlords. First Appeal No. 278 of 1948 arises out of Title Suit No. 61 of 1944 in which the plaintiffs seek recovery of 5.625 acres of land as 4 annas 10 gandas and odd co-sharer landlords. First Appeal No. 279 of 1948 arises out of Title Suit No. 188 of 1945 in which the plaintiffs seek recovery of 4,375 acres of land as 3 annas 10 gandas and odd co-sharer landlords. Thus the total area in dispute in the three suits is a little less than 20 acres, and the plaintiffs in the three suits (hereinafter referred to as the plaintiffs) seek recovery of possession of it from the defendants first party in each suit (hereinafter referred to as the defendants) as the next reversioners of one Ramdhan Singh to whom the land in dispute originally belonged.

(2) Ramdhan Singh died childless sometime in 1872, leaving behind two widows, Manrup Kuer and Pari Kuer. On his death the widows came in possession of his estate. Manrup Kuer died in 1923 and Pari Kuer in 1933. On the death of the latter succession opened and a dispute cropped up between two sets of claimants. The plaintiffs set up their reversionary right as gotias, whereas two other persons, Gaya Prasad Singh and Phalgu Prasad Singh, claimed preferential right as Ramdhan's daughter's sons and set up a deed of surrender in their own favour executed by Pari Kuer. There were litigations between these two sets of rival claimants in the criminal Court under S. 145, Code of Criminal Procedure, for possession of some land and in the revenue Court for mutation of names in respect of the zamindari property. In those cases Gaya and Phalgu succeed. The plaintiffs had, therefore, to institute title suits against them for declaration of title and recovery of possession in respect of the entire heritage. Those suits were tried analogously and were decreed on the 23rd June, 1937, and the plaintiffs recovered possession of the properties through Court on the 28th September, 1937 and the 6th October, 1937.

(3) The land in dispute, which forms part of the estate of Ramdhan and is situated in what is known as Barhaiya Tal, was recorded as bakasht in 1910 in the finally published record-of-rights of the cadastral survey. It appears that at about the time when the plaintiffs got delivery of possession a Kisan movement was started in respect of the Tal land in Barhaiya and other neighbouring mauzas. The plaintiff's case is that the defendants, taking advantage of the agrarian movement, falsely set up tenancy right in the lands in dispute under an oral settlement from Ramdhan's widows, alleged to have been made by them in the year 1328 Fasli (1921) A proceeding under S. 144, Code of Criminal Procedure, was started on the 4th November, 1937, with respect to 4.89 acres of land but it was dropped on the 3rd January, 1938 (vide exhibit Ei).

(4) The Kisan movement created a serious agrarian trouble. In order to put a stop to the movement, an award committee was appointed by the District Magistrate of Monghyr for settlement of the disputes between the zamindars and the kisans with respect to the bakasht land in Barhaiya Tal and other neighbouring places. And, according to the plaintiffs, 15.11 acres of land mentioned in schedule A 1 to the plaint, which is part of the land in dispute, were wrongly given to Bankey Singh (defendant No. 5) under the award of the arbitrators, although they had no semblance of title or possession over the said land, and notwithstanding the award, they continued in possession, but towards the end of the year 1940 Bankey Singh started interfering with their possession with respect to 4.89 acres of land, and a proceeding under S. 145, Code of Criminal Procedure, was started between them which terminated in favour of the said Bankey Singh. The allegation of the plaintiffs is that they were completely dispossessed from the entire land in the three suits as a result of the award of the arbitrators and the decisions in the proceedings under S. 145, Code of Criminal Procedure. Accordingly they instituted these suits on the 9th December, 1944, for recovery of possession of the land in dispute with mesne profits on the ground that the defendants were trespassers.

(5) The defendants contested the suits and their case, in short, is that the plaintiff's story of possession and dispossession is false, that Deonath Singh, father of Bankey Singh (defendant No. 5) obtained settlement of the entire disputed land, along with some other land, from Manrup Kuer and Pari Kuer, widows of Ramdhan, in 1328 Fasli, and that since then they have been in possession as raiyats and have acquired occupancy right therein. The suits, according to them, are, therefore, not maintainable.

(6) The trial Court, on a consideration of the entire evidence adduced by the parties, held that the defendants were trespassers and that they failed to prove their case of settlement. The suits were accordingly decreed on the 26th November, 1946, with mesne profits. Thereupon the defendants preferred these three appeals to this Court on the 7th February, 1947. During the pendency of the appeals here the plaintiffs took out execution of the decrees and got delivery of possession of the disputed land. But later on, after the passing of an Act known as "The Barahiya Tal Lands (Declaration of Possession) Act, 1950" (hereinafter referred to as the Act), the disputed land was put in the hands of a receiver and Kaushal Kishore, a plaintiff in one of the three suits, was appointed receiver by this Court and he is in possession of the land in dispute as such.

(7) From the preamble to the Act it appears that there was as already stated, an agrarian movement in certain areas of Barahiya Tal which attracted the attention of Dr. Rajendra Prasad (now the President of the Indian Union). He intervened and settled the principles according to which the dispute between the zamindars and the kisans was to be decided. Notwithstanding his decision the trouble continued, whereupon there was a meeting of the representatives of the Congress, the kisans and the zamindars and at that meeting certain persons were appointed arbitrators to decide the dispute. They gave their deci-

sion in the matter on the 20th May, 1939, according to which the land of the Tal was given to a number of persons. It is admitted that none of the persons interested in the award applied to any Court having jurisdiction over the subject-matter of the award, for filing of the award according to the provisions of Schedule II, R. 20(1), Code of Civil Procedure, which was then in force. Nor was the award registered under S. 17 of the Indian Registration Act. Under the orders of the Government, however, the lands found in possession of the raiyats according to the decision of the arbitrators were demarcated and maps and khesras were prepared accordingly. But the zamindars including the plaintiffs, did not accept the decision of the arbitrators and suits were instituted for recovery of possession of the lands from the persons to whom they had been given under the award.

(8) It was brought to our notice in the course of hearing of these appeals that one case actually came to this Court for hearing before Reuben, J. ('S. A. No. 17 of 1943') who by his judgment dated the 22nd March, 1944, affirmed the decision of the Court of appeal below decreeing the zamindar's suit for recovery of possession.

(9) In the suits before us, the trial Court held, as already stated, that the defendants are trespassers. The long title of the Act shows that it was passed

> "to declare the possession of certain raiyats on certain lands of Barahiya Tal and to nullify decrees and orders inconsistent with such possession."

(10) The Act is a short one consisting of only three sections. Section 1 gives the short title, and Sections 2 and 3 read as follows:

> "2. The persons described in column 3 of the schedule shall be deemed to have been in possession as raiyats on the twentieth day of May, 1939, of the lands described in the corresponding entries in columns 4 and 5 thereof and shown in the maps attested by Mr. M. M. Philip, I.C.S., Collector of Monghyr, on the thirty-first day of March 1940, and kept in the record room of the Collector at Monghyr.
>
> 3. No suit or other legal proceeding shall lie in any Court to question the possession declared under S. 2 and any decree or order passed or made before or after the twentieth day of May, 1939, that may be inconsistent with such possession or anything done in pursuance thereof shall be null and void."

There is a long schedule to the Act in which the names of the landlords are given in column 2, the names and descriptions of raiyats in column 3, the survey plot numbers in column 4 and the areas in column 5. On an analysis of the schedule, it appears that 506.33 acres of land in 36 tauzis under 43 maliks and situated in seven mauzas were given to 261 tenants.

(11) In respect of the land in the three suits the name of Beseswar Singh, predecessor-in-interest of the plaintiffs, finds place in the column of landlords and the name of Bankey Singh, father of the defendants, in the column of tenants. The three suits out of which these three appeals arise are confined to the land recorded in the name of Bankey Singh.

(12) An examination of the provisions of the Act shows that it was passed (1) to confer title as raiyats on certain specified persons in respect of certain specific portions of the Tal land in the Barahiya Tal and declare their possession as tenants, (2) to bar suits or other legal proceedings in respect of such land in any Court questioning the possession of those tenants and (3) to nullify any

> "decree or order passed or made before or after the twentieth day of May, 1939, that may be inconsistent with such possession or anything done in pursuance thereof."

(13) Mr. Lal Narain Sinha, appearing for the appellants and the State, contended, as a preliminary point, that the appeals are not maintainable because the power of this Court to hear the appeals has been taken away by S. 3 of the Act. The contention of Dr. Sultan Ahmed, on behalf of the plaintiffs, on the other hand, was that the Act is 'ultra vires' the State Legislature because it is not with respect to any of the matters enumerated either in List II or List III of the Seventh Schedule of the Constitution. He also contended that, even if there be legislative competence, the Act is void under Art. 13(2) because it infringes the fundamental rights of the plaintiffs guaranteed under Arts. 14 and 19(1)(f) of the Constitution. In short, his point was that the Act is void because (1) it restricts the right of enjoyment of property and the restriction is not either in the interests of the general public or for the protection of the interests of any Scheduled Tribe and thus abridges the fundamental rights of the plaintiffs "to hold property", (2) it is expropriatory, (3) it is in the nature of a legislative judgment, and (4) it denies the equal protection of laws.

(14) The important question for decision is whether the Act is constitutional. In deciding the question of the validity of an enactment, it is well-settled that we must start with a presumption in favour of its constitutionality. I may quote here the observation of Fazl Ali, J., in the case of 'CHARANJIT LAL v. THE UNION OF INDIA', AIR (38) 1951 S.C. 41, at p. 45, which runs as follows:

> "It is the accepted doctrine of the American Courts, which I consider to be well-founded on principle, that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles."

Similar views were expressed by Gwyer, C. J. in 're C. P. & BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION', 1938; '1939 F.C.R. 18' and by Kania, C. J. in 'GOPALAN v. STATE OF MADRAS', AIR (37) 1950 S.C. 27.

(15) It is, therefore, the duty of the Court to uphold an Act of the legislature, if it be possible, without doing any violence to the meaning of the words used therein, to bring it into harmony with any of the provisions of the Constitution. Dr. Sultan Ahmed contended that this presumption is rebutted in the present case because it is not possible, even on a most liberal construction, to bring the provisions of the Act under any of the legisiative matters enumerated either in List II or List III of the Seventh Schedule of the Constitution. Mr. Lal Narain Sinha contended that the Act is constitutional and his argument was that the enactment in a law relating to "arbitration" and is covered by Entry 13 of List III of the Seventh Schedule of the Constitution and that there is no infringement of any of the fundamental rights guaranteed by the Constitution. Entry 13 of List III of the Seventh Schedule is in these terms:

> "13. Civil Procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, Limitation and arbitration".

In my view, there is no provision in the Act which can be said to be a law relating to "arbitration."

(16) The State Legislature is, no doubt, competent to legislate on the topic of "arbitration". But an examination of the provision of the Act does not show that any law relating to "arbitration" has been enacted. A reference has been, no doubt, made to the date on which certain arbitrators gave their decision but no reference has been made to the award or to the arbitration proceedings either in the Act or in the preamble. There is nothing in S. 2 of the Act relating to arbitration. It simply declares that

> "persons described in column 3 of the Schedule shall be deemed to have been in possession, as raiyats on the twentieth day of May, 1939, of the lands described in the corresponding entries in columns 4 and 5 thereof".

Nor is there anything in S. 3 of the Act laying down any rule of law with respect to arbitration. The Act is not, in my opinion, either directly or indirectly, on a matter relating to "arbitration". There is not a word in the Act having even a remote bearing on the law relating to "arbitration". The argument of Mr. Lal Narain Sinha does not get any support from the words used in the Act. It would, therefore, be doing violence to the meaning of the words used in the Act if it be held that it is a law, either in form or in substance, with respect to "arbitration". This contention of the appellants must therefore, be rejected.

(17) The alternative argument of Mr. Lal Narain Sinha was that even if the Act be not a law relating to "arbitration", the enactment must be held to be valid and constitutional because the provisions of S. 2 of the Act are wholly covered by Entry 18 and those of S. 3 by Entry 65 of List II of the Seventh Schedule of the Constitution. These two entries run as follows:

> "18. Land, that is to say, rights in or over land, land-tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.
>
> 65. Jurisdiction and powers of all Courts except the Supreme Court, with respect to any of matters in this List."

(18) It cannot be disputed that the Constitution has given a very wide power to the State Legislature to legislate on the topic of "land" whether agricultural or not. The word "land" has been used in the Constitution in its generic sense without any qualification. The words that follow the word "land" are simply explanatory and illustrative and do not in any way restrict its meaning or cut down the ambit of the legislative field. Lord Wright in 'MEGH RAJ v. ALLAH RAKHIA', 1947 F. C. R. 77, at p. 86 (P. C.) while interpreting item 21 of List II of the Government of India Act, 1935, which is textually identical with entry 18 of List II of the Seventh Schedule of the Constitution, so far as the relevant words are concerned, observed:

> "The key to item 21 is to be found in the opening word, "land". That word is sufficient in itself to include every form of land, whether agricultural or not. Land, indeed, is primarily a matter of provincial concern. The land in each province may have its special characteristic in view of which it is necessary to legislate, and there are local customs and traditions in regard to land-holding and particular problems of provincial or local concern which require provincial consideration. It would be strange if the land in a province were to be broken up into separate portions, some within and some outside the legislative powers of the province. Such a conflict of jurisdiction is not to be expected. Item 21 is part of a constitution and would, on ordinary principles, receive the widest construction, unless for some reason it is cut down either by the terms of item 21 itself or by other parts of the Constitution, which has to be read as a whole. As to item 21, "land", the governing word, is followed by the rest of the item, which goes on to say, "that is to say". These words introduce the most general concept" 'Rights in or over land'. 'Rights in land' must include general rights like full ownership or leasehold or all such rights. "Rights over land" would include easements or other collateral rights, whatever form they might take. Then follow words which are not words of limitation but of explanation or illustration, giving instances which may furnish a clue for particular matters: thus there are the words "relation of landlord and tenant, and collection of rents". These words are appropriate to lands which are not agricultural equally with agricultural lands. Rent is that which issues from the land. Then the next two sentences specifically refer to agricultural lands, and are to be read with items 7, 8 and 10 of List III. These deal with methods of transfer or alienation or devolution, which may be subject to federal legislation, but do not concern the land itself, a sphere in which the provincial and federal powers are concurrent, subject to the express exception of the specific head of agricultural land which is expressly reserved to the provinces. The remainder of item 21 specifies important matters of special consequence in India relating to land. The particular and limited specification of agricultural land proves that "land" is not used in item 21 with restricted reference to agricultural land but relates to land in general."

(19) Thus it is clear that the State Legislature is competent to legislate with regard to any interest in or over land of all classes whether agricultural or not and if any of the fundamental rights guaranteed by Part III of the Constitution is indirectly affected as a result of the operation of such legislation, the enactment cannot be said to be unconstitutional. The State Legislature can, therefore, in exercise of its power under the Constitution, create, extinguish, limit or even revive lost rights in respect of land generally. Entry 18 gives widest power to the legislature of the State in Part A or Part B of the First Schedule of the Constitution to regulate the relation of landlord and tenant in respect of any land by an appropriate legislation. But an examination of the provision of S. 2 of the Act does not show that the State Legislature has enacted any law relating to land. The only purpose of the Act is to treat the possession of the persons mentioned in column 3 of the Schedule to the Act as raiyats on a particular date in respect of the lands mentioned against their names. The dominant purpose of the Act is really to give legislative recognition to the possession of those persons and treat them as raiyats of the persons mentioned in column 2 of the Schedule to the Act in respect of the land mentioned against their names in columns 4 and 5 thereof. Therefore, the enactment is concerning rights of persons but does not concern the land itself. In substance and spirit, the Act undertakes to take the property of the plaintiffs and transfer it to the defendants. A statute of this kind, therefore, in my judgment, cannot be said to be a law at all, much less a law relating to land. In 'CENTRAL PACIFIC R. R. CO. v. GALLATIN', (1879) 99 U. S. 727: 25 Law Ed. 504, at p. 508) Strong, J. in a dissenting judgment held that

> "a statute undertaking to take the property of A

and transfer it to B is not legislation. It would not be a law."

(20) Even if the view that I have taken be not correct and the Act be held to be a law relating to land, creating relation of landlord and tenant, there is no escape from the conclusion that the enactment is a direct legislation with respect to the land belonging to the plaintiffs and other landlords and therefore, in my view, notwithstanding legislative competence the Act is unconstitutional because it directly infringes the plaintiff's fundamental right guaranteed by Part III of the Constitution. The people of Free India, who have given the Constitution, have, in the exercise of their Sovereign power, guaranteed to every citizen by Part III of the Constitution the right "to acquire, hold and dispose of property" and certain other rights which are sacred and inviolable and are inherent in the citizens of every free country. Article 13(1) provides that any existing law inconsistent with or in derogation of the fundamental rights so guaranteed shall, to the extent of such inconsistency, be void, and in Cl. (2) thereof it is provided that the State shall not make any law which takes away or abridges the rights conferred by Part III, and any law made in contravention thereof shall, to the extent of the contravention, be void.

(21) Article 19 is important. It guarantees a number of rights but we are concerned here only with right to property. By Cl. (1)(f) all citizens have been guaranteed "the right to acquire, hold and dispose of property". But this right is not absolute. The State may impose "reasonable restrictions" on the exercise of the proprietary rights, provided such restrictions are necessary in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Art. 19 (5) provides:

"Nothing in sub-cls. (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the the interests of the general public or for the protection of the interests of any Scheduled Tribe."

(22) The underlying principle of Cl. (5) of Art. 19 is that the individual right of full enjoyment of proprietary interest may be restricted in the larger interests of the general public or for the protection of the interests of any Scheduled Tribe, provided the restrictions imposed are reasonable. If, therefore, a law imposes any restriction which is not in the interests of the general public or for the protection of the interests of any Scheduled Tribe, such a law must be held to be unconstitutional even if reasonable. Restriction, as held in 'GOPALAN's Case' AIR (37) 1950 S. C. 27 implies a partial control. Therefore, if a citizen holds a property, his right of enjoyment may be partially controlled in the larger interests of the general public or for the protection of the interests of the Scheduled Tribe.

(23) It would not be out of place here to refer to Art. 31 of the Constitution which also finds place in Part III thereof. The material portions of the Article, which are relevant for our purpose, are Cls. (1), (2) and (5) (b) which are as follows:

"31 (1) No person shall be deprived of his property save by authority of law,

(2) No property, moveable or immovable, including any interest in, or in any company owning any commercial or industrial undertaking shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which and the manner in which, the compensation is to be determined and given.

(5) Nothing in Cl. (2) shall affect:

(b) the provisions of any law which the State may hereafter make:

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) ....."

(24) Thus it is clear that not only a person's right to hold property is subject to reasonable restrictions, but he may also be deprived of his property by authority of law, and the property of a person, movable or immovable, may be taken possession of or acquired by the State in exercise of the right of what is known in America as the right of "eminent domain" for public purposes provided there is a law authorising the taking of such possession or such acquisition and the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to determined. Similarly, in exercise of what is known in America as the police power of the State, a person may be deprived of his property under the provisions of any state law for the purpose of imposing or levying any tax or penalty, or for the promotion of public health or the prevention of danger to life or property, and in such a case provision for compensation is not necessary.

(25) From an examination of the provisinos of Art. 19(1)(f), read with Cl. (5) thereof, and Art. 31, Cls. (1) (2) and (5), the following propositions are clearly established: (1) reasonable restraint can be imposed on the right of enjoyment either in the interests of the general public or for the protection of the interests of any Scheduled Tribe, (2) acquisition may be made or possession may be taken of any property, movable or immovable, of any person for public purposes in exercise of the right of "eminent domain" for compensation, and (3) a person may be deprived of his property, by authority of law, by the State in exercise of "police power" for the purpose of imposing or levying any tax or penalty, or for the promotion of public health or the prevention of danger to life or property even without compensation.

(26) It is, therefore, clear that no property can be acquired or taken possession of, nor any restraint, reasonable or otherwise, imposed on the proprietary right of any person in the interest of any individual or individuals. In other words, the State cannot deprive a person of his proprietary right or impose a restraint (reasonable or not) on his right of enjoyment to benefit an individual or individuals. It follows, therefore as a necessary corollary, that if by any legislative enactment property of A is transferred to B, such enactment cannot be said to be valid and constitutional and must be ignored as if it did not exist, because the Constitution does not empower the legislature to make such a law.

(27) Article 245 of the Constitution imposes a limitation on the power of the legislature. It provides that the legislature of a State may make laws for the whole or any part of the State "subject to the provisions of the Constitution" which necessarily implies that the legislature can make

laws subject to the provisions of Part III of the Constitution. Therefore, though generally the legislature has plenary power to legislate with respect to any matter within its own ambit, its enactment must be incompetent and void if in exercising that power it directly affects any right guaranteed by Part III of the Constitution and transgresses the limitations within which the legislation is permissible under the provisions of that Part. Kania, C. J., in 'GOPALAN v. STATE OF MADRAS', AIR (37) 1950 S. C. 27, at p. 35 observed as follows:

"If there is a legislation 'directly' attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saying clause of Art. 19 will arise. If, however, the legislation is not 'directly' in respect of any of these subjects, but as a result of the operation of other legislation, for instance for punitive or preventive detention, his right under any of these subclauses is abridged, the question of the application of Art. 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life" (italics (here single quoted) are mine).

(28) Therefore, even if the legislation be with regard to land, it directly creates a relationship of landlord and tenant between the plaintiffs and the defendants in respect of the plaintiff's bakasht land. It is a special enactment, the provisions of which impose a limitation on the proprietary right of the plaintiffs and other landlords mentioned in the Schedule to the Act. The plaintiff's right to hold and enjoy their bakasht land as full owners thereof is abridged because restrictions have been imposed upon their proprietary right to enjoy their bakasht lands and these restrictions are not either in the interests of the general public or in the interests of any Scheduled Tribe as required by Art. 19, Cls. (1) (5). The provisions of S. 2 of the Act are not therefore, within the limits imposed by Art. 19, Cl. (5), of the Constitution because the plaintiff's right of enjoyment of the rents and profits issuing from the bakasht lands has been directly curtailed and restricted by the legislature by creating a tenancy right to benefit the defendants who do not constitute a class. It may be mentioned here that Mr. Lal Narain Sinha conceded that it is not his case that under the Act the land in dispute has been acquired or taken possession of for compensation nor does the Act pretend to acquire the land in dispute from the plaintiffs or deprive them of their khas possession for compensation or otherwise. Therefore, even on the assumption that the Act is a legislation with respect to agricultural land, S. 2 of the Act cannot be said to be constitutional because it offends the provisions of Art. 19(1)(f), read with Art. 19(5), of the Constitution and is in the nature of an ex-propriatory legislation.

(29) Now the question for decision is whether S. 3 of the Act is 'ultra vires' the State Legislature. By the first part of the section the plaintiff's right to sue in any Court to question the possession of the defendants declared under S. 2 of the Act has been taken away, and by the second part any decree or order of the Court passed or made before or after the twentieth day of May, 1939, inconsistent with such possession of the defendants or anything done in pursuance thereof, has been nullified and declared void. Thus, the legislature has by this section not only taken away the jurisdiction of the Courts but has also reversed their decisions.

(30) The power of the State Legislature to take away the jurisdiction of the Court by a legislative enactment cannot be questioned but the legislature has no power to enact a law to nullify decrees or orders of Court and declare them void because such a power is judicial in its nature. Entry 3 of List II of the Seventh Schedule empowers the legislature to legislate with respect to administration of justice, constitution and organization of all Courts, except the Supreme Court and the High Court. Entry 65 of List II empowers the legislature to legislate with respect to jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in List II. Similarly, Entry 46 of List III empowers the State Legislature to legislate with respect to the jurisdiction and powers of all Courts except the Supreme Court, with respect to any of the matters in List III. Thus it is clear that the State Legislature has power to take away the jurisdiction and powers of all Courts (including the High Court) except the Supreme Court, with respect to any of the matters in List II or List III of the Seventh Schedule. The Supreme Court in the case of the 'STATE OF BOMBAY v. NAROTTAMDAS JETHABHAI', AIR (38) 1951 S. C. 69 has held that the State Legislature is competent to legislate, negatively as well as affirmatively, with regard to the jurisdiction of the Courts with respect to the matters within its legislative ambit and that it can bar the jurisdiction of the Courts in regard to those matters in respect of which it has power to make laws under List II or List III. Therefore, in view of the decision of the Supreme Court it must be held that it is within the competence of the State Legislature to take away the jurisdiction of Court. But the State legislature is not, in my opinion, competent to reverse the decisions and orders of Courts and nullify their effect in exercise of such powers because the powers to nullify the decrees and orders of a Court is purely a judicial power and the Constitution does not appear to have given jurisdiction to the legislature, either expressly or by necessary intendment, to arrogate to itself the power to adjudicate — a power which is exclusively within the jurisdiction of the Court.

(31) Under the Constitution, the governmental powers are divided into legislative, executive and judicial. The legislative power has been delegated to the legislature and distributed between the Parliament and the legislature of the States in Parts A and B of the First Schedule of the Constitution under Art. 246. The matters with respect to which the Parliament and the State legislatures are competent to legislate have been enumerated in Lists I, II and III of the Seventh Schedule of the Constitution. The Parliament has exclusive jurisdiction to make laws with respect to any of the matters enumerated in List I. The legislature of any State specified in Part A or Part B of the First Schedule of the Constitution has exclusive jurisdiction to legislate with respect to any of the matters enumerated in List II and the Parliament and the legislature of any State specified in Parts A & B of the First Schedule have concurrent jurisdiction to legislate with respect to any of the matters enumerated in List III subject to certain limitations. By Art. 248 the Parliament has been given exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List. The residuary power of Legislation is, therefore, vested exclusively in the Parliament.

(32) The executive power of the Union is vested in the President by Art. 53 of the Constitution, which is to be exercised by him either directly or

through officers subordinate to him. Similarly, the executive power of the State is vested by Art. 154 in the Governor and is to be exercised by him either directly or through officers subordinate to him.

(33) Thus, it is clear that the Constitution defines and delimits the powers of the legislature and the executive and, although the existence of the judiciary is assumed and recognized under the Constitution and even establishment of additional Courts provided for, its powers have not been defined. But it is well settled that when a department is created by the Constitution to the exercise of judicial authority, the Constitution contemplates the whole judicial power to be exercised by the judicial department alone with such exceptions only as the Constitution itself may make. Cooley in his treatise on Constitutional Limitations states the law thus:

"The different classes of power have been apportioned to different departments; and as all derive their authority from the same instrument, there is an implied exclusion of each department from exercise the functions conferred upon the others". (Cooley's Constitutional Limitations, Eighth Edition, Vol. I, page 175)."

And at page 177 he says:

"The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the Principal Courts of justice, create implied limitations under the law-making authority as strong as though a negative was expressed in each instance."

The law in India is not different for Spens, C. J. observed in 'PIARE DUSADH v. EMPEROR', 1944 -6 F.C.R. 61 at p. 100:

"As a general proposition, it may be true enough to say that legislative function belongs to the legislature and the judicial function to the judiciary. Such differentiation of functions and distribution of powers are in a sense part of the Indian law as of the American law."

(34) I have already stated that the preamble to the Act shows that there were disputes between the landlords and the tenants mentioned respectively in columns 2 and 3 of the Schedule to the Act in respect of the land fully set out in the Schedule. The Act purports to quiet title and give legislative finality to the decision of arbitrators by making the matter non-justiciable. The effect of the enactment, however, is directly to reach the property of the plaintiffs by providing for transfer to the defendants, without trial and judgment in Courts. Thus, by the Act, the legislature has passed the plaintiff's property to the defendants. Such a power has not been, as already stated, vested in the legislature by the Constitution. Willis states the law thus:

"It may be stated that a legislature has no power to reverse a judgment rendered by a Court. Neither can it modify a judgment, nor impair the remedies by which it may be enforced. A legislature cannot directly adjudicate controversies." (Willis on Constitutional law, page 159)

Cooley puts the same point thus:

"A legislative enactment to pass one man's property over to another would nevertheless be void, If the Act proceeded upon the assumption that such other person was justly entitled to the estate, and therefore it was transferred it would be void, because judicial in its nature; and if it proceeded without reasons, it would be equally void, neither legislative nor judicial, but a mere arbitrary fiat." (Cooley's Constitutional Limitations Eighth Edition, Vol. I, page 357)

And in the footnote of the same page he says:

"It is now considered an universal and fundamental proposition in every well regulated and properly administered Government, whether embodied in a constitutional form or not, that private property cannot be taken for strictly private purposes at all, nor for public uses without a just compensation; and that the obligation of contracts cannot be abrogated or essentially impaired. These and other vested rights of the citizen are held sacred and inviolable even against the plenitude of power of the legislative department."

I may refer again to the observations of Strong, J. in 'CENTRAL PACIFIC R. R. CO. v. GALLATIN' (1879) 99 U.S. 727: 25 Law Ed. 504 at p. 508, who, while holding that the property of A cannot be transferred to B by a legislative enactment, observed:

"It would not be a law. It would be a decree or sentence the right to declare which, if it exists at all, is in the judicial department of the government. The Act of Congress is little, if any more. It does not purport to be a general law. It does not apply to all Corporations or to all debtors of the government. It singles out two Corporations, debtors of the government, by name and prescribes for them as debtors new duties to their creditors. It thus attempts to perform the functions of a Court. This, I cannot but think, is outside of legislative action and power."

(35) Therefore, in my judgment, although the legislature has power to reopen past controversies and make laws, even retrospectively or repeal a statute or modify it, or even to pass a validating Act, it has no power to reverse the decisions of any Court because such a power, in its nature, is essentially judicial and has not been conferred on the legislature by the Constitution, either expressly or impliedly. The provision of S. 3 of the Act must, therefore, be held to be void and 'ultra vires' the State legislature.

(36) Mr. Lal Narain Sinha strongly relied upon the decision in 'PIARE DUSADH's Case', (1944) 6 F.C.R. 61 and contended on its authority that the State Legislature is competent not only to take away the jurisdiction of the Court but also to nullify the effect of decrees passed or orders made by any Court and reopen a past controversy and set the controversy at rest by a legislative action. But I do not think the decision in 'PIARE DUSADH's Case' supports the extreme contention of Mr. Lal Narain Sinha that the legislature is competent not only to nullify decrees or orders of Court and reopen past controversies but also to set at rest such controversies by a legislative action. The law in America is that the legislative function belongs to the legislature and the judicial function belongs to the judiciary, and one result of the application of this rule in the United States has been to hold that:

"Legislative action cannot be made to retroact upon past controversies and to reverse decisions which the Courts in the exercise of their undoubted authority have made".

Therefore, according to the American authorities, the legislature is incompetent to make retrospective laws because this would amount to usurpation of the functions of Courts. Relying upon the American view it was contended before the Federal Court that the legislature in India is equally incompetent to legislate retrospectively. But this argument was repelled and it was held that making retrospective laws is not exercise of a judicial function. In repelling this argument Spens, C. J. observed (at p. 101-102):

"In India, however, the legislature has more than once enacted laws providing that suits which had been dismissed on a particular view of the law must be restored and 'retried'. Two well-known instances are S. 31(2) of the Indian Limitation Act, 1908, which provided for the restoration of suits dismissed on the ground that the twelve years' period of limitation under Art. 132 of the Limitation Act applied to suits for sale by holders of simple mortgages and the Public Suits Validation Act (XI of 1932) which provided for the restoration of suits dismissed on a particular interpretation of S. 93 of the Code of Civil Procedure. Again, debt relief legislation in the various provinces has provided even for the reopening of decrees passed 'inter partes'. In view of the history of the rule in America, it is questionable whether it would be right to apply the same rule in this country. Further, the American authorities themselves show that, even in the United States limitations had to be placed on the strict American rule and that it was not found possible to differentiate by a clear-cut definition the exercise of legislative power from the exercise of judicial power. (See Willis' Constitutional Law of the United States, page 142)."

The learned Chief Justice, relying upon the views of Isaacs and Starke, JJ. in 'FEDERAL COMMISSIONER OF TAXATION v. MUNRO', 38 Com-W L R 153 as well as the legislative practice in India, held that making a law retrospective is not an exercise of the judicial power on the part of the legislature.

(37) Another extreme contention raised was that what the Ordinance had attempted to do amounted to exercise of judicial function. Again at another place the learned Chief Justice observed:

"'The legislature has not attempted to decide the question of the guilt or innocence of any of the accused'. That question had as a matter of fact been decided by tribunals which were directed to follow a certain judicial procedure." (The italics (here single quoted) are mine).

(38) Therefore, 'PIARE DUSADH's CASE is an authority for the proposition that in India the legislature is competent to put an end to the finality of a decision of Court and reopen a past controversy and even to pass validating Acts and that making such laws does not constitute exercise of judicial function; but it is not an authority for the proposition that, after the transaction is reopened and the finality is put an end to, the legislature can set as rest the controversy between the parties by a legislative pronouncement — a function which belongs exclusively to the Court.

(39) Even if it be assumed that 'PIARE DUSADH's CASE' (1944-6 FCR 61) is an authority for the proposition that the State Legislature is competent to nullify decrees or orders of Court by a legislative enactment, the Act cannot, in my judgment, be held to be constitutional, because the plaintiff's right to hold property is restricted by the Act in derogation of the provisions of Art. 19(5) of the Constitution. The land in dispute being admittedly bakasht, the plaintiffs have right of khas cultivation, but under the Act their right to khas possession has been taken away and the landlords are to remain in possession through certain tenants who shall be deemed to be raiyats under them. Thus a restriction has been imposed by the Act on their right of enjoyment. This restriction is not either in the interests of the general public or for the protection of the interests of any Scheduled Tribe; nor is the restriction reasonable. The Supreme Court has recently considered the question of reasonableness in the case of 'CHINTAMANRAO v. STATE OF MADHYA PRADESH', AIR (38) 1951 SC 118 and Mahajan J. has held that

"The word 'reasonable' implies intelligent care and deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness."

Therefore, the Act must be held void and unconstitutional by reason of Art. 19(5) of the Constitution.

(40) A similar point came up for consideration before a bench of the Calcutta High Court in the case of 'SUBODH GOPAL v. BEHARI LAL', 55 Cal W N 433 and it was held by their Lordships that S. 7 of the impugned Act — the constitutionality of which came up for consideration was 'ultra vires' Art. 19(1)(f) read with Art. 19(5) of the Constitution. The facts of that case were shortly these: One entire tauzi was sold at a revenue sale and purchased by the plaintiff of that suit. After purchase the plaintiff annulled the under-tenures and tenancies which he was entitled to avoid and annul under S. 37 of Act XI of 1859, as it stood at date of the sale and the date of the institution of the suit. After the annulment the purchaser instituted a suit for ejectment of the persons in possession of such tenures. The suit was contested by one of the defendants. The learned trial judge overruled the objections of the defendant and passed a decree in favour of the plaintiff by his judgment dated 14th February, 1949. The defendant thereupon preferred an appeal on the 25th March, 1949, to the District Judge. During the pendency of the appeal the West Bengal Legislature passed an Act called "The Bengal Land Revenue Sales (West Bengal Amendment) Act, 1950", which received the assent of His Excellency the Governor on the 15th March, 1950, and was published in the Calcutta Gazette (Extraordinary) of the date. The defendant relied upon the Act and contended that the plaintiff's right to claim recovery of possession was barred by the provisions of S. 7 of the Act. Thereupon, the plaintiff moved the High Court and contended that the Act was 'ultra vires'.

(41) The preamble of the Act is:

"Whereas it is expedient further to amend the Bengal Land Revenue Sales Act, 1859, in its application to West Bengal, for the purposes and in the manner hereinafter appearing".

By that Act S. 37 of Act XI of 1859 was replaced by S. 4 of the Amending Act of 1950. S. 4 of the Amending Act provided that the purchaser is not entitled to annul tenures and tenancies such as he could do under S. 37 of the Act of 1859. In the Act there was another important provision which is embodied in S. 7 of the Amending Act which is as follows:

"7. (1) (a) Every suit or proceeding for the ejectment of any person from any land pursuance of S. 37 or S. 52 of the said Act and

(b) every appeal or application for review or revision arising out of such suit or proceeding, pending at the date of commencement of this Act, shall, if the suit, proceeding, appeal or application could not have been validly instituted, preferred or made had this Act been in operation at the date of the institution, the preferring or the making thereof, abate.

(2) Every decree passed or order made, before the date of commencement of this Act, for the ejectment of any person from any land in pursuance of S. 37 or S. 52 of the said Act, shall, if the decree or order could not have been valid-

ly passed or made had this Act been in operation at the date of the passing or making thereof, be void:

Provided that nothing in this section shall affect any decree or order in execution whereof the possession of the land in respect of which the decree or order was passed or made has already been delivered before the date of commencement of this Act.

(3) Whenever any suit, proceeding, appeal or application abates under sub-s. (1) or any decree or order becomes void under sub-s. (2), all fees paid under the Court-fees Act, 1870, shall be refunded to the parties by whom the same were respectively paid."

(42) It was contended, on behalf of the plaintiff, that S. 7 violates the fundamental right assured to him by Art. 19(1)(f) of the Constitution to acquire, hold and dispose of property and as such is void, under Art. 13. Dealing with this part of the argument, Harries, C.J. observed at page 441:

"The right to hold property is the right to exercise and enforce all the rights which the ownership of property or of any interest therein involves. If any of these rights are taken away or prejudicially affected, the right to hold such property has to that extent been affected or restricted. Where any rights are taken away or abridged the owner of the property holds the property with restricted rights therein. His right of enjoyment has been curtailed or restricted and therefore it appears to me to be clear that section 7 of the amending Act does impose restrictions on the holding of property".

Again at page 442 he observed:

"Section 7 is prima facie unreasonable and prima facie does impose an unreasonable restriction on the petitioner's fundamental right to hold property."

He accordingly held:

"In my judgment S. 7 of this amending Act is 'ultra vires' Arts. 19(1)(f) and 19(5) of the Constitution."

(43) The validity of S. 3 of the Act was challenged by Dr. Sultan Ahmed also on the ground that it offends the provisions of Art. 14 of the Constitution. I think there is much substance in this contention. Art. 14 provides that

"the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

This Article is based on the last part of the Fourteenth Amendment to the Constitution of the United States of America which is in these terms : No State shall "deny to any person within its jurisdiction the equal protection of the laws". The equality clause of the Constitution does not forbid the State to classify the citizens into groups and legislate for them. But the classification must not be unreasonable and arbitrary. The law with regard to the equality clause is well-settled in America. In 'BARBIER v. CONNOLLY', (1885) 113 U S 27, Field, J. in delivering the opinion of the Court, said:

"Class legislation, discriminating against some and favouring others, is prohibited."

In 'HAYES v. STATE OF MISSOURI', (1887) 120 U S 68, the same learned Judge, relying upon that decision, stated the law thus:

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' '

In the case of 'GULF, C. & S. F. R. CO. v. ELLIS', (1897) 165 U S 150:41 Law Ed. 666, it was held:

"Whether a statute be public or private, general or special in form, if it attempts to create distinction and classification between the citizens of this State, the basis of such classification must be natural and not arbitrary.....Arbitrary selection can never be justified by calling it classification".

(44) Willis has succinctly stated the law thus:

"The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects of which it is directed or by the territory within which it is to operate". (Willis on Constitutional law, page 579).

(45) The Supreme Court had to interpret Art. 14 of the Constitution in the case of 'CHARANJIT LAL v. UNION OF INDIA', AIR (38) 1951 S C 41 and Fazl Ali, J. held:

"A proper classification must always rest upon some difference and must bear a reasonable and just relation to the things in respect of which it is proposed."

In the same case Mukherjea, J. stated the law thus:

"Classification "must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made; and classification made without any substantial basis should be regarded as invalid."

Applying the tests laid down in the authorities noticed above, I think Section 3 of the Act offends the provision of Article 14 of the Constitution. The Act does not pretend to make any classification, nor is there any rule of law laid down in the Act applicable to all alike. Individuals have been singled out as a special subject and discriminatory law has been passed against them. Even if it be assumed that those who subjected themselves to the jurisdiction of arbitrators constitute a class, the basis of the classification is not only unnatural and arbitrary but highly unreasonable. The Act makes differential treatment between the landlords and tenants for whose benefit it is intended. The landlords, including the plaintiffs, are forbidden to seek relief in Court but there is no such limitation imposed upon the tenants, including the defendants, or any other landlord of the locality. Thus there is a complete denial of equality before the law to the landlords governed by the Act. In this connection it is apposite to quote the following passage from the judgment of Brewer, J. in 'GULF, C. & S. F. R. CO. v. ELLIS', (1897) 165 U S 150: 41 Law Ed. 666:

"It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the Courts upon equal terms. They must pay attorneys' fees if wrong: they do not recover any if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the Statute."

(46) Therefore, on a careful consideration of the points raised before us, I am of the opinion that the Act is not in conformity with the provisions of Articles 14, 19(1)(f) and 19(5) of the Constitu-

tion and must be declared 'ultra vires' the State legislature.

(47) Coming to the merits, the points for decision are: (1) whether the defendants have proved their case of settlement as alleged, and (2) whether the plaintiff's suit is in time.

(48) The defendant's case is, as already stated, that they were inducted into the land as tenants by Mt. Manrup Kuer and Mt. Pari Kuer, widows of Ramdhan, in 1328 Fasli under and oral settlement. According to them, Deonath Singh, father of Bankey Singh (defendant No. 5), took settlement of 13 acres of land in his own name and 12.6 acres of land in the name of his wife's brother, Baburam Singh, father of defendant No. 7, as his 'benamidar' and that since the date of settlement they have been in possession of the land in dispute as tenants by payment of rent. In support of their case, the defendants produced some rent receipts alleged to have been granted by the maliks to show their possession as tenants since 1328 Fasli. It is not their case that they came in possession of the disputed land as tenants at any time before the year 1328 Fasli. Bankey Singh (defendant No. 5), who has examined himself in support of his case, has stated that his father took settlement of the suit land along with other lands in 1328 Fasli from the widows of Ramdhan. He states:

> "13 acres were settled with my father on Rs. 78/- a year as rent besides cess. 12.21 acres were settled with my father on Rs. 60/- a year besides cess. This settlement was taken in the name of my 'mama' Ramdhan Singh."

In cross-examination he states:

> "I do not know anything of the settlement except that the receipts were written and issued in my presence. There was no other paper to prove this settlement."

Therefore, if the rent receipts relied upon by the defendants be not genuine documents, they must be held to be trespassers. The trial Court has held that the defendants have failed to prove their case. We have been taken through the evidence and I do not think that on the materials placed before us we can differ from its view.

(49) (His Lordship considered the rent receipts and other documents and proceeded as follows:) On a careful consideration of the documents relied upon by the defendants, I am of the view that the defendants have failed to prove their tenancy right and the judgment of the trial Court cannot be interfered with.

(50) The next question that arises for consideration is whether the suit is in time and the plaintiffs are entitled to recover possession of the land in dispute from the defendants. The learned Subordinate Judge has held that the defendants came into possession of the land in dispute during the lifetime of the widows. It does not appear when the defendants trespassed on the land in dispute. But even if they came in possession in the lifetime of the widows, limitation could not run against the plaintiffs until they became entitled to possession after the death of the widows.

(51) Mt. Manrup Kuer died in 1923 and Mt. Pari Kuer in 1933. The present suits were instituted within twelve years of the death of Mt. Pari Kuer. The plaintiffs are, therefore, entitled to recover possession from the defendants who are trespassers. The suit must, therefore, be decreed with mesne profits.

(52) I may mention that one Murli Singh, who was the first cousin of Bankey Singh (defendant No. 5) was impleaded as defendant No. 6 in all the three suits and decrees were passed against him and others. In First Appeal No. 279 of 1948 he has been impleaded as respondent No. 7 but he has not been made party in the other two appeals. An application was made before us to add him as party in these two appeals. We were satisfied that no sufficient grounds have been made out to induce us to allow the prayer. We accordingly rejected the application. The prayer of the defendants having been rejected, First Appeals Nos. 31 of 1947 and 278 of 1948 are incompetent and must be dismissed on the ground of defects of parties also because there is possibility of two inconsistent decrees.

(53) There are three miscellaneous appeals also (Miscellaneous Appeals Nos. 195 to 197 of 1947). After the decree was passed, the plaintiffs applied for delivery of possession. The defendants filed an objection and alleged that the plaintiffs were not entitled to get delivery of possession. The learned Subordinate Judge by his order, dated the 12th July, 1947, rejected the objection and passed an order for delivery of possession. These three Miscellaneous Appeals are directed against that order. The point urged before us by the defendants is that the decree is incapable of execution. I do not think there is any substance in this contention. The trial Court has by its decree ordered recovery of possession of the land in dispute with mesne profits. Such an order is capable of execution. Whether the plaintiffs will get joint possession or symbolical possession or khas possession is a matter which may be determined in an appropriate proceeding between the landlords themselves. The defendants have no right to raise any objection on that ground. The learned Subordinate Judge is right in rejecting the objections of the defendants. These appeals are accordingly dismissed.

(54) So far as Title Suits Nos. 33 and 34 of 1947 are concerned, these should now be sent back to the lower Court for disposal, with a copy of this judgment, so far as it relates to the constitutional point involved, as required by Art. 228 (2) of the Constitution.

(55) CHATTERJI, J.: I agree, except that so far as S. 2 of the impugned Act is concerned, it cannot, in my opinion, be said to be a legislation not relating to "Land" referred to in item No. 18 in List 2 of the Seventh Schedule to the Constitution. The main object of the Act, as its preamble shows, was to set at rest the dispute which was going on with regard to Barahiya Tal lands. On the one hand, the proprietors claimed the lands as bakasht, while, on the other, certain persons claimed them as their raiyati. Section 1 of the Act describes it as the "Barahiya Tal Lands (Declaration of Possession) Act". By S. 2, in substance, the raiyati rights of the persons mentioned in column 3 of the schedule to the Act are declared. It is true that the heading of the Act shows that it was an Act "To declare the possession of certain raiyats on certain lands of Barahiya Tal". But truly speaking, the Act purports to declare raiyati rights over lands. The lands were the real cause of dispute, and if the Act was passed in order to put an end to that dispute, it is in my opinion, difficult to hold that it is not a legislation relating to "Land".

D.R.R. *Order accordingly.*

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terests of any Scheduled Tribe, ...

A. I. R. (39) 1952 Patna 177 [*C. N. 55 (13).*]

REUBEN, J.

On difference of opinion between

IMAM AND NARAYAN, JJ.

Sheobachan Singh, Petitioner v. The State of Bihar.

Criminal Misc. Case No. 354 of 1951, D/- 22-11-1951.

(a) *Public Safety — Preventive Detention Act (1950), S. 7 — Grounds of detention — Past activities of detenu can be taken into consideration by detaining authority — Membership of a party spreading doctrine of violence to acquire power, though the party is not declared unlawful, may under certain circumstances lead to inference that person concerned is likely to act in manner prejudicial to public safety. AIR (37) 1950 F C 129, Rel. on.* (Para 4)

(b) *Public Safety — Preventive Detention Act (1950), S. 7 — Grounds — Held on facts that they were not vague and that the detention was legal.*

The statement of the grounds supplied to the detenu mentioned that he was an important member of the Communist party of India, that though there was change of leadership in the middle of 1950, this brought about "little change in the highly subversive programme of the party", that all the members of the reconstituted Central Committee had "practical experience of leading armed agrarian agitation in the rural areas", that, this Committee in the early part of 1951 circularised all party units that "while exploiting the legal possibilities" the revolutionary trade unions should orientate towards illegal trade unionism as the principal form of organisation, and that "the perspective of the fight to be initiated was armed guerilla struggle in rural areas leading to the gradual establishment of 'liberated bases' setting up of 'liberation armies' for the purpose of a final overthrow of the Government." The present programme of the party was set out in paragraph 6 and the following paragraphs of the grounds which were : "Although Sri Chandra Rajeshwar Rao has resigned from the General Secretaryship of the party and the Polit Bureau, which is now functioning as the Secretariat of Central Committee, has issued a draft programme of the party which gives an impression that the party has decided to abjure violence and armed struggle and has taken to only legal methods, Government have dependable information that the party is still definitely of the view that without violence no revolution can take place and consequently it is taking steps not only to continue its underground 'Tech' organisation but to strengthen it and tighten it. In actual practice also it is continuing its orgy of loot, arson and murder in Hyderabad, Andhra, Tripura, Manipur and other places. It is therefore abundantly clear that the C. P. I. has now divided the activities on two fronts, an open front where the party still exploit all legal possibilities and an illegal front for carrying on armed guerilla struggle in rural areas for the formation of liberation bases and liberation armies, that the State Government is satisfied that the members of the Communists Party of Bihar who continue to be working for the party's cause have accepted the party's aforesaid programme, and that the members who do not accept the programme or show any hesitation are promptly suspended, expelled or 'purged' from the party.":

'Held per Reuben and Narayan JJ.': There was nothing in the grounds, to justify the inference therefrom that the party was divided into two groups, one consisting of those partaking in the legal activities and the other consisting of those indulging in activities of the opposite kind. The grounds were quite consistent with a member of the party taking part openly in one set of activities and at the same time being an active participator in underground activities of the other set. It was also consistent with a member of the party, whose participation in the illegal activities at an opportune moment was important, attempting to evade detention or arrest in the meantime by apparently confining himself to legal activities. What had been pointed was this that though the draft programme showed that the party had now decided to abjure violence, it had really not done like that and that the draft programme was nothing but a camouflage meant to deceive the public and the State. The question of mentioning to which group the detenu belonged did not therefore arise and the grounds were not vague on that ground. (Paras 12g, 16a, 18c)

Per Imam, J.:(Contra) — that the grounds definitely mentioned that the communist had formed into two groups and the grounds should have mentioned to which group the detenu belonged. Without this it was impossible for him to make effective representation. The grounds were vague and the detention illegal. (Para 5a)

Basanta Chandra Ghose, Umesh Prasad Singh and A. K. Chaudhuri, for Petitioner; S. C. Chakravarty, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

(1949-50) 11 F C R 827: (AIR (37) 1950 F C 129: 51 Cri L J 1480) (Prs 4, 12c)

('50) 1950-1 S C R 88: (AIR (37) 1950 S C 27: 51 Cri L J 1383) (Prs 12d, 12g)

('51) AIR (38) 1951 S C 157: (52 Cri L J 373) (Prs 12d, 12h)

('51) AIR (38) 1951 Pat 68: (52 Cri L J 603) (Pr 12e)

('51) 30 Pat 653: (AIR (38) 1951 Pat 153: 52 Cri L J 1231) (Pr 12g)

('51) Cri Misc. No. 271 of 1951, D/- 14-8-1951 (Pat) (Pr 18)

(1917) A C 260: (86 L J K B 1119) (Pr 12d)

IMAM, J.: This is an application under Article 226 of the Constitution and S. 491 of the Code of Criminal Procedure. The petitioner Sheobachan Singh was arrested on the 5th of August, 1951, and an order of detention was made against him by the District Magistrate of Saran on the 6th of August, 1951. The grounds of detention were served upon him on the 16th of August, 1951. The order of detention was passed by the District Magistrate under sub-section (2) of S. 3 of the Preventive Detention Act, 1950 (Act IV (4) of 1950), and the grounds of detention under S. 7 of the aforesaid Act were served upon the petitioner.

(2) Mr. Basanta Chandra Ghose appearing for the petitioner has urged, in the main, that the particulars stated in the grounds of detention against the petitioner referred to past acts which were too remote to justify an order of detention being passed against him. Secondly, he urged that the grounds of detention, which refer to the activities of the Communist Party of India in general, state in paragraphs 5, 6 and 7 a change in the leadership of the Party under B. T. Ranadive to that of Chandra Rajeshwar Rao in the middle of 1950 bringing little change in the highly subversive programme of the party, but that in early 1951 a circular was issued on behalf of the Party to all Party units to the effect that while exploiting the legal possibilities with care and tact, the

revolutionary trade unions should orientate towards illegal trade unionism as the principal form of organisation. The grounds further go on to state that a draft programme of the Party was issued which gives the impression that the Party had decided to abjure violence and armed struggle and had taken to only legal methods, but the Government had dependable information that the Party is still definitely of the view that without violence no revolution can take place and consequently it is taking steps not only to continue its under-ground "Tech" organisation but to strengthen it and tighten it, and in actual practice also it is continuing its orgy of loot, arson and murder in Hyderabad, Andhra, Tripura, Manipur and other places.

(2a) Para. 7 of the grounds of detention finally states that it is therefore abundantly clear that the Communist Party of India has now divided the activities on two fronts, an open front where the Party still exploits all legal possibilities, and an illegal front for carrying on armed guerilla struggle in rural areas for the formation of liberation bases and liberation armies. Mr. Ghose contended that it was apparent from the grounds of detention in the above-mentioned paragraphs that even according to Government the Communist Party of India had split its activity into two groups, one to pursue all legal methods to achieve its political ideology and objective, and the other to achieve the same by illegal methods and force of arms. It was essential, therefore, for the detaining authority to disclose in the grounds of detention to the petitioner as to which group the petitioner belonged; whatever the past activities of the petitioner may have been, he might now belong to that group which follows legal methods for the achievement of the political idealogy of the Communist Party of India. In the particulars of the grounds of detention specifically made against the petitioner, such allegations as are disclosed there refer to his activities at a period when the Communist Party of India did not have as a part of its programme the achievement of its objective by legal and constitutional method. It was essential therefore, for the detaining authority to precisely state as to whether in spite of the decision of the Communist Party of India to achieve its objective by legal and constitutional methods the petitioner still pursued methods which were illegal and unconstitutional. The particulars of the grounds of detention, therefore, were too vague for the petitioner to make a representation against the order of detention made by the District Magistrate.

(2-b) In this connection Mr. Ghose referred to the affidavit in his petition wherein it has been precisely stated as to what have been the activities of the petitioner for six months previous to the 10th of September, 1951, the date of the affidavit. These particulars clearly show that the petitioner had been indulging in open public activities and had addressed a Thana Food Rally held under the auspices of the Socialists, Congresites and Communists at Sonepur on the 11th of May 1951, and permission to hold the said meeting was obtained from the Superintendent of Police, Chapra. On the same date a deputation was formed to wait upon the Sud-divisional Officer, Chapra, for the recognition of the Food Committee, and the said deputation led by the petitioner met the Sub-divisional Officer on the 4th of June 1951, at 6 p.m. These allegations in the affidavit had not been controverted on behalf of the Government and could have been controverted if the allegations made in the affidavit were in any way false. Mr. Ghose accordingly argued that in law the detention of the petitioner was invalid because the allegations made against him were vague preventing him from making a representation to the detaining authority against his detention. Lastly, Mr. Ghose urged that the detention of the petitioner was mala fide and had been done in order to prevent him from standing as a candidate for election to the State Legislature from the Sonepur constituency in the district of Saran.

(3) On behalf of the State it was urged by Mr. Chakravarty that past conduct of the petitioner could be taken into consideration in order to show that the grounds of detention taken as a whole clearly disclosed material to justify the order of detention. So far as the second contention of Mr. Ghose was concerned, he urged that in spite of what had been stated in paragraphs 5, 6 and 7 of the grounds of detention, the detaining authority was satisfied that if the petitioner was allowed to remain at large, he would indulge in activities to the prejudice of the public safety and the maintenance of public order, and that for prevention of such activities it was necessary to detain him. In other words, the detaining authority was satisfied from the past activities of the petitioner that he was not pursuing legal and constitutional methods for the achievement of the objective of the Communist Party of India. As for the third contention, Mr. Chakravarty contended that there was no tangible material placed before the Court for supposing that the detention of the petitioner was mala fide and had been done in order to prevent him from standing as a candidate for election to the State Legislature. Finally, Mr. Chakravarty argued that this Court could not sit in appeal over the order of detention made by the detaining authority and hold that that authority was wrongly satisfied that the petitioner should be detained in the interest of public safety and the maintenance of public order.

(4) As to the first contention raised by Mr. Ghose, I think the grounds of detention have to be read as a whole and reference to past conduct of the person ordered to be detained may be taken into consideration by the detaining authority. Although the Communist Party of India may not have been declared unlawful, that was immaterial being a matter of expediency, as pointed out by Sastri, J., in the decision of the Federal Court in the case of 'MACHINDAR SHIVAJI v. THE KING', (1949-50) FCR 827. As was pointed out by His Lordship, mere belief in or acceptance of any political ideology may not be a ground for detention under the Act, but affiliation to a party which is alleged to be spreading its "doctrine of violence rendering life and property insecure and trying to seize power by violence" may, in certain circumstances, lead to an inference that the person concerned is likely to act in a manner prejudicial to the public safety, order or tranquillity. In my opinion, having regard to the grounds of detention as a whole, and what has been stated therein, it cannot be said that the past acts of the petitioner could not be taken into consideration by the detaining authority when it made its order of detention against him.

(5) As to the second contention raised by Mr. Ghose, I think it is a question of pure law as to whether an order of detention can be made legally where the grounds of detention themselves state that the Communist Party of India has two groups, one to pursue legal and constitutional methods for the achievements of its objective and the other to pursue illegal, unconstitutional and violent methods for the achievement of its objective, and the person ordered to be detained is not informed by the detaining authority as to which group he belongs. It is to be remembered that the Communist Party of India has not been outlawed and that mere belief in or acceptance

of any political idealogy can be no ground for passing an order of detention. If the Communist Party of India has now, as stated in the grounds of detention, decided to achieve its political idealogy by legal and constitutional methods as well as illegal, unconstitutional and violent methods, it is quite clear that those members of this Party who are now pursuing the former methods were indulging in an activity fully permitted by the Constitution of India, and their detention while pursuing such methods would be illegal and in contravention of the provisions of the Constitution relating to fundamental rights. The petitioner may have in 1949 and in or about August 1950, indulged in subversive activities in pursuance of the programme of the Communist Party of India as it then stood, but since the change in early 1951, he may have adopted that part of the programme which directed some of the members of the Communist Party of India to pursue legal and constitutional methods for the achievement of the political idealogy and the objective of the Communist Party of India. In such circumstances, the activities of the petitioner up to August 1950, would not disclose to him the material on which now the detaining authority was satisfied that his detention was necessary in the interest of public safety and maintenance of public order so that he could make a representation effectively against the order of detention.

(5a) The affidavit on behalf of the petitioner, uncontroverted as it is & which could have been controverted, clearly indicates that before the order of detention was made against him, his activities were in the interest of public good and that he addressed a Thana Food Rally under the auspices of various political parties including the Congress with the permission of the Superintendent of Police, Chapra, and that he also led a deputation for the recognition of the Food Committee before the Sub-divisional Officer on the 24th of June 1951. The affidavit also discloses that the petitioner while going to a peace meeting and also Kisan workers meeting on the 5th of August 1951, was arrested at the Sonepur railway station, that he had also been elected as a member of the Bihar State Election Board of the Communist Party towards the end of July 1951, and the news of this appeared in the newspapers on the 2nd and 3rd of August 1951. I refer to the affidavit merely to show that for some time before the 6th of August 1951, the date of the petitioner's arrest, he had been indulging in activities which were open, legal and constitutional, obviously a course of activities directed by the Communist Party of India when a change in its programme took place in early 1951. Apart from the question of vagueness in the grounds of detention, the detention of the petitioner is illegal because the grounds of detention do not state as to whether he elongs to that group of the Communist Party of India which is pursuing illegal, unconstitutional and violent methods for the achievement of the political idealogy and the objective of the Communist Party of India.

(5b) It is not a question of sitting in appeal against the order of detention made by the detaining authority, as argued by Mr. Chakravarty on behalf of the State The grounds of detention have been provided for by Section 7 of the Preventive Detention Act, 1950 (Act IV of 1950) purely for the purpose of giving the person detained an opportunity of making a representation. What representation can a detained person make on the grounds of detention before us where it has been specifically stated that one group of the Communist Party of India has been directed to pursue legal and constitutional methods for the achievement of its political idealogy and objective and it has not been disclosed to the petitioner that he belongs not to this group but to the other group which has been directed to pursue illegal, unconstitutional and violent methods for the achievement of the same idealogy and objective? In my opinion, therefore, having regard to the nature of the grounds of detention disclosed in this case and the uncontroverted affidavit on behalf of the petitioner, the detention of the petitioner is illegal.

(6) As to the third contention, having regard to the view I take on the second contention, the question does not arise. The materials before me, however, are insufficient to enable me to conclude that the order of detention was necessarily mala fide.

(7) I would accordingly allow the application and hold that the petitioner has been illegally detained and would direct that he be released forthwith unless he is otherwise lawfully detained.

(8) NARAYAN, J.: In this case I am in the unfortunate position of not being able to agree with my learned brother that the detention of the petitioner is illegal.

(9) The petitioner Sheobachan Singh was arrested on the 5th of August 1951, and on the 6th of August 1951 the District Magistrate of Saran passed an order for his detention according to Sub-section (2) of Section 3 of the Preventive Detention Act, 1950. On the 16th of August 1951 he was served with the grounds for his detention. The present application which is labelled as an application under Article 226 of the Constitution of India and Section 491 of the Code of Criminal Procedure was filed on 10-9-1951.

(10) The substantial contention urged by Mr. Basanta Chandra Ghose, who has appeared for the petitioner before us, is that the grounds served on the petitioner are too vague and indefinite to enable him to make an effective representation against the order of detention and that the petitioner could not be detained merely because of his past activities. The learned Counsel has pointed out that the subversive activities referred to in the grounds are of a time when the Communist Party of India had not included within its programme the achievement of its objective by legal and constitutional methods, and that as because of the change in the leadership and other causes their programme has been altered and as the petitioner is now taking part in public works and acting in a legal and constitutional manner, he cannot be detained for what he might have done in the past and at a time when violence was included within the programme of the Communist Party.

(11) In view of the contentions raised before us it is necessary to know how the grounds served on the petitioner stand. In paragraph 1 it is stated that this petitioner Sheobachan Singh is an important member of the Communist Party of India, and in paragraph 2 the objective of the Communist Party of India has been stated. The objective mentioned is the destruction of the present social order and to supplant the existing Government by a Communist State by waging political and economic struggle. The following statement in this paragraph indicates that the programme which the Communist party had adopted was really a very dangerous programme.

> "Government have dependable information that in pursuance of the above objective, different communist calls functioning in Bihar and received secret directives from the party headquarters to build up illegally as quickly as possible large stocks of fire-arms and ammunition, to smuggle explosives on a large scale specially

from the industrial areas, to collect iron bars and other implements for breaking jails and for capturing different service Associations so that the Services could be exploited at a critical moment to turn against Government so as to bring about a complete collapse of administration. The party in this State arranged secret dumps in inaccessible hilly tracts and Government have reasons to believe that most of the confirmed members of the party were supplied with unlicensed fire-arms obtained illegally from Burma, Pakistan and from American soldiers."

(11a) Then paragraph 3 says that the members of the Communist party "made vigorous efforts to incite Kisans to take forcible possession of the zamindar's land even when there was no semblance of any legal right" and that a semi-military Red force was organised for assisting them in their violent acts. It is said that on the industrial front as well workers were incited and asked to resort to violence if necessary. Paragraph 4 gives some further details, and it states that the party has already resorted to murder for deflection from and acting against the interests of the party and that "these are not sporadic incidents but follow a country-wide plan."

(11-b) In Paragraph 5 it is stated that at about the middle of 1950 the leadership of the party was transferred from the hands of Shri B. T. Ranadive to those of Shri Chandra Rajeshwar Rao, but it is asserted that this change in leadership brought little change in the highly subversive programme of the party. It makes mention of a circular issued to the party units which indicates that violence was still within the programme of the party and that its objective still remained the final over-throw of the Government. Paragraph 6 is important in the sense that it states that though the draft programme of the party issued under the leadership of the new leader Shri Chandra Rajeshwar Rao gives the impression that the party had decided to abjure violence and has taken only to legal methods, Government have:

"dependable information that the party is still definitely of the view that without violence no revolution can take place and consequently it is taking steps not only to continue its underground 'Tech' organisation but to strengthen and tighten it."

It is further stated in this paragraph that the party is still "continuing its orgy of loot, arson and murder in Hyderabad, Andhra, Tripura, Manipur and other places.

(11-c) Paragraph 7 says that it is thus clear that the party has now:

"divided the activities on two fronts — an open front where the party still exploits all legal possibilities and an illegal front for carrying on armed guerilla struggle in rural areas for the formation of liberation bases and liberation armies."

Paragraph 8 says that the State Government is satisfied that the Communist party of Bihar which continues to be working for the party's cause has accepted the party's aforesaid programme and that the "members who do not accept the programme or show any hesitation are promptly suspended, expelled or 'purged' from the party."

(12) Before I pass on to the succeeding paragraphs which mention the past activities of this petitioner, I have to point out that the paragraphs the summary of which I have given above do not at all indicate that the Communist party is now divided into two groups, one of which has adopted legal and constitutional means and the other still believes in violence. On the other hand, these paragraphs go to indicate that though under the present leadership the party has adopted a programme which gives the impression that it has decided to abjure violence, it really still believes in violence and revolution so much so that it is "continuing its orgy of loot, arson and murder." What the State Government seem to mean is this that the so-called draft programme issued by the present leader is only a camouflage and that the activities of the party still continue to be as dangerous as before. In the grounds I find nothing to support the view that there is one group which is pursuing strictly legal and constitutional methods and that the present petitioner belongs to that group.

(12-a) Paragraph 10 says that the petitioner is a very important worker of the Communist Party of India, and paragraph 11 says that in 1949 he was reported to be in possession of a cyclostyle machine which he used for cyclostyling party leaflets. One such leaflet was entitled as "Railway Mazdooron Ki Roti Per Khunkkar Hamla" and it had been issued in the name of this petitioner in his capacity as the Vice-President of the O. T. Railway Road Union. The pamphlet instigated the railway workers to form 'militant committees' and to surround their officers and seek the release of their comrades. Paragraph 12 says that this petitioner was reported to be in possession of an unlicensed revolver, and paragraphs 13, 14 and 15 are quoted below in extenso, because they make mention of some very important activities of this petitioner.

"13. On 14th June 1949, he contacted party workers at Sonepur whom he exhorted to strengthen the party with money and men and advocated training of workers in use of bhalas and lathis.

14. On 5th July 1949, he attended a secret meeting of the party at Katihar in which a decision was taken to popularise the party by advising Kisans to forcibly occupy all lands in excess of 35 acres in possession of big cultivators.

15. He was one of the 3rd party workers who were selected by the party for receiving training in guerilla fighting in a secret training centre of the party organised at Manpur district Saran in or about August 1950."

(12-b) The conclusion at which the District Magistrate has arrived is indicated in the following language.

"In the circumstances I am satisfied that if he is allowed to remain at large he will indulge in activities to the prejudice of public safety and the maintenance of public order. For prevention of such activities, I consider his detention necessary."

(12-c) What have been mentioned in paragraphs 10 to 15 are the specific grounds so far as the present petitioner is concerned, and if the State Government or the District Magistrate could detain the petitioner for his past activities, these grounds cannot be regarded as insufficient grounds for his detention. Much less can it be urged that these grounds are so vague and indefinite that they do not enable him to make an effective representation against the order of his detention. Fortunately for me, my learned brother has overruled the contention of Mr. Ghosh that the past conduct of the person ordered to be detained cannot be taken into consideration by the detaining authority. My learned brother has referred to the decision of the Federal Court in 'MACHINDAR SHIVAJI v. THE KING', (1949-50) FCR 827, in which his Lordship Patanjali Sastri, J., who delivered the judgment of the Federal Court, made the following observation:

"It was said that, the Communist Party not having been banned in the Province, the appellant's alleged membership of that party, even if true, could not, in the absence of any allegation of acts or conduct on his part suggesting that he was acting or was likely to act in a manner prejudicial to public safety, be regarded as a ground for satisfaction under Section 2 (1) (a). We cannot accede to this contention. While mere belief in or acceptance of any political ideology may not be a ground for detention under the Act, affiliation to a party which is alleged to be spreading its 'doctrine of violence rendering life and property insecure and trying to seize power by violence' may, in certain circumstances, lead to an inference that the person concerned is 'likely' to act in a manner prejudicial to the public safety, order or tranquility. The fact that the Party had not been outlawed is immaterial, that being a matter of expediency."

(12-d) His Lordship was of the view that membership of the Communist Party (which has adopted a violent programme) cannot be ruled out of consideration as material on which no satisfaction could rationally be grounded. In the well-known case 'A. K. GOPALAN v. STATE OF MADRAS', (1950) 1 S C R 88, his Lordship the Chief Justice of the Supreme Court has pointed out that for preventive detention action must be taken on good suspicion, and that it is a subjective test based on the cumulative effect of different actions, perhaps spread over a considerable period. In this very case Patanjali Sastri, J., has pointed out that preventive detention is a purely precautionary measure which must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof (per Lord Atkinson in 'REX v. HALLIDAY', (1917) AC 260 at p. 275.) Mukharjea, J., in this case further observed that:

"the object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence."

In a very recent case, 'STATE OF BOMBAY v. ATMA RAM SHRIDHAR', AIR (38) 1951 S C 157, his Lordship the Chief Justice of the Supreme Court observed as follows:

"By its very nature, preventive detention is aimed at preventing the commission of an offence or preventing the detained person from achieving a certain end. The authority making the order, therefore, cannot always be in possession of full detailed information when it passes the order and the information in its possession may fall far short of legal proof of any specific offence, although it may be indicative of a strong probability of the impending commission of a prejudicial act. Section 3, Preventive Detention Act, therefore, requires that the Central Government or the State Government must be satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to (1) the defence of India, the relations of India with foreign powers, or the security of India, or (2) the security of the State or the maintenance of public order, or (3) the maintenance of supplies and services essential to the community or ..... it is necessary so to do, make an order directing that such person be detained. According to the wording of S. 3, therefore, before the Government can pass an order of preventive detention it must be satisfied with respect to the individual person that his activities are directed against one or other of the three objects mentioned in the section, and that the detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. The wording of the section thus clearly shows that it is the satisfaction of the Central Govt. or the State Govt. on the point which alone is necessary to be established. It is significant that while the objects intended to be defeated are mentioned, the different methods, acts or omissions by which that can be done are not mentioned, as it is not humanly possible to give such an exhaustive list. The satisfaction of the Government, however, must be based on some grounds. There can be no satisfaction if there are no grounds for the same. There may be a divergence of opinion as to whether certain grounds are sufficient to bring about the satisfaction required by the section. One person may think one way, another the other way. If, therefore the grounds on which it is stated that the Central Government or the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of mala fides cannot be challenged in a Court. Whether in a particular case the grounds are sufficient or not, according to the opinion of any person or body other than the Central Government or the State Government, is ruled out by the wording of the section. It is not for the Court to sit in the place of the Central Government or the State Government and try to determine if it would have come to the same conclusion as the Central or the State Government. As has been generally observed, this is a matter for the subjective decision of the Government and that cannot be substituted by an objective test in a Court of law. Such detention orders are passed on information and materials which may not be strictly admissible as evidence under the Evidence Act in a Court, but which the law, taking into consideration the needs and exigencies of administration, has allowed to be considered sufficient for the subjective decision of the Government."

(12-e) In this case the Commissioner of Police, Bombay, had stated that in or about the month of January 1950 there was a move for a total strike on the railways in India in the month of March 1950 and that the applicant (the detenu in that case) was taking prominent part to see that the strike was brought about and was successful. He had further stated that although the railway strike in the month of March did not materialise, the idea of bringing about such strike as soon as convenient continued to be entertained and the present respondent was actively engaged in bringing about such a strike in the near future. The Police Commissioner refused to disclose further facts relating to the activities of the detenu as they were against public interest. A Bench of the Bombay High Court presided over by the Chief Justice of that Court allowed the petition and directed the release of the detenu, but the Supreme Court disagreed with the view of the Bombay High Court and allowed the appeal of the State. This point was considered by Das, J., and myself in 'SUBODH KUMAR SINGH v. THE STATE', AIR (38) 1951 Pat 68, and we came to the conclusion that the detaining authority was at liberty to draw an inference adverse to the detenu from his past activities.

(12f) It is not therefore open to the detenu to urge before us that his detention is not justified

because in 1949 he had issued a leaflet instigating the railway workers to indulge in violent activities and had advocated training of workers in the use of the bhalas and lathis. And what is more important is that he had advised the Kisans to forcibly occupy all lands in excess of 35 acres in possession of big cultivators. These materials cannot be regarded as 'vague and indefinite, and if they have been communicated to the petitioner, they contain sufficient particulars to enable him to make an effective representation to the authority concerned. In this way, the requirements of Article 22 (5) of the Constitution of India have been fully complied with in this case, and it is, in my opinion, no use going into the question as to whether the Communist Party of India has now divided itself into two groups, one of which follows legal and constitutional methods and the other illegal and violent methods.

(12-g) I have already said that the grounds do not at all indicate that there are really two groups in the party, one of which is proceeding in a legal manner and the other in an illegal manner. What has been pointed out is this that though the draft programme shows that the party has now decided to abjure violence, it has really not done like that and that the draft programme is nothing but a camouflage meant to deceive the public and the State. In his affidavit the petitioner has tried to show that he has been engaged in public activities for the last six months, and he has stated that he addressed a Thana Food Rally organised by the different parties in this country, including the party in power and that on the 4th of June 1951 he led a deputation to the Sub-divisional Magistrate of Chapra for the recognition of the Food Committee. It was open to the District Magistrate and to the State to think that in spite of the fact that this petitioner has taken part in such public activities, at heart he is still a violent Communist committed to the entire violent and subversive programme of the Communist Party of India. As I pointed out in 'MADAN LAL v. STATE OF BIHAR', 30 Pat 653, the facts alleged have to be taken to be correct, and it will not be a ground for interference if the detenu merely puts forward a counter-version. I further said that if two inferences including the one that was drawn by the detaining authority are possible on the facts, it was not open to us to say that that particular inference should not have been drawn by the detaining authority. In 'A. K. GOPALAN'S CASE', (1950) 1 S C R 88, Das, J., while dealing with Article 22 of the Constitution of India observed as follows:

"Those provisions are not justiciable, for they are the provisions of the Constitution itself which is supreme over everybody. The Court can only seek to find out, on a proper construction, what protection has in fact been provided. The Constitution has provided for the giving of the grounds of detention although facts as distinguished from grounds may be withheld under Clause (6) and the right of representation against the order of detention. It has provided for the duration of the detention. There the guaranteed fundamental procedural rights end. There is no provision for any trial before any tribunal. One cannot import the condition of a trial by any tribunal from the fact that a right of representation has been given. The right to make representation is nothing more than the right to 'lodge objections' as provided by the Danzig Constitution and the Weimar Constitution."

(12-h) The important observation made by Kania, C. J., in the case of the 'STATE OF BOMBAY v. ATMA RAM SHRIDHAR', AIR (38) 1951 SC 157, has already been quoted by me, and in this case his Lordship has further explained what can be the meaning of the word "vague" which is so commonly used by detenus or their lawyers in relation to the grounds served. The following is the observation made by his Lordship in this connection:

"The contention that the grounds are 'vague' requires some clarification. What is meant by vague? Vague can be considered as the antonym of 'definite.' If the ground which is supplied is incapable of being understood or defined with sufficient certainty it can be called vague. It is not possible to state affirmatively more on the question of what is vague. It must vary according to the circumstances of each case. 'It is, however, improper to contend that a ground is necessarily vague if the only answer of the detained person can be to deny it.' That is a matter of detail which has to be examined in the light of the circumstances of each case. If, on reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation against the order of detention it cannot be called vague. The only argument which could be urged is that the language used in specifying the ground is so general that it does not permit the detained person to legitimately meet the charge against him because the only answer which he can make is to say that he did not act, as generally suggested. In certain cases that argument may support the contention that having regard to the general language used in the ground he has not been given the earliest opportunity to make a representation against the order of detention."

(12-i) In this case there are quite specific allegations so far as the petitioner is concerned, and on these particulars the State or the District Magistrate could certainly keep him detained according to the provisions of the Preventive Detention Act. I need not repeat that it is also open to them to assert that the Communist Party in India and particularly the Communists of Bihar including this applicant still believe in violence, and that their attitude has not undergone any real or appreciable change in spite of the apparent alteration in the draft programme. Evidence cannot be taken by us for deciding as to whether the statements made by the District Magistrate in his grounds or the statements made by the present petitioner in his affidavit are correct. Putting a counter-version is not the same thing as placing circumstances which can go to establish that the alleged facts or grounds are 'non est', and it cannot reasonably be urged in this case that the petitioner's affidavit discloses circumstances which go to indicate that the facts stated in the grounds are 'non est.' Undoubtedly, this is a case in which the State can successfully urge that their satisfaction is grounded on materials which are of rationally probative value. I am, therefore, of the opinion that the detention of this petitioner is legal and justified, and I would accordingly dismiss this application.

(13) REUBEN, J.: This case under Art. 226 of the Constitution of India and S. 491 of the Code of Criminal Procedure has been referred to me on a difference of opinion between my brothers Imam and Narayan, JJ. The point of difference as stated in the order of reference is:

"Whether, on the grounds of detention served on the detenu, his detention is illegal or legal".

(13a) The particulars of the difference between their Lordships will appear from what I say below.

(14) The petitioner who is a member of the Communist Party of India was arrested on the 5th of August 1951 and is detained under an order of detention made by the District Magistrate of Saran on the 6th August in exercise of power under S. 3 of the Preventive Detention Act, 1950 (Act IV of 1950). The grounds of detention under S. 7 of the Act were served on the 16th of August 1951. Mr. Basanta Chandra Ghosh on behalf of the petitioner urged three points before the referring Bench:

1. The particulars given in the statement of grounds of detention relate to past acts too remote to justify an order of detention.

2. From the statement of grounds itself it appears that the Communist Party of India has split up its activities between two groups, one group to pursue the object of the party by legal methods, the other to attempt to achieve them otherwise, and, in the absence of an assertion in the statement of grounds that the detenu belongs to the latter group, the allegations against him are too vague to enable him make a representation, and

3. the detention is 'mala fide', in order to prevent the detenue from standing for election to the State legislature.

(14a) The difference between their Lordships which has led to the present reference arose on the second point. According to Imam, J. the grounds show that sometime in the year 1951 the Communist Party was divided into two groups. He held that, in the absence of an assertion that the petitioner belonged to the group which is to adopt illegal methods, it was not possible for the petitioner to make a representation. According to Narayan, J., the grounds do not show a division of the party into two groups. In his opinion, the grounds indicate that the divided fronts are mere camouflage and the party programme continues as dangerous as before. His Lordship did not go on to consider the effect of this finding in view of his finding on the first point, regarding which both their Lordships agreed that particulars of past acts of the persons detained may be sufficient by themselves to sustain an order of detention. Whereas, however, the particular past acts enumerated in the grounds were held by Imam, J. to be of no avail because they relate to a period prior to the divided fronts, his Lordship Narayan, J. held that, apart from the question as to the correct interpretation of the grounds relating to the divided fronts, the past acts enumerated were sufficient to sustain the present order of detention. On the third point their Lordships agreed that 'mala fides' were not established.

(15) Incidentally, their Lordships took a different view as regards the use of the affidavit of the petitioner as establishing the facts stated therein. The statements of fact in the affidavit relied on relate to the petitioner's behaviour shortly before his arrest, namely, that during the preceding six months the petitioner, in pursuance of the policy and programme of the Communist Party of India "to work democratically", was engaged in open public activities, took part in a Thana food rally on the 11th of May 1951, and in a deputation which was formed on that occasion met the Sub-divisional Officer on the 4th of June 1951. These facts not having been controverted before the referring Bench and there not being any assertion in the grounds contrary to them, I do not see why the assertions should not be accepted by the Court.

(16) The decision of the point referred to me turns on the interpretation of the statement of grounds. It commences, after mentioning that the petitioner is an important member of the Communist Party of India by describing the programme and activities of the Communist Party of India previous to the middle of the year 1950, during the time when B. T. Ranadive was the General Secretary of the party. In the middle of 1950, according to the grounds, the leadership of the party passed to the hands of Chandra Rajeshwar Rao but this brought about "little change in the highly subversive programme of the party", in support of which statement it is mentioned that all the members of the reconstituted Central Committee had "practical experience of leading armed agrarian agitation in the rural areas". According to the grounds, this Committee in the early part of 1951 circularised all party units that "while exploiting the legal possibilities" the revolutionary trade unions should orientate towards illegal trade unionism as the principal form of organisation, and made it clear that "the perspective of the fight to be initiated was armed guerilla struggle in rural areas leading to the gradual establishment of 'liberated bases' and setting up of 'liberation armies' for the purpose of a final overthrow of the Government". The present programme is set out in paragraph 6 of the grounds which I reproduce below with the two following paragraphs:

> "6. Although Sri Chandra Rajeshwar Rao has resigned from the General Secretaryship of the party and the Polit Bureau, which is now functioning as the Secretariat of Central Committee, has issued a draft programme of the party which gives an impression that the party has decided to abjure violence and armed struggle and has taken to only legal methods, Government have dependable information that the party is still definitely of the view that without violence no revolution can take place and consequently it is taking steps not only to continue its underground 'Tech' organisation but to strengthen it and tighten it. In actual practice also it is continuing its orgy of loot, arson and murder in Hyderabad, Andhra, Tripura, Manipur and other places.
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> 7. It is therefore abundantly clear that the C. P. I. has now divided the activities on two fronts, an open front where the party still exploit all legal possibilition and an illegal front for carrying on armed guerilla struggle in rural areas for the formation of liberation bases and liberation armies.
>
> 8. That State Government is satisfied that the members of the Communists Party of Bihar who continue to be working for the party's cause have accepted the party's aforesaid programme, members who do not accept the programme or show any hesitation are promptly suspended, expelled or 'purged' from the party".

(16a) Stress has been laid before me on the assertion in paragraph 7 that the Communist Party of India has now "divided the activities on two fronts." These words have to be read in the background of the context. In the immediately preceding paragraph, the detaining authority has described the present programme as giving "an impression that the party has decided to abjure violence and armed struggle and has taken to only legal methods". The phrase "giving an impression" suggests that the detaining authority does not accept the "impression" at its face value. He makes it clear by putting the word "though" at the commencement of the paragraph and continuing that the Government have dependable information that the party still believes in violence and is taking steps towards it. To make his meaning clear he adds that in actual practice the party is continuing "its orgy of loot, arson and

murder" in various places in India. The detaining authority is obviously thinking of violence as forming an essential part of programme. When, therefore, in paragraph 7, he speaks about activities on two fronts, he is speaking of activities in pursuance of the programme as understood by him, that is to say, activities on a legal front and activities on an illegal front both forming part of one programme. He is speaking not of two separate sets of activities, but of two faces along which coordinated action is being taken. It is in this sense that the word "programme" seems to be used in paragraph 8, in which the detaining authority speaks of members who have not accepted into (the?) programme being expelled, suspended or purged. It is true that under the present programme as set out in the grounds there are two sets of activities, legal activities and illegal activities. There is nothing in the grounds, however, to justify the inference therefrom that the party is divided into two groups, one consisting of those partaking in the legal activities and the other consisting of those indulging in activities of the opposite kind. The grounds are quite consistent with a member of the party taking part openly in one set of activities and at the same time being an active participator in underground activities of the other set. It is also consistent with a member of the party, whose participation in the illegal activities at an opportune moment is important, attempting to evade detention or arrest in the meantime by apparently confining himself to legal activities.

(17) Imam, J. has reasoned thus. On the grounds themselves it appears that the Communist Party consists of two groups, one pursuing legal methods, the other not. The party has not been declared unlawful. The members of the first group are acting in a lawful orderly manner and there can be no justification for their detention. It follows that it is not sufficient to tell the detenu merely that he belongs to the Communist Party. He must be told that he belongs to the group which is acting illegally. This position does not arise on my interpretation of the grounds. For these reasons the absence of a statement that the petitioner belonged to a particular group of the Communist Party does not affect the validity of the grounds served.

(18) Mr. Ghosh has referred to the decision of a Division Bench in the case of 'KARYANAND SHARMA', Cri Misc. No. 271 of 1951, D/- 14-8-1951, and has urged that the detention should be held to be bad for failure to state the real grounds of the detention. I am doubtful if the petitioner is entitled to raise the point before me on this reference but, since it has been argued, I shall deal briefly with it. Karyanand Sharma, an important member of the Communist Party of India, was detained under an order made by the Government of Bihar dated the 23rd of June 1951. Previous to this he was in hiding. When he emerged from hiding on the 13th of June 1951 he addressed letters to the Chief Minister and the Chief Secretary of the State stating that having been elected President of the Bihar State Kisan Sabha he proposed to cease working underground , but would come to Patna and take charge of the office of the Sabha. Further he stated that he would stand as a candidate in the ensuing general elections. These letters reached their addressees on the 16th of June, that is to say, before the detention order was passed against Karyanand Sharma and long before the grounds served on him in accordance with S. 7 of the Prevention Detention Act. Those grounds, however, were confined to an assertion of his membership of the Communist Party of India, the programme and activities of the party and to the past act of the detenu himself, the latest of which was dated the 9th of November 1950. Shearer, J. with whom Ahmad, J. agreed, observed:

> "It may be that, in spite of the assurance contained in the letter that the petitioner intended to work democratically the Provincial Gocernment was of opinion that he might, in pursuing his candidature, adopt methods likely to create disorder. If, however, that was so, the facts on which this belief was entertained ought to have been set out in the grounds. It is a condition of the power conferred on the executive to deprive an individual of his liberty that the power must be exercised in complete good faith, and more particularly, that the real reasons, which have weighed with the Provincial Government in taking action, must be set out in the grounds, so that the person against whom the order is made may have an opportunity of making a representation to an Advisory Board. If the real reasons, or any of the real reasons, are suppressed, and the official responsible for drawing up the grounds deliberately sets himself to prepare a document purporting to show that the case falls wholly within a class of case in which the Courts have held that the power has been legitimately exercised, there has been a complete absence of good faith".

(18b) Dealing with a counter affidavit filed by the State on this point asserting that for a long period the detenu was working under cover, that a series of attempts were made to apprehend him, and that, if any of these attempts had been successful, an order of detention would have been made against him forthwith, his Lordship observed:

> "I do not doubt myself that, if the petitioner had been apprehended at any time prior to the middle of this year, making of an order of detention against him would have been fully justified. But it does not necessarily follow that, if an order of detention could, with propriety, have been made in one set of circumstances, such an order can, with equal propriety, be made in quite another set of circumstances".

(18c) Mr. Basanta Chandra Ghosh has argued that exactly same is the case here; it may be that on the grounds stated the detention of the petitioner would have been sustainable if he had been arrested and detained prior to the formation of the double front; the creation of the double front, however, has brought new set of circumstances into existence and, so long as there is no ground relating to a period after the formation of the double front, the grounds are not legally sufficient to sustain the detention. I have compared the grounds in the two cases. Each set of grounds consists of a general statement relating to the Communist Party and its programme and activities and a special statement relating to the activities of the detenu. In substance, the general statements in both cases are the same, but in the case before me grounds Nos. 6 and 7 have been added. These two paragraphs expressly deal with the change in the circumstances and state what view the detaining authority takes of the change of circumstances. According to that authority, the change of programme merely gives a misleading impression, and violence and armed struggle continue to form part of the approved programme. Then in the next paragraph, having stated that the members who do not accept the programme are suspended, expelled or purged, the grounds go on in paragraph 9 to state that the petitioner continues to be an active member of the Communist Party of India. Among the

particulars stated against the petitioner is a statement that in or about August 1950 he was one of the three party workers selected for training in guerilla fighting. It is true that this relates to a period before the formation of the double front but it should be taken along with the assertions in the previous paragraphs about the continuation of the violent part of the party's programme and the petitioner's continued active membership of the party. It is not for me to determine whether on these grounds it was necessary to order his detention for the law requires the satisfaction of the detaining authority. But on the grounds as set out, I do not think that there is any justification for thinking that the real reason for the detention of the petitioner has been withheld.

(19) For the reason which I have given I think that, on the grounds of detention served, the detention of the petitioner is legal.

(20) The record will now be sent back to the referring Bench with my opinion.

R.G.D. *Order accordingly.*

A. I. R. (39) 1952 Patna 185 *[C. N. 55 (14).]*

(FULL BENCH)

REUBEN, IMAM AND DAS JJ.

Jagarnath Prasad and another, Petitioners v. The State of Bihar and others, Opposite Party.

Criminal Misc. Nos. 353 and 355 of 1951, D/- 14-12-1951.

(a) Public Safety — Preventive Detention Act (1949), S. 3 (1)(a)(iii) — "Maintenance of supplies and services essential to community" — Supply of cloth and commodities are included in the clause.

The word 'supplies' carries with it the meaning "to fill the needs of or to supply provisions to the community"; in other words, the meaning of the words "maintenance of supplies and services essential to the community" in Cl. (iii) of S. 3 (1) (a) must be "the up-keep of the needs and the provisions essential to the community". This is the only proper meaning, which follows not only from grammatical construction, but also from the context in which the words have been used. The supply of cloth fills an essential need of the community and is a service to it. Any interference with such supply and service will be prejudicial to the maintenance of supplies and services essential to the community. Where with regard to an essential commodity there is a system of controls, on which the maintenance of supplies and services depends, evasion of the control orders will prejudicially affect the maintenance or upkeep of the supplies and services essential to the community. The view point that the action of a petty shop-keeper will not prejudicially affect the maintenance of supplies and services, fails to take note of the control system; and further, if a number of petty shop-keepers indulge in similar activities, there will, undoubtedly, be an artificial scarcity in cloth.

It is not open to the Court to consider the difference in degree, and treat some prejudicial activities as coming within the expression and some as not coming within it, though in the ordinary grammatical sense they all come within the expression. AIR (38) 1951 Pat 47; AIR (38) 1951 Pat 134, Approved.

Observations of Shearer J. in Cri. Misc. Case No. 258 of 1951, D/- 20, Aug. 1951 (Pat) Dissented from; 1950 S C R 594, Distinguished. (Para 11)

(b) Essential Supplies (Temporary Powers) Act (1946) — Validity — Repeal of India (Central Government Legislature Act, 1946 by Art. 395 of Constitution does not end Essential Supplies Act — Resolutions of 23rd March 1949 and of 20th December 1949 validly kept alive the Act — Adoption of Laws Order 1950 was neither illegal nor beyond competency of President — Constitution of India, Arts. 372, 395.

On the 25th of January, 1950, the Essential Supplies (Temporary Powers) Act, 1946, was a "law in force in the territory of India immediately before the commencement of the Constitution." Art. 372 says that this law shall continue in force notwithstanding the repeal of the enactments referred to in Art. 395. By the resolution of the 23rd March, 1949, the Essential Supplies (Temporary Powers) Act, 1946, had already been extended for twelve months commencing on the 1st day of April, 1949. Therefore, by reason of the aforesaid resolution, read with Art. 372 of the Constitution, the Essential Supplies (Temporary Powers) Act, 1946, would remain in force till the 31st March, 1950. By the December resolution, it would remain in force till the 31st March, 1951. It is true that the reference in the two resolutions was to the period mentioned in Ss. 2 and 3 of the India (Central Government and Legislature) Act, 1946, which was to stand repealed on the commencement of the Constitution. But in effect the resolutions extended the period of the Essential Supplies (Temporary Powers) Act, 1946, and the resolutions were passed at a time by an authority which was competent to pass them. The provisions of Art. 372 of the Constitution would save the Essential Supplies (Temporary Powers) Act, 1946, in spite of the repeal of the India (Central Government and Legislature) Act, 1946, on the commencement of the Constitution. It is not correct to say the resolution of the 20th December, 1949, was invalid and ineffective, nor that the Adaptation of Laws Order, 1950, made by the President on the 26th of January, 1950, was seeking to revive something which was already dead. On the 26th of January, 1950, the President was confronted with this position: by reason of the two resolutions referred to above, the Essential Supplies (Temporary Powers) Act, 1946, was to remain in force till the 1st day of April, 1951, because the period mentioned in S. 4 of the India (Central Government and Legislature) Act, 1946, had been extended till that date; however, the India (Central Government and Legislature) Act, 1946, itself came to an end on the midnight of the 25th January, 1950; but that did not put an end to a law in force in the territory of India immediately before the commencement of the Constitution. There was, thus, an apparent anomaly, and it was necessary to bring the provisions of sub-s. (3) of the S. 1 of the Essential Supplies (Temporary Powers) Act, 1946, into accord with the provisions of the Constitution, i.e. into accord with the provisions of Arts. 395 and 372 of the Constitution. It was for this purpose that a modification was necessary by way of an amendment of sub-s. (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946, and the President gave effect to the resolutions by substituting "the 1st day of April 1951" for the period originally mentioned in sub-s. (3), S. 1, Essential Supplies (Temporary Powers) Act, 1946. This adaptation or modificatioin was neither illegal nor beyond the competency of the President within the meaning of Cl. (2) of Art. 372 of the Constitution. Explanation III to the Article does not, in any way, affect the position. The provisions of the Article are not being construed as continuing any temporary law beyond the date fixed for its expiration. All that the President did was to resolve an apparent anomaly and give effect to the resolutions of the Constituent Assembly so as to avoid any apparent conflict between the provisions of

sub-s. (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946, and the provisions of Constitution of India. (Para 18)

(c) *Essential Supplies (Temporary Powers) Act, (1946), S. 1(3) — It is not a delegated legislation.*

There is no delegation by sub-s. (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946. The delegation, if any, with regard to the period mentioned in Ss. 2 and 3 of India (Central Government and Legislature) Act, 1946, was by the British Parliament, and it was open to the British Parliament to pass delegated legislation. The Indian Legislature did not delegate its legislative function to any outside body by the provisions of sub-s. (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946. It was faced with the difficulty of fixing a period which might be extended in a certain contingency, and it stated in effect that the period shall be as long as the power to legislate exists. It merely adopted a convenient form of fixing the period. AIR (38) 1951 S C 484, Ref. (Para 19)

(d) *Public Safety — Preventive Detention Act (1949), S. 3 — Grounds of detention — Jurisdiction of Court to determine correctness.*

It is not open to the Court to go into an attempted explanation of the facts alleged, in order to determine the correctness or otherwise of the grounds of detention. AIR (38) 1951 Pat 153, Relied on. (Para 21)

(e) *Public Safety — Preventive Detention Act (1949), S. 3 — Detention order, when criminal prosecution is pending — Detention, if mala fide.*

Where there is a pending criminal case against a person when the detention order against him is made, there is no rule of law that unless a choice of one of two alternatives, prosecution or detention, is made at the earliest moment, the order of detention must be held to be invalid. The proper approach is to consider the facts of each case and then consider whether the order of detention was 'mala fide' or not. AIR (38) 1951 Pat 68, Relied on. (Para 24)

(f) *Public Safety — Preventive Detention Act (1949), S. 4 — Petitioner holder of license to sell rationed cloth — Shop closed and license withdrawn — Whether can be detained on ground that he is likely to indulge in black-marketing.*

Preventive detention depends on suspicion — suspicion inferred from circumstances, and it is for the detaining authority to be satisfied about the inference to be drawn. The mere closure of the shop of the petitioner who was a holder of a license to sell cloth or even the temporary seizure of his goods is no ground for holding that the order of detention on the ground that the petitioner is likely to indulge in black-marketing prejudicial to the maintenance of supply of essential commodities and services, is 'mala fide'. (Para 26)

B. C. Ghose, A. K. Choudhury, Padmanand Jha, Dilip Kumar Sinha and Ras Bihari Singh, for Petitioners; Govt. Advocate and S. C. Chakravarty, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('45) 1945-7 FCR 81: (AIR (32) 1945 FC 18: 46 Cri L J 559) (Pr 24)
('50) 1950 S C R 594: (AIR (37) 1950 S C 124: 51 Cri L J 1214) (Pr 11)
('51) AIR (38) 1951 S C 332: (1951 S C R 747) (Pr 19)
('51) AIR (38) 1951 S C 484: (1952 Cri L J 69) (Pr 20)
('51) AIR (38) 1951 Bom 369: (52 Cri L J 954) (Pr 20)
('51) 55 Cal W N 572: (AIR (38) 1951 Cal 120: 52 Cri L J 934 FB) (Pr 20)
('44) 23 Pat 252: (AIR (31) 1944 Pat 354) (Pr 24)
('51) 30 Pat 630: (AIR (38) 1951 Pat 47: 52 Cri L J 406) (Prs 8, 10)
('51) 30 Pat 653: (AIR (38) 1951 Pat 153: 52 Cri L J 1231) (Prs 8, 21)
('51) 30 Pat 716: (AIR (38) 1951 Pat 134: 52 Cri L J 1175 SB) (Pr 8)
('51) AIR (38) 1951 Pat 68: (52 Cri L J 603) (Pr 24)
('51) Cri Misc No 671 of 1950 D/- 13-2-51 (Pat) (Pr 12)
('51) Cri Misc No 701 of 1950 D/- 9-1-51 (Pat) (Pr 25)
('51) Cri Misc No 199 of 1951, D/- 7-6-1951 (Pat) (Pr 25)
('51) Cri Misc No 258 of 1951 D/- 20-8-1951 (Pat) (Prs 8, 24)

DAS, J. These two petitions under Art. 226 of the Constitution of India, and S. 491 of the Code of Criminal Procedure, have been heard together as they raise common questions of law. This judgment will govern both the applications. The facts out of which the two applications arise are similar but not the same, and it will be necessary to state separately the facts of two cases.

(2) One of the applications is on behalf of Jagernath Prasad (hereinafter called the first petitioner), who is stated to be a shop-keeper at Chapra dealing in cloth. On or about the 4th of October, 1950, his shop was searched, and certain books, such as the stock register, cash book etc., were taken away by the Magistrate who searched the shop. It was stated that the first petitioner was then absent from Chapra. When he returned, he came to know that a report had been made against him for his prosecution under S. 7 of the Essential Supplies (Temporary Powers) Act, 1946. On the 13th or 14th of November, 1950, the first petitioner made a representation. On the 28th of November, 1950, when the first petitioner was ill at Banaras, a second representation was made on his behalf to the District Magistrate of Saran. On this representation, it is stated, the District Magistrate asked for a report from the Sub-divisional Magistrate, who, in his turn, called for a report from Mr. Ekka, the Magistrate who searched the shop of the petitioner.

On the 4th of November, 1950, however, an order of detention had been made by the State Government against the first petitioner in exercise of the powers conferred on it by sub-cl. (iii) of Cl. (a) of sub-s. (1) of S. 3 of the Preventive Detention Act, 1950 (Act IV of 1950). This order of detention stated that "the State Government was satisfied that with a view to preventing Shri Jagarnath Prasad from acting in any manner prejudicial to the maintenance of supplies and services essential to the community", it was necessary to arrest and detain him in the jail at Chapra. It is to be noted that when the order of detention was passed, the first petitioner was not in custody. It is stated on his behalf that on being informed of the order of detention, he surrendered on the 30th May, 1951. The order of detention, was served on the first petitioner on that date in Chapra Jail, and on the 8th of June, 1951, the grounds of detention dated the 5th of June, 1951, were communicated to the first petitioner. It is stated that on the 10th June, 1951, the first petitioner made a representation to the Secretary, Supply and Price Control Department. From an affidavit filed on behalf of the State of Bihar, it appears that the first petitioner made a representation against the

order of detention which was considered by the Advisory Board, and on the 21st July, 1951, the Board reported that in its opinion there was sufficient cause for the detention of the first petitioner.

(3) The grounds of detention communicated to the first petitioner, gave a statement of certain facts in the first four paragraphs namely, (a) that Sri Jagarnath Prasad held a licence for a wholesale dealer in cloth under paragraph 3 of the Bihar Cotton Cloth and Yarn (Control) Order, 1948; (b) that in his capacity as a licensee, he received for sale to the public a supply of cloth from one of the cloth importers in Bihar; (c) that one of the conditions of the licence was that he should maintain a register of daily transactions showing correctly the opening balance, receipt, sale, and closing balance of all cloth received by him; and (d) that during the months of September and October 1950 (before the approaching festivals of Dasahara and Muharram), an artificial scarcity in cloth was caused in Bihar by the cloth dealers indulging in certain activities such as hoarding, withholding from sale popular variety of cloth or selling them at exorbitant prices), to check which the State Government directed simultaneous raids of cloth shops in all districts. After stating these facts, the grounds of detention proceeded to give particular facts relating to the first petitioner. These read as follows:

"5. 102½ pairs of saries and dhotis were sold by his firm between 31-8-50 to 3-10-50, but these were not accounted for in the stock register.
6. 20½ pieces of dhotis and saris were found short out of a balance of 402 pieces of dhotis and saris.
7. There was no entry regarding sale shown in the stock register after 28-8-50.
8. No sale of cloth from 24-8-50 to 3-10-50 had been shown in the cash memo.
9. One original cash memo was found unserved to the customer."

(4) I now proceed to give the relevant facts of the second case in which the petitioner is Zullu Khalifa (hereinafter called the second petitioner.) The second petitioner was also a dealer in cloth of Hilsa Bazar within the district of Patna. His shop was searched by a Magistrate on the 21st February, 1951. It is stated that on the 22nd February, 1951, a report was submitted to the Sub-divisional Magistrate of Bihar, and a complaint was made for his prosecution on charges under Section 7 of the Essential Supplies (Temporary Powers) Act, 1946. The second petitioner was arrested and removed to jail. An application for bail was made on behalf of the second petitioner, and he was released on bail. But before that, a second complaint was made against the second petitioner alleging that he had tried to pass off as yarn a bale of cloth which a cartman was bringing to the shop of the second petitioner. On the 31st May 1951, an order of detention was passed against the second petitioner in which it was stated that:

"the State Government was satisfied that with a view to preventing the second petitioner from acting in any manner prejudicial to the maintenance of supplies and services essential to the community, it was necessary to arrest the second petitioner and detain him in the district jail at Patna."

On the 5th of June 1951, the second petitioner was arrested and detained in pursuance of the said order of detention. The grounds of detention dated the 13th June 1951, were communicated to the second petitioner on the 15th of June 1951. In this case also, the grounds of detention recited the same general facts in the first four paragraphs, to which I have already made a reference. The particular facts relating to the second petitioner, as disclosed in the grounds of detention, were these:

"5. The shop-keeper had kept 11 pieces of mill-made new dhotis and saris concealed in his room up-stairs, apparently with the object of selling them in black-market.
6. There was excess of 15 pieces of dhotis and shortage of 2 pieces of saris as compared to his total stock of 36 pieces of dhotis and 68 pieces of saries.
7. He procured 60 pieces of dhotis and 10 thans of 'markin' from the Patna market and he would not disclose that source of supply. Apparently he procured all these cloth for sale from the black-market in Patna.
8. When he handed over the bale containing the above to the cart-man, he said that the bale contained yarn."

(5) On the facts stated above, the principal question for decision in these two cases is if the detention of the two petitioners is legal. Mr. Basanta Chandra Ghose, appearing for the two petitioners, has contended that the detention is not legal, and has urged several grounds in support of his contention. His grounds may be thus formulated:

1. Taking the grounds of detention as alleged by the State Government to be correct, the activities to which they refer do not and cannot prejudice the maintenance of supplies and services essential to the community, inasmuch as the expression "maintenance of supplies and services essential to the community", as used in Clause (iii) of Section 3 (1) (a) of the Preventive Detention Act, as a special, and well-understood technical meaning referable only to such supplies and services as are of the nature of public utilities; e.g., supply of electric energy, supply of water, supply of transport services, etc. It is contended that the expression has no reference to mere supplies of commodities, such as cloth, even if such supplies be essential to the community.

2. The Essential Supplies (Temporary Powers) Act, 1946,has ceased to be in force before the dates of the orders of detention, and the Bihar Cotton Cloth and Yarn Control Order, 1948, had also fallen with it; in the absence of such a control order, violation of the conditions of a licence, etc., could not, in any way, jeopardise the maintenance of supplies of cloth.

3. The orders of detention are mala fide in the sense that the grounds alleged by the State Government do not exist in fact; they are absurd and self-contradictory.

4. In any view, the grounds are vague, and there has been a failure to comply with the mandatory provisions of Clause (5) of Article 22 of the Constitution of India.

(6) In the case of the second petitioner, two further grounds have been urged: one is that when a prosecution has been launched under Section 7 of the Essential Supplies (Temporary Powers) Act, 1946, no order of detention can be made; the second is that the shop of the petitioner was closed, locked and sealed, and its stock seized on the 21st or 22nd of February, 1951, i.e., about two months before the order of detention. By reason of the closure of the shop, the second petitioner was not in a position to indulge in any anti-social activities: therefore, the order of detention was 'mala fide.'

(7) For convenience and facility of understanding, I have summarised above, under six main heads, the argument of Mr. Basanta Chandra

Ghose. Under each head, the argument has gone into ramifications, which it has not been always easy to follow. I shall refer to some of these ramifications when dealing with each of the points mentioned above.

(8) The first contention of Mr. Basanta Chandra Ghose as to the meaning of the expression "maintenance of supplies and services essential to the community" was dealt with by a Division Bench of this Court in a batch of cases, the decisions being reported in 'DAYANAND MODI v. STATE OF BIHAR', 30 Pat 630, and 'MADAN LAL v. THE STATE OF BIHAR', 30 Pat 653. In Special Bench decision of 'MISRI LAL v. STATE', 30 Pat 716, the real point for decision was somewhat different; but the meaning of the expression "prejudicial to the maintenance of supplies and services essential to the community" was considered, and it was stated that the true meaning of the expression was:

> "to prevent any person from doing an act in any manner prejudicial to the upkeep of the needs, the provisions and the services essential to the community."

The view expressed in the two earlier decisions referred to above was doubted by one of the Judges who decided Criminal Misc. No. 258 of 1951, on the 20th August, 1951. In that decision Shearer, J., stated as follows:

> "What amounts to 'acting in a manner prejudicial to..... the maintenance of supplies and services to the community'? Certain acts can be said, with reasonable certainty, to come within the scope of the language used by Parliament as, for instance an attempt to precipitate a strike on a railway, or among dock labourers engaged in unloading certain ships at a port, or the employees of a power house supplying electricity to a town. Strikes of this kind must inevitably cause inconvenience to so many persons that the well-being of the community can fairly be said to be threatened. On the same ground an attempt on the part of a financier or group of financiers to corner supplies of a controlled commodity and hold them for a rise in price would, I imagine, be such an act. But is an attempt on the part of an ordinary shop-keeper dealing in a controlled commodity to dispose of part of his stock-in-trade in the black-market? Speaking for myself, I must say that I very much doubt it."

He, however, observed that:

> "more than one Division Bench of this Court took the view that orders of detention passed in similar circumstances were valid, and the question must be regarded as concluded by authority."

It is primarily because of the doubt expressed by Shearer, J., that these cases have now come before this larger Bench.

(9) On the arguments of Mr. Basanta Chandra Ghose, the real question that falls for consideration is if the expression "maintenance of supplies and services essential to the community" used in Section 3 of the Preventive Detention Act, 1950, has a technical meaning which restricts it to public utilities like the supply of electrical energy, water etc., (which has, undoubtedly, a service aspect), or it embraces supplies and services of all commodities essential to the community. There has been much argument before us as to whether the word "and" in the expression means "or" in the context of Section 3 of the Preventive Detention Act.

That argument was considered in 'DAYANAND MODI'S CASE', 30 Pat 630. I do not propose to consider that argument afresh, because, assuming that the word "and" is used in a cumulative sense in Clause (iii) of Section 3 (1) (a) of the Preventive Detention Act, the supply of an essential commodity necessarily involves a service to the community. The expression "maintenance of supplies and services essential to the community' has to be considered as a whole, each word being given its true meaning and import. As was pointed out by Imam, J., in 'MISRI LAL'S CASE 30 Pat 716, the word "maintenance", according to Webster's Dictionary, means "support and up-keep of property etc."; the word "supply" has, amongst various meanings, the meaning "to fill the needs of, to furnish with supplies, provisions, etc., as well as filling a want, a need." It was observed that the word "supplies" carried with it the meaning "to fill the needs of or to supply provisions to the community"; in other words, the meaning of the words "maintenance of supplies and services essential to the community" must be "the up-keep of the needs and the provisions essential to the community." If I may say so with respect, that seems to me to be the only proper meaning, which follows not only from grammatical construction, but also from the context in which the words have been used. There cannot be any doubt that the supply of cloth fills an essential need of the community and is a service to it. Any interference with such supply and service will be prejudicial to the maintenance of supplies and services essential to the community. Where with regard to an essential commodity there is a system of controls, on which the maintenance of supplies and services depends, evasion of the control orders will prejudicially affect the maintenance or up-keep of the supplies and services essential to the community. The view point that the action of a petty shop-keeper will not prejudically affect the maintenance of supplies and services, fails to take note of the control system; and further, if a number of petty shop-keepers indulge in similar activities, there will, undoubtedly, be an artificial scarcity in cloth, as was stated to have happened before these detention orders were passed.

(10) Mr. Ghose contended very seriously that in the Defence of India Act, 1939, and the Rules made thereunder, the expression "maintaining supplies and services essential to the life of the community" had a narrow meaning restricted only to public utilities, and it must be presumed that the legislature knew this meaning when it used the same or similar expression in the Preventive Detention Act. He further submitted that this was made quite clear by Ordinance XVIII and Ordinance XX of 1946. He referred particularly to the latter Ordinance, which contained certain provisions of the Defence of India Act, 1939, and of the Defence of India Rules. He pointed out that Rule 81 of the Defence of India Rules, which previously empowered the appropriate authority to made orders for securing the defence of British India, the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community in respect of articles or things of any description whatsoever, was by Ordinance XX of 1946, modified, and the competent authority was empowered to make orders only for maintaining supplies and services essential to the life of the community, and Clause (a) of Sub-rule (2) of Rule 81 was modified to relate to the production, distribution, use or consumption of electrical energy; similarly , other clauses were also modified so as to relate to such matters as letting and sub-letting of house accommodation, etc. Mr. Ghose also referred to Rule 81-A and many other Defence of India Rules, and his contention was that the changes made in the Defence of India

Rules by Ordinance XX of 1946, indicated clearly that the expression "maintaining supplies and services essential to the life of the community" was understood to refer to public utilities or supplies and services of a like nature.

In my opinion, this contention is not borne out by a close scrutiny of the Defence of India Act and the Rules made thereunder. In 'DAYANAND MODI'S CASE', 30 Pat 630, I had pointed out that there were rules made under the Defence of India Act, 1939, which showed that the expression "maintaining supplies and services essential to the life of the community" was not understood in the narrow sense contended for by Mr. Ghose. Rule 81, as it originally stood, is itself illustrative of the meaning in which the expression was understood. It empowered the competent authority to provide by order for regulating disposal, use, consumption etc., of articles or things of any description whatsoever for', amongst other purposes, maintaining supplies and services essential to the life of the community. The fact that by Ordinance XX of 1946, the rule was so modified as to relate to supply of electrical energy etc. is no ground for holding that the expression was understood in a narrow sense. Take for example R. 88 which related to the handling and conveyance of ammunition etc. The expression "for maintaining supplies essential to the life of the community" occurred in the Rule both before and after 1946. In the Defence of India Act, 1939, the expression used was "for maintaining supplies 'and' services essential to the life of the community". If Mr. Gohse's contention is correct, then R. 88 will be 'ultra vires' the Act, because the rule will not come within the meaning of the expression used in the parent Act. Subrule (2) of R. 81D empowered the District Magistrate to pass certain orders in respect of shops dealing in essential articles for the purpose of maintaining supplies essential to the life of the community. This subrule again shows that the expression "for maintaining supplies and services essential to the life of the community" was not understood in the sense contended for by Mr. Ghose. It is, I think unnecessary to multiply details. It is sufficient to state that, in my opinion, there was no such accepted, technical meaning of the expression as is suggested by Mr. Ghose. The expression has to be understood in its ordinary grammatical sense; and as I have explained above, in its ordinary grammatical sense, the expression covers the kind of activities which are referred to in the grounds of detention communicated to the two petitioners.

(11) There has been some argument before us as to whether a difference in degree can be treated as a difference in class, and Mr. Ghose has referred to certain observations made in 'ROMESH THAPPAR v. STATE OF MADRAS', 1950 S.C.R. 594. This argument has been advanced by Mr. Ghose in support of the view point that such activities as are referred to in the grounds of detention, on the part of a petty shop-keeper, are so slight in degree that they must be treated as being in a class different from the class contemplated by the expression "maintenance of supplies and services essential to the life of the community". The observations made in 'ROMESH THAPPAR's Case' have, in my opinion, no application in the present case; because in Romesh Thappar's case their Lordships were referring to the distinction drawn by the statute itself between "public order" and "security of the State". Moreover, whether it is necessary to detain a particular person on account of his prejudicial activities is really a matter for the detaining authority which will, no doubt, consider the nature and degree of seriousness of the prejudicial activities. I am unable to accept the view that it is open to the Court to consider the difference in degree, and treat some prejudicial activities as coming within the expression and some as not coming within it, though in the ordinary grammatical sense they all come within the expression.

(12) I now proceed to the second contention, namely, if the Essential Supplies (Temporary Powers) Act, 1946, had ceased to be in force before the dates of the orders of detention passed in these cases. The contention of Mr. Ghose is that, in any view of the matter, the Essential Supplies (Temporary Powers) Act, 1946, ceased to be operative after mid-night on the 25-1-1950. Alternatively, he argued that the Essential Supplies (Temporary Powers) Act, 1946, was bad on the ground of delegated legislation so far as sub-s. (3) of S. 1 (duration clause) was concerned. This contention again, though in a slightly different form, was considered by a Division Bench of this Court, of which I was a member, in Criminal Misc. No. 671 of 1950, 'SRILAL KOWALA v. THE STATE', decided on the 13th February, 1951. Some of the arguments in support of the contention were noticed by me in the said decision. I shall cofine myself now to the additional grounds which have been urged by Mr. Ghose.

(13) It will, I think, be convenient to give first a statement of facts out of which the contention arises. I start with the India (Central Government and Legislature) Act, 1946 (9 & 10 Geo. VI C. 39), which amended the Government of India Act, 1935, in respect of certain matters. For our purpose, the relevant sections are Ss. 2 and 4. By S. 2, the Indian Legislature was given power to make laws with respect to, 'inter alia' trade and commerce in, and the production, supply and distribution of cotton and woollen textiles etc. The section also stated that any law made by the Indian Legislature which that Legislature would not, but for the provisions of the section, have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a particular period except as respects things done or omitted to be done before the expiration thereof. Section 4 referred to the particular period, and read as follows:

"The period mentioned in the two last preceding sections is the period of one year beginning with the date on which the Proclamation of Emergency in force at the passing of this Act ceased to operate or, if the Governor-General by public notification so directs, the period of two years beginning with that date:

Provided that if and so often as a resolution approving the extension of the said period is passed by both Houses of Parliament, the said period shall be extended for a further period of twelve months from the date on which it would otherwise expire so, however, that it does not in any case continue for more than five years from the date on which the Proclamation of Emergency ceases to operate."

The main purpose of India (Central Government and Legislature) Act, 1946, appears to have been to keep alive or give certain emergency powers to the Indian Legislature. By S. 5, provision was also made for the duration of laws passed by the Indian Legislature by virtue of the Proclamation of Emergency under S. 102 of the Government of India Act, 1935. The Essential Supplies (Temporary Powers) Act, 1946, was passed by the Indian Legislature in exercise of the power conferred by S. 2 of the India (Central Government and Legislature) Act, 1946. The Act received the assent of the Governor-General on the 19th November, 1946. Sub-s. (3) of S. 1 of the Act was in these terms:

"It shall cease to have effect on the expiration of the period mentioned in S. 4 of the India (Central Government and Legislature) Act, 1946, except as respects things done or omitted to be done before the expiration thereof, and S. 6 of the General Clauses Act, 1897, shall apply upon the expiry of this Act as if it had then been repealed by a Central Act."

It is not in dispute that the Proclamation of Emergency referred to in S. 4 of the India (Central Government and Legislature) Act, 1946, ceased to operate after the 31-3-1946. It is also not in dispute that the Governor-General of India made a public notification on the 3rd March, 1947, in which he directed that the period mentioned in Ss. 2 and 3 of the India (Central Government and Legislature) Act, 1946, shall be a period of two years beginning with the 1st day of April, 1946, being the date on which the Proclamation of Emergency referred to in S. 4 ceased to operate. On the 25th February, 1948, the Constitutent Assembly passed a resolution to the following effect:

"In pursuance of the proviso to S. 4 of the India (Central Government and Legislature) Act, 1946, as adapted by the India (Provisional Constitution) Order, 1947, this Assembly hereby approves the extension of the period mentioned in Ss. 2 and 3 of the said Act for a further period of twelve months commencing on the first day of April, 1948."

It may be stated here that the constitutional position of India changed after the passing of the Indian Independence Act, 1947. The British Parliament lost all legislative authority over India, so that the Houses of Parliament referred to in the Proviso to S. 4 of the India (Central Government and Legislature) Act, 1946, could not pass the resolution referred to therein. On the 14th of August 1947, the Governor-General of India made an order in exercise of the powers conferred by S. 9 read with S. 19(4), Indian Independence Act, by which for "both Houses of Parliament" the words "the Dominion Legislature" were substituted. A new section, S. 4A, was inserted which said that the powers of the Dominion Legislature shall, until other provision is made by or in accordance with a law made by the Constituent Assembly, be exercisable by that Assembly. Therefore, the Constituent Assembly passed the resolution referred to above on the 25th of February, 1948, and this was published for general information on the 3rd March, 1948. On the 23rd of March, 1949, the Constituent Assembly passed yet another resolution which stated that the period mentioned in Ss. 2 and 3 of the India (Central Government and Legislature) Act, 1946, shall extend for a further period of twelve months commencing on the 1st day of April, 1949. This resolution was published for general information on the 25th March, 1949. I now come to the last resolution, namely, the resolution of the 20th December, 1949, published in the Gazette of India, Extraordinary, dated the 24th December, 1949. The resolution was to the effect that the Constituent Assembly approved the extention of the period mentioned in Ss. 2 and 3 of the India (Central Government and Legislature) Act, 1946, for a further period of twelve months commencing on the 1st day of April 1950. It is to be noted that this last resolution of December, 1949, was passed, after the Constituent Assembly had passed the Indian Constitution on the 26th day of November, 1949. Article 394 of the Constitution stated that that Article and certain other Articles with which we are not concerned, would come into force on the day the Constitution was made, and

"the remaining provisions of this Constitution shall come into force on the twenty-sixth day of January, 1950, which day is referred to in this constitution as the commencement of this Constitution."

The point which I wish to emphasise here is that the last resolution of December, 1949, was passed before the commencement of the Constitution. Article 395 of the Constitution repealed, 'inter alia', the Government of India Act, 1935, together with all enactments amending or supplementing it. Article 372 of the Constitution stated (I am quoting only such portions of Art. 372 as are relevant for our purpose):

"372(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Art. 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any Court of law."

(14) There are several Explanations appended to Art. 372 of which Explanation III is relevant for our purpose. This Explanation is in these terms:

"Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force."

On the 26th of January, 1950, the President made the Adaptation of Laws Order, 1950. Sub-s. (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946, was modified, and for the words "on the expiration of the period mentioned in S. 4 of the India (Central Government and Legislature) Act, 1946" the words "on the 1st day of April, 1951" were substituted. On the 16th of August, 1950, the Essential Supplies (Temporary Powers) Amendment Act, 1950, was passed (Act LII of 1950). By this, the words the figures "31st day of December 1952" were substituted for the words and figures "1st day of April 1951". It is to be noted that under Art. 369 of the Constitution, Parliament had power to make laws in respect of ('inter alia') trade and commerce within a State in, and the production supply and distribution of, cotton and woollen textiles etc., for a period of five years from the commencement of the Constitution. There was, therefore, no lack of legislative authority for Act LII of 1950.

(15) I have given above a brief 'resume' of legislative history by which the duration of the Essential Supplies (Temporary Powers) Act, 1946, was extended till the 31st December, 1952.

(16) Let me now examine the contention of Mr. Ghose that the Essentail Supplies (Temporary Powers) Act, 1946, ceased to be operative after midnight on the 25th January, 1950; there are two alternative arguments also — one to the effect that in any view it came to an end on the 31st of March, 1950, because the resolution of December, 1949, was invalid and inoperative; the second

alternative argument is that sub-section (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946, is bad on the ground of delegated legislation. I do not think that there is any difficulty up to the 31st March, 1949, provided sub-s. (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946, is not 'ab initio' bad on the ground of delegated legislation — an argument which I shall deal with in subsequent paragraphs. The principal argument of Mr. Ghose is based on Art. 395 of the Constitution whcih repealed the Government of India Act, 1935, together with all enactments amending it. He contends that the India (Central Government and Legislature) Act, 1946, which was an Act to amend the Government of India Act, 1935, stood repealed on midnight of the 25th of January, 1950. If the Act itself stood repealed on that day, the period mentioned in Ss. 2, 3 and 4 of the Act could not remain alive after the death of the Act itself; in other words, those sections went with the Act. He points out that sub-section (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946, as it stood then, referred to the period mentioned in S 4 of the India (Central Government and Legislature) Act, 1946, and if the period mentioned in S. 4 disappeared with the Act, the Essential Supplies (Temporary Powers) Act, 1946, also came to an end at midnight on the 25th January, 1950, notwithstanding the resolution of the 23rd March, 1949. As to the resolution of the 20th December, 1949, which extended the period for one year more commencing from the 1st April, 1950, the contention was that it was invalid and totally ineffective to keep alive the Essential Supplies (Temporary Powers) Act, 1946, after the 31st March, 1950, even assuming, without in any way conceding, that the earlier resolution kept it alive till the 31st March, 1950. Mr. Ghose says that the Adaptation of Laws Order made by the President on the 26th of January, 1950, could not give life to something which was already dead, nor could the Amending Act of 1950 amend a piece of legislation which had already come to an end. Thus, in substance, is the argument of Mr. Ghose.

(17) It seems to me that the whole argument of Mr. Ghose hinges on his contentions — (1) that the repeal of the India (Central Government and Legislature) Act, 1946, by Art. 395 of the Constitution brought the Essential Supplies (Temporary Powers) Act, 1946, to an end, in spite of the resolution of the 23rd March, 1949; and (2) that the resolution of the 20th December, 1949, was, in any case, invalid & ineffective. Both these contentions are, in my opinion, incorrect.

(18) Sub-section (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946, fixed the period of duration of the Act, as the period mentioned in S. 4 of the India (Central Government and Legislature) Act, 1946. That period was uncertain in the sense that it stated a maximum period in certain instalments: first, one year from the date on which the Proclamation of Emergency ceased to operate; then two years from that date; if the Governor General made a notification, then twelve months more, as often as a resolution was passed, subject to a maximum of five years. It is clear that the Indian Legislature intended the Essential Supplies (Temporary Powers) Act, 1946, to be in force for the entire period in instalments mentioned above, provided the necessary notification and resolutions were validly passed by a competent authority; therefore, sub-s. (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946, took the convenient form of stating that the period of duration shall be the expiration of the period mentioned in S. 4 of the India (Central Government and Legislature) Act, 1946. There was no delegation whatsoever by the Indian Legislature to an outside body. The Indian Legislature applied its mind and fixed the duration as being the period mentioned in S. 4 of the India (Central Government and Legislature) Act, 1946. In its true nature and scope, sub-s. (3) of S. 1 is not delegated legislation. It is worthy of note that even if the duration were not fixed by sub-s. (3) of S. 1, the Essential Supplies (Temporary Powers) Act, 1946, would have continued to be of effect as long as the Indian Legislature was competent to make such a law under the parliamentary statute; see the provisions of S. 2 of the India (Central Government and Legislature) Act, 1946. The period referred to in sub-s. (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946, was extended for one year commencing from the 1st day of April, 1949. It was again extended for a period of twelve months commencing on the 1st day of April, 1950. Both these resolutions were passed by the Constituent Assembly at a time when that authority was competent to pass the resolutions. I am unable to accept the contention of Mr. Ghose that the resolution of the 20th December, 1949, was invalid or ineffective. Mr. Ghose contended that the Constitutent Assembly knew then that the India (Central Government and Legislature) Act, 1946, would come to an end on the 25th January, 1950; therefore, they could not pass a resolution which would keep the period alive beyond a date on which the Act, in which the period is mentioned, would itself fall. This argument, I think, fails to give effect to the provisions of Art. 372 of the Constitution. On the 25th of January, 1950, the Essential Supplies (Temporary Powers) Act, 1946, was a "law in force in the territory of India immediately before the commencement of the Constitution." Article 372 says that this law shall continue in force notwithstanding the repeal of the enactments referred to in Art. 395. By the resolution of the 23rd March, 1949, the Essential Supplies (Temporary Powers) Act, 1946, had already been extended for twelve months commencing on the 1st day of April, 1949. Therefore, by reason of the aforesaid resolution, read with Art. 372 of the Constitution, the Essential Supplies (Temporary Powers) Act, 1946, would remain in force till the 31st March, 1950. By the December resolution, it would remain in force till the 31st March, 1951. It is true that the reference in the two resolutions was to the period mentioned in Ss. 2 and 3 of the India (Central Government and Legislature) Act, 1946, which was to stand repealed on the Commencement of the Constitution. But in effect the resolutions extended the period of the Essential Supplies (Temporary Powers) Act, 1946, and the resolutions were passed at a time by an authority which was competent to pass them. I think that the provisions of Art. 372 of the Constitution would save the Essential Supplies (Temporary Powers) Act, 1946, in spite of the repeal of the India (Central Government and Legislature) Act, 1946, on the commencement of the Constitution. I do not accept the contention of Mr. Ghose that the resolution of the 20th December, 1949, was invalid and ineffective, nor do I accept his contention that the Adaptation of Laws Order, 1950, made by the President on the 26th of January, 1950, was seeking to revive something which was already dead. On the 26th of January, 1950, the President was confronted with this position: by reason of the two resolutions referred to above, the Essential Supplies (Temporary Powers) Act, 1946, was to remain in force till the 1st day of April, 1951, because the period mentioned in S. 4 of the India (Central Govern-

ment and Legislature) Act, 1946, had been extended till that date; however, the India (Central Government and Legislature) Act, 1946, itself came to an end on the midnight of the 25th January, 1950; but that did not put an end to a law in force in the territory of India immediately before the commencement of the constitution. There was, thus, an apparent anomaly, and it was necessary to bring the provisions of sub-s. (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946, into accord with the provisions of the Constitution, i.e. into accord with the provisions of Arts. 395 and 372 of the Constitution. It was for this purpose that a modification was necessary by way of an amendment of sub-s. (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946, and the President gave effect to the resolutions by substituting "the 1st day of April 1951" for the period originally mentioned in sub-s. (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946. This adaptation or modification was neither illegal nor beyond the competency of the President within the meaning of Cl. (2) of Art. 372 of the Constitution. Explanation III to the Article does not, in any way, affect the position. The provisions of the Article are not being construed as continuing any temporary law beyond the date fixed for its expiration. All that the President did was to resolve an apparent anomaly and give effect to the resolutions of the Constituent Assembly so as to avoid any apparent conflict between the provisions of sub-s. (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946, and the provisions of the Constitution of India.

(19) I have already dealt with the argument of delegated legislation. There is, in my opinion, no delegation by sub-s. (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946. The delegation, if any, with regard to the period mentioned in Ss. 2 and 3 of India (Central Government and Legislature) Act, 1946, was by the British Parliament, and Mr. Ghose has conceded that it was open to the British Parliament to pass delegated legislation. I do not think that the Indian Legislature delegated its legislative function to any outside body by the provisions of sub-s. (3) of S. 1 of the Essential Supplies (Temporary Powers) Act, 1946. It was faced with the difficulty of fixing a period which might be extended in a certain contingency, and it stated in effect that the period shall be as long as the power to legislate exists. It merely adopted a convenient form of fixing the period. In this view of the matter, I do not think that it is necessary to consider the case law on the subject of delegated legislation, which case law has been exhaustively referred to and discussed in the recent decision of the Supreme Court in Re Art. 143, 'Constitution of India' and Delhi Laws Act (1912) etc. AIR (38) 1951 S C 332.

(20) For these reasons, I hold that the Essential Supplies (Temporary Powers) Act, 1946, did not come to an end before the dates of the orders of detention passed against the two petitioners. Mr. Ghose has not referred us to any decision in which his contention has been accepted. There are decisions in which a similar contention, though not exactly in the same form, was negatived. I had referred to some of those decisions in Srilal Khowala's case (Criminal Miscellaneous No. 671 of 1950, decided on the 13th February, 1951). A still more recent decision is the Special Bench decision of the Calcutta High Court in 'RAMANANDA v. The STATE', 55 Cal W N 572, and also the decision of the Bombay High Court in 'THE STATE v. HIRA LAL MANILAL', A I R (38) 1951 Bom 369. I do not wish to burden this judgment by an unnecessary repetition of the reasons given in those decisions. Since I had prepared this judgment, I have seen a decision of the Supreme Court in 'JOYLAL AGARWALA v. THE STATE', AIR (38) 1951 S C 484, where the contention that S. 1(3) of the Essential Supplies (Temporary Powers) Act, 1946, is bad on the ground of delegated legislation has been negatived on the same grounds.

(21) As to the remaining two contentions of Mr. Ghose in respect of the first petitioner, I have examined the grounds of detention with reference to the affidavits which have been filed on behalf of the petitioner. I am unable to accept the contention that the grounds do not exist in fact or that the orders of detention are 'mala fide' Mr. Ghose has made much of a letter, letter No. 4948 P. C./Text-B1/1948 dated the 8th March, 1950, which stated that in respect of cloth "for November, 1949 and onward packing" the Government of Bihar had decided to eliminate whole salers from the cloth trade. A copy of this letter is an enclosure to one of the affidavits filed on behalf of the first petitioner. This letter was also explained in a Press Note dated the 22nd March, 1950. Mr. Ghose has submitted that as wholesalers were eliminated from the 8th of March, 1950, all the grounds of detention stated against the first petitioner, who was a whole-sale dealer, became incorrect. I do not think that this contention is correct. As the letter itself shows, the Government of Bihar decided to eliminate the wholesalers only in respect of cloth "for November 1949 and onward packing". There was no elimination of wholesalers in respect of cloth for earlier months. On behalf of the first petitioner, an affidavit was filed in the course of arguments that he had no stock of cloth packed before the 1st November, 1949. That is a question of fact, the truth of which can be found out only on investigation. In 'MADAN LAL's Case', 30 Pat 653, I had tried to explain clearly how far it was open to the Court to examine the grounds. I had stated there that it was not open to the Court to go into an attempted explanation of the facts alleged, in order to determine the correctness or otherwise of the grounds of detention. On behalf of the first petitioner, Mr. Ghose really wants us to investigate into the truth or otherwise of the facts alleged in the grounds of detention. I do not think that he has made out that the grounds do not exist, or that they are absurd and self-contradictory.

(22) It was argued that the grounds were vague, and there was, thus, a failure to comply with the mandatory provisions of Cl. (5) of Art. 22 of the Constitution of India. I do not find that the grounds were vague, or that they did not afford an opportunity to the first petitioner to make an effective representation. The first petitioner, as I have already stated, did make a representation which was considered by the Advisory Board.

(23) In my opinion, the detention of the first petitioner is legal, and there are no reasons for intereference by us;

(24) As to the second petitioner, I have to deal with the two additional points of Mr. Ghose. After arguments had closed in this case, we were informed by Counsel for the State of Bihar that the prosecution against the second petitioner had been withdrawn. The question whether there can be a detention order when a prosecution for a criminal offence is pending, was dealt with by me, at great length, in 'SUBODH KUMAR SINGH v. THE STATE', AIR (38) 1951 Pat 68. I pointed out there that there is no rule of law that unless a choice of one of two alternatives, prosecution or detention is made at the earliest moment, the order of detention must be held to be invalid. 'I stated that the' proper approach was to consider the facts of each case and then consider whether the

order of detention was 'mala fide' or not. I still adhere to that view. I may state also that there was an appeal to the Supreme Court against the aforesaid decision, and the appeal was dismissed. Mr. Ghose relied on certain observations made in 'KAMLA KANT v. EMPEROR', 23 Pat 252 by my learned brother Shearer, J. in a subsequent decision in 'Cri. Misc. No. 258 of 1951, decided on the 20th August, 1951' the same Judge explained his earlier observations by stating:

"In all the circumstances of the case ('KAMLA KANT AZAD's Case') it was possible to infer that the orders of detention had not been made in order to prevent the petitioners from acting in a manner prejudicial to the public order, but in order to punish them for what they had already done. It was on this ground and on this ground alone that the decision was approved by the Federal Court ('BASANTA CHANDRA v. KING EMPEROR', 1945-7 F C R 81 at p. 89".

His Lordship pointed out that if in any particular case, it was impossible to say that the order of detention was made in order to punish the petitioner for having operated or attempted to operate on the blackmarket and not in order to prevent him from doing so, the observations made by him in 'KAMALA KANT's Case' would have no application.

As I look at the matter, the real question is whether the order of detention is mala fide or not. We know now that the prosecution against the second petitioner has been withdrawn; but I am unable to hold, on the basis of the grounds of detention stated against the second petitioner, that the order of detention was for an ulterior or collateral purpose, and not for the purpose of preventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to the community. One must always keep in mind the distinction between 'preventive detention' and 'punitive action'.: the first has reference to a likelihood of some prejudicial activity in future, and the second has reference to some past action for which punishment is needed. The State Government has stated unequivocally that it is satisfied that it is necessary to pass an order of detention against the second petitioner to prevent him from acting in a manner prejudicial to the maintenance of supplies and services essential to the community, and I am unable to hold, on the basis of the grounds of detention communicated to him, that the order was for any purpose other than that stated by the State Government.

(25) As to the other point arising out of the closure of the shop of the second petitioner on the 21st or 22nd February, 1951, our attention has been drawn to certain observations in 'DASRATH PRASAD v. THE STATE OF BIHAR', Cri Misc No. 199 of 1951, decided on the 7th June, 1951. C. P. Sinha, J. observed therein:

"During the course of the argument, another point emerged, and it is this. The last but two paragraphs of the grounds, which have already been quoted above, show that the petitioner as a ration shopkeeper had been drawing from Government Godown more foodgrains than was required for the cardholders, and that he was selling the excess foodgrains in the black market, and that, therefore, according to the State Government, if the petitioner was allowed to remain at large, he would indulge in activities to the prejudice of the maintenance of supplies and services essential to the community, and, for prevention of such activities, the State Government considered his detention necessary. The question is, if the petitioner has ceased to be a ration shopkeeper, his ration shop has been closed, his licence under the Foodgrains Control Order suspended or cancelled, is it physically possible for the petitioner to indulge in the activities referred to in these two paragraphs? The complaint against him is that as a ration shopkeeper he used to draw from Government Godown more foodgrains than was necessary to supply to the card-holders, and he was diverting the surplus foodgrains to the blackmarket. If the petitioner had ceased to be a ration shopkeeper, he could not draw any foodgrains from the Government Godown; if he could not, then there could be no apprehension that the petitioner would indulge in activities to the prejudice of maintenance of supplies and services essential to the community. It appears, however, from a judgment of this Court in the case of 'MOHAMMAD ABDUL QAYUM v. THE STATE', Cri Misc No. 701 of 1950, decided on the 9th January 1951, that in such a case it was open to the State Government to draw an inference that, if the petitioner was allowed to remain at large, he would indulge in similar activities irrespective of the question whether he had a permit for a ration shop or not. In the present case, the inference drawn by the State Government that the petitioner, if left at large, was likely to indulge in activities to the prejudice of maintenance of supplies and services essential to the community is based on the only fact that the petitioner as a ration shopkeeper used to draw more foodgrains from Government Godown than was necessary which surplus foodgrains he used to divert to the blackmarket. If that fact on which the inference or apprehension of the State Government was based did not exist, then, in my opinion, it appears doubtful if there was any basis left on which the apprehension or the inference of the State Government could be founded. But, as it is not necessary to decide that question in the present case, I do not like to deal with that point in any greater detail."

(26) The observations show clearly enough that the question is not a question of law, and will depend on the facts of each case. Even after the suspension of a licence, a large stock of cloth may remain to be disposed of, and the person complained against may even receive a fresh supply of cloth with or without a licence. It is not difficult for a dealer in the blackmarket to get cloth without a licence. Preventive detention depends on suspicion — suspicion inferred from circumstances. and it is for the detaining authority to be satisfied about the inference to be drawn. In my opinion the mere closure of the shop of the second petitioner or even the temporary seizure of his goods is no ground for holding that the order of detention is 'mala fide'. It appears that the licence of the second petitioner has not been cancelled; even if it were cancelled, it is not reasonable to hold that the kind of activities in which the second petitioner indulged, cannot be committed by him again without a licence. The commission of anti-social activities of the nature alleged against the second petitioner does not 'necessarily' depend on the obtaining of a licence, though the past acts relate to a violation of the conditions of a licence.

(27) For the aforesaid reasons, I would hold that the detention of the second petitioner is also legal.

(28) The result, therefore, is that the applications fail, and are dismissed.

(29) REUBEN, J.: I agree.

(30) IMAM, J.: I agree.

R.G.D. *Applications dismissed.*

A. I. R. (39) 1952 Patna 194 [*C. N. 55 (15).*]

RAMASWAMI AND SARJOO PROSAD JJ.

Ram Prasad Narayan Sahi and others, Petitioners v. The State of Bihar and others, Opposite-Party.

Misc. Judicial Case No. 204 of 1950, D/ 3-1-1952.

(a) *Constitution of India, Art. 245 — Law — Meaning of — Sathi Lands (Restoration) Act (XXXIV (34) of 1950), S. 2.*

Law in its legislative sense is of much wider import than the juristic notion of law as the command of a sovereign or as a rule laying down a general course of conduct. The term "law" in Art. 245 must be construed so as to include in its scope all legislative Acts enacted in the prescribed manner and form. Sathi Lands (Restoration) Act was therefore 'Law' in the strict sense and the declaration contained in it was not in the nature of a mere decree in respect of certain individuals' rights. 4 Cal 172 P C, Rel. on. (*Para 8*)

(b) *Sathi Lands (Restoration) Act (XXXIV (34) of 1950) — Validity.*

(*Per Ramaswami J.*): *There is no hard and fast line to be drawn between a legislative and a judicial Act. In India there is no doctrine or dogma of separation of the various powers. The Constitution has not 'vested' judicial power or the legislative power in separate departments of the State. The legislature has not usurped judicial function in passing the Act. 'Case law discussed.*

(*Paras 12, 15, 18*)

(c) *Constitution of India, Art. 14 — Sathi Lands (Restoration) Act (XXXIV (34) of 1950)—Validity.*

Art. 14 does not prohibit legislative classification. Nor does it prohibit the legislature from enacting special laws to combat special evils. A classification that takes account of the different degrees in which an evil is present must be upheld as reasonable and valid. Even legislation relating to one individual would not violate the equal protection clause, if there is no discrimination. The Sathi Lands (Restoration) Act cannot be held to be invalid on the ground of its violating Art. 14. (1918) 249 U S 152, Rel. on. (*Para 19*)

(d) *Court of Wards Act (IV (4) of 1870), S. 18 — Construction — Lease, etc., of estate — Duty of Court of Wards.*

The clause 'as it may judge to be most for the benefit of the property and the advantage of the Ward' governs not only the last clause but also the previous two clauses which deal with leases or farms of the whole or part of the estate and mortgage or sale of any part of the estate. In all the three classes of cases the Court of Wards must apply its mind to the question whether the transaction is for the benefit of the property or for the ward's advantage. If the Court of Wards did not apply its mind to the question of the benefit of the estate or the ward's advantage the settlement of the land is illegal and void. 23 All 394 P C; AIR (37) 1950 Pat 134, Ref. (*Paras 21, 22*)

(e) *Constitution of India, Art. 226 — Exercise of discretion — Disputed questions of fact.*

The remedy given by Art. 226 is an extraordinary one and can be invoked only in exceptional circumstances by those who have no alternative remedy by way of suit or otherwise. Disputed questions of fact cannot be satisfactorily determined in these summary proceedings. (*Para 23*)

(f) *Constitution of India, Art. 226 — Requirements of.*

('*Per Sarjoo Prosad, J.*':) *There must be something in the nature of the case itself and in the facts and circumstances thereof to couple the power vouchsafed to the High Court under Art. 226 of the Constitution with a duty to exercise the same in order to compel the High Court to give relief to the person concerned. The essential requirements in all such cases are, (i) that the petitioner has some fundamental or legal right, (ii) that the said right has been actually violated or there is an imminent threat to that right, and (iii) that the petitioner has either no other remedy available to him; or even if there is such a remedy available, that remedy would not be equally prompt, adequate and efficacious; and in case he is left to that remedy, he is likely to suffer incalculable loss and harassment. AIR (37) 1950 Pat 387 (F B); AIR (38) 1951 Pat 570, Rel. on.* (*Para 29*)

P. R. Das, Baldeo Sahay, Balbhadra Prasad Singh and Ishwari Nandan Singh, for Petitioners; Advocate-General, Bhuvneshwardhari Singh, Harikishore Thakur and Bisheshwar Prasad Sinha, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('01) 28 Ind App 190: (23 All 394 P C)	(Pr 20)
('79) 5 Ind App 178: (4 Cal 172 P C)	(Pr 10)
('51) AIR (38) 1951 S C 332: (1951 S C R 747)	(Pr 28)
('77-78) 3 Cal 63: (1 Cal L R 161 FB)	(Pr 10)
('42) ILR (1942) 2 Cal 349: (AIR (29) 1942 P C 44)	(Pr 17)
('49) 29 Pat 19: (AIR (37) 1950 Pat 134)	(Pr 20)
('50) 29 Pat 491: (AIR (37) 1950 Pat 387: 51 Cri L J 821 FB)	(Pr 29)
('51) 30 Pat 735: (AIR (38) 1951 Pat 570)	(Pr 29)
(1907) A C 73: (76 L J P C 19)	(Pr 23)
(1930) A C 377: AIR (17) 1930 P C 314)	(Pr 12)
(1932) A C 260: (101 L J P C 40)	(Pr 16)
68 Common-W L R 261	(Pr 23)
19 Ill 383	(Pr 11)
(1925) 2 Ir Rep 231	(Pr 12)
16 Pa St 256	(Pr 11)
(1908) 211 U S 210: (53 Law Ed 150)	(Pr 12)
(1914) 234 U S 227: (58 Law Ed 1288)	(Pr 19)
(1919) 249 U S 152: (63 Law Ed 527)	(Pr 19)

RAMASWAMI, J.: In this case the petitioners Sri Ram Prasad Narayan Sahi and Sri Ramrekha Prasad Narayan Sahi have obtained a rule calling upon the State of Bihar and other respondents to show cause why a writ in the nature of mandamus should not be issued commanding them not to take any action under the Sathi Lands (Restoration) Act, 1950 (Bihar Act XXXIV of 1950) and not to interfere with the possession of the petitioners over 200 bighas of land of which they claim to have obtained an agricultural lease. Cause was shown against the rule by the Advocate-General on behalf of the State of Bihar, Maharani Janki Kuar and the Collector of Champaran to whom notice of the rule was directed to be given.

(2) The petitioners allege that on 19th July 1946 they made a representation to the Government of the State through the manager of the Bettiah Raj asking for settlement of 200 bighas of land preferably in Sathi farm or Materia farm and in addition 110 bighas of waste land known as Marhia Chaturbhujwar Rakhat. On the next date Sri Rameshwar Singh, Manager of the Bettiah Estate wrote to the Collector of Champaran recommending that the settlement should be made without payment of any salami. The Board of Revenue recommended that settlement should be made on the condition that the petitioners paid half the current rate of salami. On 14th October 1946 the Government of the State wrote to the Board of Revenue approving of the proposal for settlement of 200 bighas of land on the usual rental and on

payment of half the current rate of salami. On 20th of October 1946 the petitioners sent a cheque of Rs. 5,000/- to the manager of the Bettiah Estate on account of payment towards salami and rent for 1354 Fasli. The petitioners state that on 2nd November 1946 they obtained possession of the land though the 'bandobasti hisab' farm was actually signed by Circle Officer and Sri Ramrekha Prasad Sahi on a subsequent date. The petitioners allege that under the Bihar Tenancy Act as amended they have acquired the status of occupancy raiyats and cannot be ejected except in execution of a decree obtained through the Court. The petitioners maintain that the Act is constitutionally invalid and pray that the rule nisi should be made absolute against the respondents.

(3) In the counter-affidavit the respondents state that the Court of Wards recommended settlement of the land in favour of the petitioners though the Collector of Champaran and the Commissioner had opposed settlement on the ground that the assets of the estate should not be wasted by distributing them to the petitioners who merely claim distant relationship with Maharani Janki Kuer. The respondents assert that the settlement was illegal and void since the Court of Wards did not apply its mind to the question whether the settlement was for the benefit of the property or for the advantage of the Ward. On the contrary, the settlement was contrary to the interests of the Ward since the Sathi Lands were of high quality and had been in khas possession of the estate and were not lands upon which raiyats were to be inducted in the normal course of management.

The respondents state that after settlement was made there was great agitation among the tenants of the area and there was opposition on their part to the petitioners taking possession of the land, and in consequence there was a breach of peace and criminal cases were instituted. In paragraph 10 of the counter-affidavit the respondents state that the matter was brought to the notice of the Congress Working Committee who were of opinion that settlement of the land with the petitioners was against public interest. Thereafter the State Government made a request to the petitioners to restore the lands; but the petitioners refused. The respondents assert that the petitioners were not lawfully inducted as raiyats since settlement was void and illegal and they could not acquire the status of occupancy raiyat under the new amendment to the Bihar Tenancy Act.

(4) In a supplementary affidavit the respondents assert that Sri Prajapati Misra surrendered 45 bighas of land on 3rd July 1950, and the remaining land, viz., 15 bighas and odd on 25th July 1950. Annexure A to this affidavit is a letter by Prajapati Misra addressed to the Manager, Bettiah Estate. In this letter Prajapati Misra states that there was an agitation by the tenants against the settlement of the Sathi Lands made with Sahi brothers, that he himself was associated with the agitation and that the Sahi brothers had instituted criminal cases against the tenants. The agitation did not cease but the matter was brought to the notice of Congress High Command at Delhi. Prajapati Misra states that since his motive was questioned, he decided to create a trust-deed on 1st April 1950, transferring the land to a board of trustees, the object of the trust being to promote the cause of basic education.

(5) The main question debated in this case is whether the Sathi Lands (Restoration) Act, 1950 (Bihar Act XXXIV of 1950), is constitutionally valid.

(6) The Act is entitled an Act to provide for the restoration of certain lands (commonly known as Sathi Lands) belonging to the Bettiah Wards Estate unlawfully settled in favour of certain individuals. The Act begins with a preamble:

> "Whereas certain lands (commonly known as Sathi lands) belonging to the Wards Estate were settled in favour of certain individuals: Whereas such settlement is contrary to the provisions of the law; And whereas it is expedient to provide for the restoration of these lands to the Bettiah Wards Estate; It is hereby enacted as follows:

Section 2 (1) enacts:

> "Notwithstanding anything contained in any law for the time being in force, the settlement of the Sathi lands (described in the Schedule) on behalf of the Bettiah Wards Estate with Shri (Rai Bahadur) Ram Prasad Narayan Sahi and Shri Ram Rekha Prasad Narayan Sahi, sanctioned as per Bettiah Wards Estate Manager's order, dated the 18th November 1946, is declared to be null and void, and no party to the settlement or his successor-in-interest shall be deemed to have acquired any right or incurred any liability thereunder."

Section 2 (2) enacts that:

> "the said lessees and their successor-in-interest shall quit possession of the said land from the date of commencement of this Act and if they fail to do so, the Collector of Champaran shall eject them and restore the lands to the possession of the Bettiah Wards Estate."

Section 2, Sub-section (3) provides that:

> "the Bettiah Wards Estate shall, on restoration to it of the lands pay to the said lessees the amount of salami money that the said lessees may have paid for the settlement of the lands and also any such substantial expenses as may have been incurred by the said lessees on the improvement of the said lands before the commencement of this Act."

Section 2, Sub-section (3) empowers the State Government to make rules to carry out the purposes of the Act. A schedule annexed to the Act gives detailed description of the land settled in favour of the petitioners.

(7) Mr. Das argued at the outset that the impugned Act was not 'law' in the sense in which the legislature was competent to enact it. Learned Counsel founded his argument on a passage from Blackstone's Commentaries:

> "Municipal law is properly defined to be a rule of civil conduct prescribed by superior power in a State commanding what is right and prohibiting what is wrong.....first, it is a rule, not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore, a particular Act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law; for the operation of this Act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an Act to declare that the crime of which Titius is accused shall be deemed high treason; this has permanency, uniformity and universality, and therefore is properly a rule."

It was submitted by the learned Counsel that the declaration contained in the impugned Act was in the nature of a decree in respect of the petitioners' right and was not 'law' in strict sense. To put it in other words, the argument was that the declaration represents a rule in the nature of 'privilegia' as distinguished from 'leges.'

(8) In my opinion, the argument is attractive but wholly unsound. Law in its legislative sense is of much wider import than the juristic notion

of law as the command of a sovereign or as a rule laying down a general course of conduct. The term 'law' in Article 245 must be construed so as to include in its scope all legislative Acts enacted in the prescribed manner and form. Dicey observes:

"Parliament, habitually interferes, for the public advantage, with private rights. Indeed such interference has now become (greatly to the benefit of the community) so much a matter of course as hardly to excite remark, and few persons reflect what a sign this interference is of the supremacy of Parliament. The statute-book teems with Acts under which Parliament gives privileges or rights to particular persons or imposes particular duties or liabilities upon other persons" (Law of the Constitution, page 49.")

(9) Maitland also points out that Parliament enacts a vast number of statutes which a jurist would class rather as privilegia than a legis — the statutes lay down no general rules but deal only with particular cases:

"Listen to the titles of a few of the public Acts; an Act for establishing a workhouse at Havering, an Act to enable the King to license a playhouse at Margate, an Act for erecting a house of correction in Middlesex, an Act for incorporating the Clyde Marine Society, and Act for paving the town of Cheltenham, an Act for widening the roads in the borough of Bodmin. . . an Act for naturalizing Andreas Emmercich, an Act for enabling Cornelius Salvidge to take the surname of Tutton, an Act for rectifying mistakes in the marriage settlement of Lord and Lady Camelford, an Act to enable the guardians of William Frye to grant leases, an Act to dissolve the marriage between Jonathan Twiss and Francis Dorrill" (Constitutional History page 383.)

(10) In 'EMPRESS v. BURAH', 3 Cal 63, Markby, J., held that S. 9 of Act XXII (22) of 1869 was invalid on the ground that

"legislative Council was restricted to the exercise of functions which are properly legislative, that is, to the making of laws, which (to use Blackstone's expression) are rules of action prescribed by a superior to an inferior or of laws made in furtherance of those rules. The English Parliament is not so restricted. It is not only a legislative but a paramount sovereign body. The Indian legislative council cannot, in my opinion, do all that Parliament can do even when there is no express prohibition.....The legislative council, when it merely grants permission to another person to legislate, does not make a law within the meaning of the Act from which it derives its authority."

In appeal the Judicial Committee rejected the argument that there was distinction between Parliament and the Indian legislature, or that the latter was restricted to the making of the laws in the sense defined by Blackstone while Parliament was not so restricted.

At page 193, the Judicial Committee stated:

"Their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed 'of the nature and principles of legislation.' The Indian Legislature has power expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself" 'QUEEN v. BURAH', 5 Ind App 178.")

(11) It was next objected that the entire Act was invalid since the legislature was exercising judicial power. Mr. P. R. Das maintained that there was distinction between a judicial and a Legislative Act, that the one was determination of what the existing law is in relation to a transaction already had while the other is a predetermination of what the law shall be for the regulation of all future cases arising under it. In support of his contention Mr. P. R. Das referred to a passage from Cooley on Constitutional Limitations, Volume I, page 183:

"The legislative power extends only to the making of laws, and in its exercise it is limited and restrained by the paramount authority of the Federal and State Constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the Courts for to do so would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative." (NEWLAND v. MARSH', 19 Ill 383.")

That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of Government." ERVINE'S APPEAL', 16 Pa St 256 at p. 266.

It was contended by Mr. P. R. Das, that in the present case the declaration contained in Section 2 (1) was in the nature of a decree in respect of the disputed land in favour of the Bettiah Estate; and that Section 2 (2) was in the nature of execution of a decree which only Courts are competent. It was argued that the entire Act was unconstitutional as being usurpation of judicial power.

(12) The argument of Mr. P. R. Das proceeds upon a misconception. It is true that there is a distinction in principle between a legislative and a Judicial Act:

"A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power 'PRENTIS v. ATLANTIC COAST LINE CO.', (1908) 211 U S 210."

But there is no hard and fast line to be drawn between a Legislative and a Judicial Act. A law which is restrospective or which declares or modifies existing rights may often have the effect of a judicial decree. The legislature may legislate to interfere with pending proceedings in law Courts. For instance, in the Irish Free State, legislation was passed to declare the meaning of the law, while an appeal was pending ('LYNHAM v. BUTLER', (1925) 2 Ir Rep 231). Also in Copyright (Preservation) Act, 1929 (No. 25 of 1929), Section 4 was included to affect the decision of the Judicial Committee in an appeal 'PERFORMING RIGHT SOCIETY, LTD. v. BRAY', (1930) A C 377.

It was argued for the appellant in that case that Section 4 was ultra vires. The Judicial Committee however held that the section was valid and must be given full effect in all Courts. Again, the Courts may interpret laws in one way, but the legislature may by a declaratory enactment lay down a different interpretation. In such a case the Court in exercise of its function has declared what it believes to be the law but legislature in effect declares the judicial interpretation to be unfounded and unwarranted. The legislature may also enact laws providing that suits which had been dismissed on a particular view of the law must be restored

and re-tried. Two well-known instances are Section 31 (2) of the Indian Limitation Act, 1908, which provided for the restoration of suits dismissed on the ground that the twelve years' period of limitation under Article 132 of the Limitation Act applied to suits for sale by holders of simple mortgagees and the Public Suits Validation Act (XI of 1932), which provided for the restoration of suits dismissed on a particular interpretation of Section 93 of the Code of Civil Procedure. Again, debt relief legislation in the various Indian States has provided for the reopening of decrees which Courts had passed inter partes.

(13) It is beyond question that the Dominion legislatures are in the fullest sense sovereign within the ambit of their powers. Halsbury States:

"There is nothing to forbid confiscatory measures of any kind, and it is quite regular for a legislature to interfere with private property rights, such as Wills, or to provide a Code to secure a just treatment of dependents by their deceased husband or father. Though in the Irish Free State, Constitution rights of the subject are asserted, these can be reduced by ordinary legislation, for the Constitution can thus be amended. The legislature may legislate to interfere with pending proceedings in the law Courts, as well as to declare unsound a view of law taken by the Courts. 'Ex post facto' legislation is as a rule perfectly legal, and, though prohibited in the Irish Free State, the prohibition can be removed by a simple Act." (Halsbury Laws of England, Vol I, p. 86.)

(14) A Colonial Legislature has also plenary authority and full discretion in its exercise; Halsbury states:

"A confirmed Act of a local legislature lawfully constituted, whether in a settled or a conquered colony, has, as to matters within its competence and within the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by Imperial Legislation, & it may indemnify in respect of actions performed during a regime of material (sic.) law. It may authorise the detention of a politician deported from Egypt, though not guilty of any offence against local law. In the same way the legislature of a protectorate may sanction detention of a chief as a means of securing peace and order, and the legislature of a mandated territory is free to adopt measures of a very drastic character to secure public advantage as against private owners of water rights. Protectorate legislation may deal as is held best with property rights in land, and it is vain to argue against an Act that it is confiscatory or influenced by considerations of private interests as against public benefit." (Halsbury, Laws of England, Vol. I, p. 179.)

(15) The American authorities do not afford assistance in this case for the constitutional position in India is quite different. In United States not merely the doctrine of separation of powers prevails but the Supreme Court has proceeded on the assumption that the Constitution was intended to reproduce the provisions that already existed in many of the State Constitutions 'positively' forbidding the legislature from exercising Judicial Powers (See Willoughby's Constitution of the United States, page 1616). There are also certain Specific Limitations contained in the Federal and State Constitutions, such as, prohibition of depriving any person of life, liberty or property without due process of law (5th amendment) and the prohibition against laws impairing the obligation of contracts (Article 1, Section 10.) The practical result has been that retrospecive or declaratory acts have usually been held void apart from the question whether judicial power has been invaded. In United States it has been held that legislative action cannot be made to retroact upon past controversies and reverse decisions which the Courts in exercise of their undoubted authority have made:

"This would not only be exercise of Judicial Power but it would be its exercise in most objectionable and offensive form since the legislature is in effect Court of review to which parties may appeal when dissatisfied with the rulings of the Court."

In India, however, the Constitutional position is different. There is no doctrine or dogma of separation of the various powers. It is important to notice that our Constitution has not 'vested' judicial power or the legislative power in separate departments of the State. The Articles of our Constitution do not divide and establish areas of black and white.

(16) In ABEYESEKERA v. JAYATILAKE', (1932) A C 260, an Order in Council of 1925 made provision as to the legislative Council in Ceylon, but reserved to His Majesty power to revoke, alter or amend the order. The appellant brought an action to recover penalties under the order from the respondent, who he alleged had sat and voted after his seat had become vacant under its provisions by reason of his having a pecuniary interest in a contract with the Government. In 1928, after the action had been brought, but before its trial, an amending Order in Council was made providing that the action should be dismissed; it also amended the order of 1923 so as to except the office held by the respondent from its operation. The Judicial Committee held that the order of 1928 was valid exercise of legislative power which His Majesty had reserved in himself.

At page 266, the Judicial Committee states:

"It appears to their Lordships that this was not an exercise of the royal prerogative in that sense. It is indeed the exercise by His Majesty, as sovereign, of the 'Legislative Powers' inherent in him by his title derived from conquest and cession of Ceylon, so far as he had not parted with any of them by acts of his own, and their Lordships are of opinion that it is plain from the Letters Patent and Order in Council already recited that His Majesty had expressly reserved to himself the right to do that which, by the order in Council now in question, he undoubtedly has done. Such right as the plaintiff may have had arose entirely out of the Order in Council of December 19, 1923, which was made by His Majesty in Council by virtue of the same authority as that which justifies the making of the Order in Council of November 1, 1928. Their Lordships are of opinion that, while it would not have been competent for His Majesty, by virtue of the royal prerogative alone, to make either order, he was perfectly competent and had sufficient right and title to make them both by virtue of the 'legislative' authority he had reserved to himself when parting with a portion of the right originally vested in him."

(17) In 'BHAIRABENDRA NARAYAN v. DEBENDRA NARAYAN', ILR (1942) 2 Cal 349, a suit had been brought for declaration of title to and possession of an impartible estate in Assam known as the Bijni Raj. The suit was contested by Jogendra and Bhairabendra who alleged that they were nearest male agnates and that the family was governed by Dayabagha School of Law as modified by certain custom. While the suit was pending Assam Act II of 1931 called Assam Bijni Succession Act was passed which declared that the defendant Jogendra shall be holder of the Raj and that upon his death Bhairabendra Narayan shall succeed. The trial Judge dismissed the suit on

the ground that the Act was a bar and the plaintiff cannot succeed even if she had acquired any right under a will.

The High Court reversed the decision of the trial Judge holding that the Act did not bar a claim to the Bijni Raj even based upon an adverse possession, but only barred claims based upon an alleged right of succession. In appeal, the Judicial Committee set aside the judgment of the High Court holding that no adverse possession before 1931 had any effect to prevent Jogendra from taking the estate which the Act had vested in him. The Judicial Committee accordingly modified the decree of the High Court observing that a declaratory Act of a legislature, which enacted that property in an estate had vested in a particular person as from a definite date in the past was valid even against claims to the estate based upon adverse possession.

(18) Upon principle and precedent, I am of opinion that the Act impugned in this case is 'law' within the meaning of Article 245 of the Constitution, that the legislature has not usurped judicial functions in making the enactment.

(19) An important part of the argument has reference to Article 14 of the Constitution. Mr. P. R. Das contended that the impugned Act was unconstitutional since it made discrimination against the petitioners. Learned Counsel maintained that there was violation of the guarantee of equal protection clause. In my opinion this argument is untenable. The guarantee of equal protection under Article 14 is not absolute. The clause does not prohibit legislative classification. Nor does it prohibit the legislature from enacting special laws to combat special evils. A classification that takes account of the different degrees in which an evil is present must be upheld as reasonable and valid. Even legislation relating to one individual would not violate the equal protection clause, if there is no discrimination. In this context, it is important to remember the principle that the Court ought to make every possible presumption in favour of the constitutionality of the enactment:

> "It must be presumed that legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds." MIDDLETON v. TEXAS POWER AND L. CO', (1919) 249 U S 152."

The onus is, therefore, on the petitioners to establish that the classification adopted by the legislature in the impugned Act is arbitrary or unreasonable. In para. 9 of the affidavit, the petitioners allege that from 1948 to 1949 settlements of about 2,000 acres of land were made by the Bettiah Estate on the basis of 10 years rental and in some cases for good reasons at 5 years rental. The petitioners allege that the State Government or the State legislature have not repudiated the new settlements except the one made with the petitioners. In the counter-affidavit the respondents say that the State Government did take exception to the settlement of the land to Prajapati Misra which settlement also was unlawful. But Prajapati Misra willingly surrendered the lands settled with him and no legislation was therefore needed in his case. The allegation of the petitioners that about 2,000 acres of land were settled is vague for the names of the settlees are not furnished and there is no averment that the other settlements were unlawful or that there was Kisan agitation or apprehension of breach of peace in those cases.

The onus is on the petitioners to show that the equal protection clause has been violated but they have not furnished any reliable proof in support of their allegation. In my opinion the attack on the legislation on the ground of violation of Article 14 fails. To adopt the language of Justice Holes:

> "It is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up & enumerating other instances to which it might have been applied equally well, so far as the Court can see. That is for the legislature to judge unless the case is very clear 'KEOKEE CONSOLIDATED COKE CO. v. TAYLOR', (1914) 234 U S 227."

(20) The next contention is that the impugned Act violates Article 19 (1) (f) of the Constitution. It was argued by the learned counsel that after payment of Salami the petitioners obtained possession of the land and had been paying rent to the Bettiah Estates for several years. Learned Counsel pointed out that under the amended Section 21-A, Bihar Tenancy Act, the petitioners had acquired occupancy right, that the legislature had deprived the petitioners of their right by passing the impugned Act. But it was urged for the respondents that the settlement was null and void and that the petitioners had acquired no right or title to the land but were mere trespassers. The Advocate-General founded his argument on Section 18 of the Courts of Wards Act which states:

> "The Court may sanction the giving of leases or farms of the whole or part of any property under its charge, and may direct the mortgage or sale of any part of such property, and may direct the doing of all such other acts as it may judge to be most for the benefit of the property and the advantage of the ward."

The respondents assert that in making the lease in favour of the petitioners the Court of Wards did not apply its mind to the question whether the settlement was for the benefit of the property or for the advantage of the Ward Maharani Janki Kuar. The Advocate-General pointed out that the Collector and Commissioner had both opposed the settlement on the ground that it was against the interest of the ward's estate. The Advocate-General submitted that if the Court of Wards made colourable exercise of authority for an indirect purpose and not with the object of benefiting the ward it was not a real exercise of discretion and the transaction was void and illegal. The Advocate-General relied upon 'MOHAMMAD MUMTAZ ALI KHAN v. SAKHAWAT ALI KHAN', 28 Ind App 190 in which the Judicial Committee held that it was not within the power of a Court of Wards to make voluntary alienation in perpetuity of its ward's real estate and that the grant was ineffectual to pass title inasmuch as it was not proved to have been for the benefit of the estate and the advantage of the ward within the meaning of S. 172 of the Oudh Revenue Act, 1876.

To the same effect is 'KAMAKHYA NARAIN SINGH v. KARANPURA DEVELOPMENT CO. 29 Pat 19 in which the question arose regarding the validity of a prospecting license in respect of extensive coal lands lying within the estate of the appellant Raja accompanied by an agreement to lease. Upon examination of evidence the High Court held that the prospecting license in the case was executed by the Court of Wards in excess of its powers as it was done regardless of the advantage of the Ward and benefit to his property; and that the prospecting license was void and inoperative and that the Civil Court had complete jurisdiction to pass a decree in ejectment against the lessee.

(21) But Mr. P. R. Das argued that under S. 18 it was not incumbent upon the Court of Wards to

judge whether the lease would be for the benefit of the property or for the advantage of the ward. Learned counsel argued that in the two classes of cases (1) giving of leases or farms of the whole or part of any property under its charge, (2) mortgage or sale of any part of such property, the Court of Wards was not bound to consider whether the transaction would be for the benefit of the property or for the advantage of the Ward. Learned counsel argued that in the case of contract for sale or contract for mortgage or lease the section imposes a condition that the Court of Wards should judge whether it is for the benefit of the property or for ward's advantage but not in the cases when the Court of Wards makes an outright sale or mortgage or grants a lease or farm of the whole or part of the estate.

In my opinion the argument of Mr. Das is misconceived. Such a construction of S. 18 is unreasonable and would lead to sterlling (Sic) result. The Court of Wards stands in the same fiduciary capacity to its wards as other guardians, and is bound to do all that lies in its power in furtherance of the ward's interests. The Court of Wards is also like any other guardian responsible to its wards as trustee for the property entrusted to its care. I therefore think that the more correct interpretation is that in all the three classes of cases the Court of Wards must apply its mind to the question whether the transaction is for the benefit of the property or for the ward's advantage. In other words, the clause 'as it may judge to be most for the benefit of the property and the advantage of the Ward' governs not only the last clause but also the previous two clauses which deal with leases or farms of the whole or part of the estate and mortgage or sale of any part of the estate.

(22) Mr. Das then contended that the Court of Wards did apply its mind to the question of advantage of the estate when the settlement was made with the petitioners. On behalf of the respondents the Advocate-General asserted that the settlement was not for the benefit of the estate, that the land settled was valuable and was intended to be cultivated khas on behalf of the estate. The Advocate-General referred to para. 8 of the counter-affidavit. Mr. Das complained that the respondents did not produce the letter of the Court of Wards sent to the State Government approving of the proposed settlement with the petitioners. The Advocate-General undertook to produce the letter but Mr. Das again objected that the respondents ought not to be allowed to produce evidence at a late stage. From the affidavits however it is apparent that the Collector and Commissioner had objected to the settlement of the land on the ground that the estate would be deprived of the valuable assets.

The letter of the Government does not suggest that settlement was made for the benefit of the estate or that Government or Court of Wards had considered the question. It is not possible to satisfactorily decide this point in these summary proceedings since I am not certain if all the relevant materials have been produced by the parties. But it is prima facie apparent that the Court of Wards did not apply its mind to the question of the benefit of the estate or the Ward's advantage. If this is correct the settlement of the land is illegal and void.

(23) Mr. P. R. Das argued even if the petitioners acquired no interest on account of settlement they obtained possession of the land from the Bettiah estate and had been paying rent. Learned Counsel contended that the petitioners had acquired a proprietary right within the meaning of Art. 19(1)(f). Reliance was placed upon 'MINISTER OF STATE v. DALZIEL', 68 Common-W L R 261 and 'PERRY v. CLISSOLD', (1907) A C 73. But the Advocate-General argued that the Manager of the Bettiah estate had no authority to accept rent and the petitioners were mere trespassers. It is not necessary to investigate this question, for I am satisfied that this is not a proper case in which the High Court ought to issue any writ. It is plain that the petitioner's title depends upon disputed questions of fact which cannot be satisfactorily determined in these summary proceedings. The remedy given by Art. 226 is an extraordinary one and can be invoked only in exceptional circumstances by those who have no alternative remedy by way of suit or otherwise. In the present case, the settlement of the land which the petitioners claim appears prima facie illegal. If the allegation of the respondents is correct, the Court of Wards has committed a breach of trust in making the settlement. There is also no satisfactory reason why the petitioners should not institute a suit for obtaining the reliefs they seek.

(24) In the special circumstances of the case I hold that the High Court ought not to grant any writ. In my opinion, the Rule must be discharged and the application must be dismissed with costs to the respondents. Hearing fee ten gold mohurs.

(25) SARJOO PROSAD, J.: This application is under Art. 226 of the Constitution of India wherein the petitioners have prayed for a writ to restrain the opposite party from taking any steps under "The Sathi Lands Restoration Act" (Bihar Act XXXIV of 1950), on the ground that the said Act is ultra vires the Bihar Legislature and is void and unconstitutional. The relevant facts of the case have been set out in the judgment of my learned brother, and it is unnecessary for me to repeat them.

(26) Mr. P. R. Das has urged various constitutional points in support of this application. He contends that the impugned Act is in violation of (i) Art. 14, (ii) Art. 19(1)(f) and (iii) Art. 31(2) of the Constitution. He also contends that the so-called Act of the Legislature is not a 'law' at all, inasmuch as in enacting the same the Legislature has arrogated to itself the functions of the Judiciary and has perpetrated not a legislation but a decree of a Court of law with all its processes of execution. He submits that the legislation in question seeks to deprive the petitioners of their private rights without any public purpose and without providing for any compensation. Mr. Das has sought to develop these arguments in his own inimitable style, though, I must say, with somewhat stoic indifference to the difficulties of the Court in deciding the case — an indifference which, in my opinion, has not minimised, if not actually contributed to those difficulties.

(27) I confess that I was much impressed with the argument of Mr. Das that the impugned Act is not a 'Law' at all. An analysis of its provisions shows that all that the Act purports to do is to declare the settlement of the Sathi lands with the petitioners null and void, and then to direct that if the petitioners fail to quit possession of the lands within a certain period, the Collector of Champaran shall be entitled to eject them and to restore the lands to the possession of the Bettiah Wards Estate. It is, therefore, in form and substance nothing but a decree of a Court which also prescribes the particular mode of execution of that decree. The question then is whether the Legislature was competent to enact such a legislation thereby encroaching upon and arrogating to itself all the functions of a Court of Law.

It is true that our Constitution-makers have not strictly followed the American pattern in having a

water-tight demarcation of powers between the Legislature, the Executive and the Judiciary; but at the same time I feel that it would be wrong to interpret our constitution on the analogy of the British Constitution where the King in Parliament is the fountain-head and repository of all powers. Such a claim cannot be put forward either on behalf of the President or on behalf of the Legislatures under the present Constitution of India. Art. 245 or Art. 248 of the Constitution which has of course, preserved residuary powers of legislation in the Indian Parliament, cannot be interpreted to mean that Parliament can by legislation usurp the functions of the Judiciary and take upon itself to discharge the normal functions of a Court of Justice.

I do not, of course, for a moment suggest that it is not open to Parliament to create by legislation new Courts and Tribunals or to take away from the jurisdiction of a particular Court the trial of certain cases or class of cases. But what I do emphasise is that in every civilised country there is a well-known and marked distinction between the functions of the Legislature, the Executive and the Judiciary. The creation of the three organs of the State to exercise their respective functions is a common feature of most civilised governments. I cannot imagine that the framers of the Indian Constitution had completely ignored this distinction which is so essential for a stable and harmonious working of the governmental mechanism, especially in a country where the percentage of literacy is almost negligible, and where not even a minimum qualification has been fixed for the members of the Legislature.

(28) In this context, on behalf of the opposite party, strong reliance has been placed upon the decision of the Supreme Court of India on a reference made by the President of the Indian Republic under Art. 143 of the Constitution in regard to the validity of the Delhi Laws Act (1912 etc.) 'IN RE, ART. 143, CONSTITUTION OF INDIA AND DELHI LAWS ACT (1912) etc', AIR (38) 1951 S C 332. The problem which the Supreme Court had to tackle in that case was whether the laws in question were void as delegated legislation. The case in question is hardly any authority on the point with which I am concerned at present. It may be assumed that by making the members of the cabinet responsible to the legislature, there was some kind of fusion of legislative and executive functions so as to permit conditional or ancillary legislations being delegated to the hands of appropriate executive authorities; but I do not find anything in the decisions of the various learned Judges in that case to lend countenance to the assumption that the Legislature under the Constitution of India was entitled to usurp and assume the functions of the Judiciary. Such an assumption may lead to conflicting and even chaotic results because the Legislature in that event might be held competent to direct a person to be hanged who has already been acquitted by a Court of law on a particular charge or snatch away the property of a citizen and give it to another in spite of the fact that Courts of law have pronounced to the contrary.

The guarantee of fundamental rights and the powers vouchsafed to the Supreme Court or for the matter of that to the High Courts under Arts. 32 and 226 of the Constitution respectively are wholly inconsistent with any such supremacy of the Legislature. I have, therefore, great hesitation in accepting the position that no such distinction of functions of the Legislature and the Judiciary was envisaged and preserved by the present Constitution of India. For the present, I do not feel tempted to enter into further discussion of the matter, and I hold myself free to examine the problem on some other appropriate occasion.

(29) I find that this application can be disposed of on a much narrower ground. I agree with my learned brother that this is not a proper case in which this Court should issue a writ. It has been repeatedly pointed out by this Court that although the powers of the Court to issue writs under Art. 226 of the Constitution are very wide, the remedy provided therein must remain an extra-ordinary remedy to be used where ordinary legal process cannot give adequate and prompt relief; vide; 'BAGARAM v. STATE OF BIHAR', 29 Pat 491 (FB) and 'GOPESHWAR PROSAD SAHI v. STATE OF BIHAR', 30 Pat 735. I was myself a party to the latter decision where I fully examined the legal position. I pointed out then that there must be something in the nature of the case itself and in the facts and circumstances thereof to couple the power vouchsafed to us under Art. 226 of the Constitution with a duty to exercise the same in order to compel us to give relief to the person concerned. The essential requirements in all such cases are (i) that the petitioner has some fundamental or legal right, (ii) that the said 'right' has been actually violated or there is an imminent threat to that right, and (iii) that the petitioner has either no other remedy available to him; or, even if there is such a remedy available, that remedy would not be equally prompt, adequate and efficacious; and in case he is left to that remedy, he is likely to suffer incalculable loss and harassment.

I am not satisfied 'prima facie' for the reasons already stated in the judgment of my learned brother that the petitioners have established a clear title or 'legal right' necessitating our interference under Art. 226. There may be much strength in the contention of the learned Advocate General that the so-called settlement of the disputed lands with the petitioners was wholly void. I have no desire to prejudice the case of the petitioners in any subsequent litigation that may arise between the parties; but it is abundantly clear to me for the present that the petitioners' title or right, if any, depends upon disputed questions of fact which cannot be satisfactorily adjudicated in these summary proceedings.

(30) I also do not accept the interpretation of Mr. P. R. Das in regard to the language of S. 18 of the Court of Wards Act. The argument, that in the case of a contract for sale or a contract for mortgage or lease the section imposes a condition that the Court of Wards should consider whether it is for the benefit of the Ward but not so in cases where the Court of Wards actually effects a sale or mortgage of the property of the Ward, is on the face of it anomalous and untenable. Section 18 does not admit of such an interpretation, and I agree with my learned brother that on a true construction of the section the Court of Wards in all the above cases must apply its mind to the question whether the transaction is for the benefit of the Estate or to the advantage of the Ward.

(31) The application accordingly fails and must be dismissed with costs as directed.

D.H. *Application dismissed.*

A. I. R. (39) 1952 Patna 200 *[C. N. 55 (16).]*

SHEARER J.

Ragho and others, Petitioners v. The State.

Criminal Revn. No. 263 of 1951, D/- 30-11-1951.

Criminal P. C. (1898), Ss. 202, 203 and 204 — Complaint — Preliminary investigation declaring complaint false — Magistrate summoning accused

to settle dispute which is of civil nature — Order ultra vires.

Where an Honorary Magistrate holds an investigation into a complaint under S. 202 and comes to the conclusion that the case is untrue, the Sub-Divisional Magistrate has no jurisdiction to summon the accused merely because there is a dispute between the parties and he thinks that it is desirable that it should be settled, when in fact the dispute can only be settled in the Civil Court. 67 I. C. 499 (Pat) and 40 Cal. 854, Rel. on. (Para 1)

Anno: Criminal P. C., S. 204 N. 5 Pt. 14.

Baldeva Sahay and S. C. Mukherji, for Petitioners.

Cases referred to:

('13) 40 Cal 854: (14 Cri L J 297) (Pr 1)
('22) 67 Ind Cas 499: (23 Cri L J 403 Pat) (Pr 1)

ORDER: This is an application to quash a prosecution instituted against the three petitioners by one Kulsum Debi. Kulsum Debi and her husband Ram Chandra Prasad have, for some years, been in occupation of a small hut standing at one corner of a parcel of land, one katha or so in area, which belongs to the employer of the petitioner Ragho Prasad. Apparently, on so much of the land as is not occupied by the hut wood had been stacked by persons who have taken out licences from the Muzaffarpur Municipality. On or about the 3rd of October, 1950, one of these licensees Lakhan Mahto, brought some wood to the land, and Kulsum Debi protested at this wood being put down in a certain part of it. According to her, the petitioners intervened and assaulted her. An Honorary Magistrate, Mr. Syed Ahmad Nawab, held a local investigation under S. 202 of the Code of Criminal Procedure, and examined some seven or eight witnesses, recording in each case a summary of what they said to him. The conclusion to which he came was that the story was in large part untrue and that there was no good reason to prosecute the petitioners.

Nevertheless, the learned Sub-divisional Magistrate has summoned them. The reason which the learned Sub-divisional Magistrate gives is a somewhat extraordinary one, namely, that there is a dispute as between Kulsum Debi and her husband on the one hand and the employer of the petitioner Ragho Prasad on the other over this land, and that it is desirable that this dispute should be settled. That may, indeed, be very desirable. But it can only be settled in the civil Court, and not in the criminal Court. Apparently, while Ragho Prasad or his employer is prepared to permit Kulsum Debi and her husband to remain in occupation of the hut, or at all events, not to disturb them except by due process of law, he contends that Kulsum Debi and her husband have no right to the rest of the land, and that he is entitled to let it out to such persons as Lakhan Mahton for the purpose of stacking wood on it. Mr Baldeva Sahay for the petitioners, in inviting me to take the somewhat unusual course of quashing the prosecution, relied on 'RAMPABITAR SINGH v. KASIM ALI KHAN', 67 Ind Cas 499 (Pat) and 'ABDULLAH MANDAL v. EMPEROR', 40 Cal 854. These decisions are in point. No useful purpose would, in my opinion, be served by allowing this prosecution to continue and it will accordingly be quashed.

V.B.B. *Prosecution quashed.*

A I. R. (39) 1952 Patna 201 *[C. N 55 (17).]*

LAKSHMIKANTA JHA C. J. AND CHATTERJI J.

Ramlal Ganjhee and others, Appellants v. Lodha Munda and others, Respondents.

A. F. A. D. No. 2090 of 1948, D/- 28-11-1951.

(a) Record of Rights — Contrary entries in cadastral survey and later revisional survey — Presumption — Entry in later records is not rebutted by earlier record — Onus is on him who challenges to show that later record is incorrect — (Evidence Act (1872), S. 35).

Where there are two Records of Rights prepared at different times, entries in both of them will be presumed to be correct entries of the state of things existing at the time when the entries were made; and there is nothing in the law which would entitle a party to say that the entry in the subsequent record is rebutted by the entry in the previous record and that as the later entry records the existing state of things, preference must in the absence of evidence be given to it. The mere production of a contrary entry in the earlier Cadastral Survey Record-of-Rights would not in law rebut the presumption arising out of the subsequent entry in the revisional survey Record of Rights. Consequently the party who challenges an entry in the later Record of Rights has to prove that it is incorrect. The earlier entry is not enough to prove that the later one is incorrect. 'Case law Ref.' (Paras 9 and 10)

Anno: Evidence Act, S. 35 N. 12.

† *(b) General Clauses Act (1897), S. 3 (25) — Right to rear and appropriate lac from lac bearing trees is not immovable property but an interest in immovable property — It is an incorporeal right (Limitation Act (1908), Arts. 142 and 144), 'Case law reviewed.'* (Para 14)

Anno: General Clauses Act, S. 3, N. 10, 11; Limit. Act, Arts. 142 and 144, N. 6, 7.

(c) Limitation Act (1908), Arts. 142 and 144 — Suit for declaration and permanent injunction in realty suit for possession of interest in immovable property — Suit is governed by Art. 144.

Where the suit, though in terms for declaration and permanent injunction is really for possession of an interest in immovable property (right to collect lac from lac bearing trees) is not governed by Art. 142 but by Art. 144. Where the plaintiffs themselves do not frame the suit as one for possession, having regard to the nature of the right claimed by them, it will hardly be reasonable to preclude the defendants from showing that the suit is barred by limitation under Art. 144 merely because they have not in their written statement specifically pleaded that they were in adverse possession. (Para 16)

Anno: Limi. Act, Arts. 142 and 144, N. 2, 3, 7, 97.

(d) Limitation Act (1908), Arts. 142 and 144 — Distinction.

Articles 142 and 144 are both rules of limitation, the only difference being that in the case of Art. 142, the onus lies on the plaintiff to prove his possession within 12 years, while in the case of Art. 144 it is for the defendant to prove when his possession became adverse. In a suit for possession of an interest in immovable property the question when the possession of the defendant becomes adverse to the plaintiff depends on the nature of the interest, particularly when it is an incorporeal right. (Para 16)

Anno: Lim. Act, Arts. 142 and 144 N. 2.

L. K. Choudhury, for Appellants.

Cases referred to:

(Arranged in orders of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('12) 17 Ind Cas 910: (10 All L J 516) (Pr 12)
('88) 12 Bom 221 (Prs 13, 15)
('92) 19 Cal 544 (F B) (Pr 13)
('93) 20 Cal 446 (Pr 13)
('11) 14 Cal L J 572: (12 Ind Cas 305) (Prs 13, 15)

('21) AIR (8) 1921 Cal 405: (69 Ind Cas 910) (Pr 15)
('30) AIR (17) 1930 Mad 679: (125 Ind Cas 545) (Pr 13)
('09) 1 Ind Cas 903: (5 Nag L R 21) (Pr 14)
('37) AIR (24) 1937 Nag 289: (ILR (1938) Nag 31) (Pr 14)
('22) 1 Pat 674: (AIR (10) 1923 Pat 58) (Pr 13)
('27) 8 Pat L T 121: (AIR (14) 1927 Pat 164) (Pr 9)
('29) 10 Pat L T 569: (AIR (16) 1929 Pat 460 F B) (Pr 9)
('31) 12 Pat L T 280: (AIR (17) 1930 Pat 410) (Pr 9)
('31) 12 Pat L T 283: (AIR (17) 1930 Pat 568) (Pr 9)
('31) 12 Pat L T 304: (134 Ind Cas 957) (Pr 9)

CHATTERJI, J.: This is an appeal by the defendants 1-7 in a suit brought by the plaintiffs for a declaration that the plaintiffs and defendant No. 10 have the right to rear and appropriate lac from one half of the lac bearing trees standing on the jungle plots in village Jaru, district Ranchi, bearing C. S., Nos. 1, 51, 63, 231, 32, 98 and 142 and for permanent injunction restraining the defendants 1-9 from obstructing the plaintiffs and defendant No. 10 in the exercise of their said right.

(2) The jungle plots in question are recorded in the survey as gair-mazrua-malik. The defendants 1-7 are the landlords of the village Jaru and defendants 8 and 9 are said to have acquired interest therein by virtue of transfers from defendants 1-7.

(3) The plaintiffs' case briefly is that their ancestors as well as the ancestor of defendant No. 10 had the right to rear and appropriate lac from one half of the lac-bearing trees in the aforesaid jungle plots and this right was exercised by them from time immemorial and that the plaintiffs and defendant No. 10 have been similarly enjoying that right, but on the 30th September, 1945, defendants 1-7 denied their right. The suit was instituted on 4th October, 1945.

(4) The written statements were filed, one by defendants 1-7 and the other by defendant No. 8. They took various pleas of which those that are material to this appeal are that the plaintiffs never had nor have any right to rear and appropriate lac from the lac-bearing trees in the jungle plots in question and that their suit is barred by limitation.

(5) The learned Munsif who tried the suit held that the plaintiffs have no right to rear or appropriate lac from the lac bearing trees in the jungle plots in question and also that the suit is barred by limitation. He accordingly dismissed the suit.

(6) On appeal, the learned Additional Subordinate Judge who heard it formulated the following points for determination;

"1. Whether the suit is entertainable by the civil Court.
2. Whether the plaintiffs have got right to rear, harvest and appropriate lac from half the lac bearing trees in the disputed plots?
3. Whether the suit is barred by limitation?
4. Whether the plaintiffs are entitled to relief for permanent injunction?"

He decided all these points in favour of the plaintiffs and allowed the appeal in these terms:

"It is declared that the plaintiffs and defendant No. 10 have got the right to rear, harvest and appropriate the lac from half the lac bearing trees on C. S., plot Nos. 1, 51, 63, 239, 32, 98 and 142. Defendant Nos. 1 to 9 are permanently injuncted from obstructing the plaintiffs and defendant No. 10 in the enjoyment of the aforesaid right. The judgment and the decree of the lower Court are hereby set aside."

Being dissatisfied with this decree, the defendants 1-7 have preferred this second appeal.

(7) Mr. L. K. Choudhury on behalf of the appellants has pressed the appeal only on two points, namely (1) whether the plaintiffs have got right to rear and appropriate lac from half of the lac bearing trees in the plots in question and (2) whether the suit is barred by limitation.

(8) On the first point it is argued that the decision of the learned Subordinate Judge is erroneous in law in as much as he threw the onus on the defendants to prove that the entry in the C. S. record, published in 1908, in which the ancestors of the plaintiffs and defendant No. 10 were recorded to be in enjoyment of the right in question on payment of Rs. 16/- as rent, was incorrect. It is said that in the R. S. record, which was finally published in 1932, the jungle plots are recorded as gair-mazrua-malik without any mention of the plaintiffs' alleged right and that this raises a presumption of correctness in favour of the defendants which the learned Judge altogether overlooked.

(9) It has been held by this Court in 'ABHIRAM v. CHINTAMANI', 8 Pat L T 121; 'RAJRIKH PANDEY v. SHAM SHANKER', 12 Pat L T 280; 'NAURANGI v. KANHAIYA', 12 Pat L T 283 and 'MATUKDEO NARAIN v. SADHUSARAN', 12 Pat L T 304 that where there are two Records of Rights prepared at different times, entries in both of them will be presumed to be correct entries of the state of things existing at the time when the entries were made; and there is nothing in the law which would entitle a party to say that the entry in the subsequent record is rebutted by the entry in the previous record; and that as the later entry records the existing state of things, preference must in the absence of evidence be given to it. Again in 'TENGAROO SUKUL v. CHATTU BHAR', 10 Pat L T 569, a Full Bench of this Court has held that mere production of a contrary entry in the earlier Cadastral Survey Record-of-Rights would not in law rebut the presumption arising out of the subsequent entry in the Revisional Survey Record of Rights.

(10) The effect of these decisions is that the entry in the later Record-of-rights will prevail and the party who challenges it is to prove that it is incorrect. The earlier entry is not enough to prove that the later one is incorrect. But the learned Subordinate Judge here has gone just the other way. He says:

"The onus accordingly was on the defendants to show that the entry in the C. S. regarding the right of the plaintiffs was incorrect. The defendants have not discharged this onus."

This is obviously wrong. The learned Judge thinks that the mere fact that the plaintiffs' alleged right recorded in the C. S. has not been recorded in the R. S. is not sufficient to disprove the existence of the plaintiffs' right. In the R. S. the plots are recorded as gair-mazrua-malik without any mention of the plaintiffs' alleged right. This entry raises a presumption in favour of the defendants and against the plaintiffs. The onus, therefore, lies on the plaintiffs to rebut this presumption. The finding of the learned Judge is based entirely on the assumption that the plaintiffs' alleged right is proved by the entry in the C. S. which the defendants ought to have proved, but failed to prove, to be incorrect. This finding is obviously erroneous in law and cannot be accepted as binding in second appeal. The case, therefore, must go back.

(11) On the question of limitation, Mr. Choudhury argues that the suit will be governed by Art.

142 of the first schedule to the Indian Limitation Act and the concurrent finding being that the plaintiffs failed to prove that they exercised the right in question within 12 years from the date of the suit, the suit should be dismissed on the ground of limitation. The learned Additional Subordinate Judge has held that neither Art. 142 nor Art. 144 of the Limitation Act applies, because the right in question is not immovable property. In his view the suit will be governed by Art. 120 of the first Schedule to the Limitation Act. This is the residuary article applicable to "suit for which no period of limitation is provided elsewhere in this schedule"; the limitation is 6 years from "when the right to sue accrues". The learned Judge has held that the right to sue accrued on 30th September 1945, as alleged in paragraph 8 of the plaint. The reason given by him is this:

> "The allegation in para 8 of the plaint is that the defendant No. 1 to 7 denied plaintiffs' right and asserted that they would not allow the plaintiffs to harvest standing lac on 30-9-45. These allegations have not been specifically challenged in the written statements. Accordingly I take 30-9-45 as the starting point for the purpose of limitation."

Paragraph 8 of the plaint runs as follows:

> "That the cause of action arose on 30-9-45 when the defendants Nos. 1 to 7 denied the plaintiffs' right in suit and asserted that they will not allow them to harvest the standing lac and also during the period from the year 1940 up-to-date. That the defendants Nos. 8 and 9 are interested in denying the plaintiffs' rights."

This is traversed in paragraph 14 of the written statement of defendants 1-7 as follows: Para. 8 of the plaint: The allegations regarding the accrual of cause of action are false."

In the face of this denial in the written statement, it is difficult to understand how the learned Judge could take the allegation in paragraph 8 of the plaint to be uncontroverted and, therefore, correct. Besides, P. W. 1, one of the plaintiffs, admits in his examination-in-chief "Defendants 1 to 7 have dispossessed us from the trees for the last 3 years". This admission, though relied upon by the learned Munsif, appears to have been altogether ignored by the learned Subordinate Judge. The evidence was recorded in February 1947 and, therefore, 3 years from that date would take us to February 1944. On no account, therefore, 30th September, 1945, could be taken to be the date when the plaintiffs' right to sue accrued. Consequently the finding of the learned Judge that the suit is not time-barred cannot be accepted as binding in second appeal.

(12) Mr. Choudhury contends that the right to rear and appropriate lac from lac bearing trees is immovable property, as defined in the General Clauses Act and the present suit being in substance for possession of this right, Art. 142 will apply. According to the definition in S. 3(25) of the General Clauses Act (Act X of 1897),

> "immovable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

It is argued that the right to rear and appropriate lac is a benefit to arise out of land. In 'KATWARU CHAMAR v. RAM ADHIN', 17 Ind Cas 910 (All) it was held by a single Judge of the Allahabad High Court that the trees which bear fruits or other forest produce are considered as immovable property. Lac bearing trees may be taken to be immovable property. But the right to rear and appropriate lac from the trees does not, in my opinion, come within the definition of immovable property in the General Clauses Act. It is a benefit to arise out of the trees and not out of the land. If the trees be immovable property, the right to rear and appropriate lac from the trees is an interest in immovable property.

(13) There are various reported cases in which the question as to whether the right of fishery is immovable property or interest in immovable property has been considered. In 'FADU JHALA v. GOUR MOHUN JHALA', 19 Cal 544 (FB), four of the five Judges who composed the Full Bench agreed that a right of fishery is immovable property within the dennition in the General Clauses Act, though the Full Bench by a majority of three to two neld it is not immovable property, as contemplated by S. 9 of the Specific Relief Act. One of them expressly held that it is an interest in immovable property. In 'BHUNDAL PANDA v. PANDOL POS PATIL', 12 Bom 221 the right of fishery was held to immovable property. In 'RAM GOPAL v. NURUMUDDIN', 20 Cal 446 the same view was taken. In a latter case, 'LOKENATH BIDYADHAR v. JAHANIA BIBI', 14 Cal L J 572 the Calcutta High Court, however, took the view that a right of fishery is not immovable property for all purposes, but it is an interest in immovable property. Mookerjee J. who delivered the judgment to which Carnduff J. agreed observed:

> "As at present advised, we find it difficult to hold, notwithstanding the decision in 'RAM GOPAL v. NURUMUDDIN', 20 Cal 446 which apparently does not accurately state the effect of the opinion of the majority of the Full Bench in 'FADU JHALA v. GOUR MOHUN', 19 Cal 544 F B that a right to extraterritorial fishery is immovable property for all purposes. But, in our opinion, there is no room for reasonable doubt that a right of this description relates to an interest in immovable property."

This case was quoted with approval in 'HILL CO. v. SHERAJ RAI', 1 Pat 674 in which Sir Dawson Miller C. J. who delivered the judgment to which Mullick J. agreed held that an exclusive right of fishery is an interest in immovable property. Following this decision, the Madras High Court in 'SECRETARY OF STATE v. DISTRICT BOARD OF TANJORE', AIR (17) 1930 Mad, 679 has held that an exclusive right of fishery is an interest in immovable property.

(14) If a right of fishing is an interest in immovable property, it may be said with greater force that a right to rear and appropriate lac from lac bearing trees is an interest in immovable property. In 'PARMANAND v. BIRKHU', 1 Ind Cas 903 (Nag) it has been held by the Judicial Commissioner's Court at Nagpur that a right to take out lac from trees standing on a jungle is an interest in immovable property, as defined in S. 3 of the Indian Registration Act. The definition of immovable property in the Registration Act is substantially the same as in the General Clauses Act. Mr. Choudhury relies on 'IMAMALI ABUL KEDAR v. PRIYAWATI DEVI', AIR 1937 Nag 289 in which it was held that a lease of lac bearing trees is a lease of immovable property. The reason for the decision was that the trees were immovable property. Consequently, the lease of the trees was certainly a lease of immovable property. But the right to rear and appropriate lac is distant from the trees themselves. In my opinion, the right to rear and appropriate lac from lac bearing trees is not immovable property but an interest in immovable property.

(15) The question then arises as to which is the proper article of the Limitation Act applicable to this suit. The suit, as framed, is for a declaration and for a permanent injunction. In terms, it

is not a suit for possession. The right to rear and appropriate lac, though it is an interest in immovable property, is an incorporeal right. The right of fishing is also an incorporeal right. In the above-cited Bombay case 'BHUNDAL PANDA v. PANDOL POS PATIL', 12 Bom 221, which related to a right of fishing Sargent C. J. observed:

"A man is said to be in possession of a right when he can exercise it, and he recovers possession of an incorporeal right when the obstruction which interfered with its exercise is removed. The form of the order by which possession is restored must depend upon the nature of the right and the circumstances of the case."

In the aforesaid Patna Case '1 Patna, 674' it was held that an exclusive right of fishery can be acquired by adverse possession and the right of the owner of the water would be extinguished by operation of S. 28 of the Limitation Act. In 'LOKENATH v. JAHANIA BIBI', 14 Cal L J 572, it was definitely held that a suit in ejectment in respect of a fishery would lie. It is, therefore, clear that a suit for possession of an incorporeal right, which is an interest in immovable property, does lie. The present suit, though in terms it is for declaration and permanent injunction, is in substance for possession of an interest in immovable property. Article 142 will not apply, because that article refers to suit for possession of "immovable property" and not of "an interest in immovable property". Suit for possession of an "interest in immovable property" is covered by Art. 144. Consequently this suit will be governed by Art. 144. In 'HARISH CHANDRA v. PRAN NATH', AIR (8) 1921 Cal 405 it was held that a suit for a declaration that a certain pathway is a public pathway and for an injunction to remove certain obstruction would be governed by Art. 144.

(16) It is to be observed that the defendants in their written statement did not specifically plead adverse possession. But it was definitely pleaded that the suit was barred by limitation and in paragraph 16 of the written statement it was asserted:

"That these defendants Nos. 1 to 7 are the landlords of the village. The jungle has been recorded in their names. The lac on the lac bearing trees are reared by them. As usual this year also lac was reared by them."

If really the lac was reared and appropriated by the defendants, as alleged by them, their possession would prima facie be adverse to the plaintiffs. The plaintiffs themselves did not frame the suit as one for possession, and having regard to the nature of the right claimed by them, it will hardly be reasonable to preclude the defendants from showing that the suit is barred by limitation under Art. 144 merely because they did not in their written statement specifically plead that they were in adverse possession. Articles 142 and 144 are both rules of limitation, the only difference being that in the case of Art. 142, the onus lies on the plaintiff to prove his possession within 12 years, while in the case of Art. 144, it is for the defendant to prove when his possession became adverse. In a suit for possession of an interest in immovable property the question when the possession of the defendant becomes adverse to the plaintiff depends on the nature of the interest, particularly when it is an incorporeal right. The lower appellate Court will consider the evidence in the case from this point of view and will decide whether the suit is barred by limitation.

(17) A further point is taken by Mr. Choudhury, namely, that the appeal in the lower Court abated because the appellants Nos. 2 and 3 died during the pendency of the appeal and no substitution was made within the prescribed period. As the case is going back, the lower appellate Court will consider this question and if there has been abatement, it will give an opportunity to the appellants to apply to have the abetment set aside.

(18) In the result I would allow the appeal, set aside the decision of the Court of appeal below and send back the case to that Court for disposal according to law in the light of the observations made above. Costs will abide the result, but it is to be made clear that as there was no appearance on behalf of the respondents in this Court the appellants will not be entitled to any hearing fee in this Court.

(19) LAKSHMIKANTA JHA, C. J.: I agree.

R.G.D. *Appeal allowed.*

A. I. R. (39) 1952 Patna 204 *[C. N. 55 (18).]*

DAS AND SARJOO PROSAD, JJ.

Kumardhubi Engineering Works, Ltd., Petitioners v. State of Bihar.

Miscellaneous Judicial Case No. 265 of 1949, D/-14-12-1951.

(a) *Sales Tax — Bihar Sales Tax Act (VI (6) of 1944), Ss. 21 (3) and 25 (3) — Object of calling for statement.*

The whole object of calling for a statement of the case is to enable the Board to place before the High Court all the relevant facts bearing on each particular question with its own opinion based on these facts as to the manner in which the question should be answered. The opinion of the Board may or may not be acceptable to the High Court but the statement of the relevant facts bearing on those questions is wholly material and it is no use merely stating the grounds on which the deduction has been disallowed to the assessee by the various officers of the Sales Tax Department in the different stages of the case. (Para 3)

(b) *Sales Tax — Bihar Sales Tax Act (VI (6) of 1944), S. 21 (3) — Question of fact — Interference on reference.*

As to whether a particular article is or is not directly used in the raising of coal is not a question of law but entirely a question of fact. The evidence of an expert like the Chief Inspector of Mines on a point like this may be very relevant and entitled to great weight, but if after consideration of the evidence the Sales Tax Authorities are unable to hold in favour of the assessee and to allow the deduction on that account, the High Court, on a reference, cannot possibly interfere. (Para 4)

(c) *Sales Tax — Bihar Sales Tax Act (VI (6) of 1944), S. 21 (3) — Point not raised before Sales Tax Authorities nor before Board of Revenue — Point cannot be raised before High Court.* (Para 5)

(d) *Sales Tax — Bihar Sales Tax Act (VI (6) of 1944), S. 5 (2) (a), (ii) — Parts of ropeways — Exemption from tax.*

The Certificate of a Colliery showed that for purposes of manufacture "Colliery stores directly used in the raising of coal will be free from tax." The question was whether the parts of ropeways fell under this category.

'Held' that the parts of ropeways would not come within the meaning of "colliery stores directly used in the raising of coal". (Para 7)

(e) *Sales Tax — Bihar Sales Tax Act (VI (6) of 1944) — Rules under — R. 4 — Deduction on account of labour charges — Specific claim — Necessity of.*

It is quite true that in assessing tax, assessment should not be made on account of labour charges at all because that has nothing to do with the sale of materials with which the Sales Tax Act is concerned, but deduction on this score should be speci-

fically claimed and the proper materials placed before the Sales Tax Authorities in order to enable them to judge how much allowance should be reasonable. (*Para 9*)

Mahabir Prasad and K. N. Moitra, for Petitioners, Government Pleader and R. Prasad, for Opposite Party.

SARJOO PROSAD, J.: This application arises out of a reference made by the Board of Revenue, Bihar, under Section 21 (3) of the Bihar Sales Tax Act of 1944 read with Section 25 (3) of the Bihar Sales Tax Act, 1947. The reference has been made in pursuance of an order of this Court, dated the 13th of February 1950, under which the Board of Revenue was asked to state a case in regard to certain questions formulated in that order.

(2) The facts giving rise to this application are as follows: The petitioner, Messrs. Kumardhubi Engineering Works, Ltd., (hereinafter called the Limited Company) has been assessed to Sales Tax on a total taxable turnover of Rs. 23,88,707 for the year ending the 31st of March, 1947. The Limited Company returned a gross turnover of its business at Rs. 57,40,630/4/-, out of which, after claiming certain deductions, its return showed a taxable turnover of Rs. 4,22,356/4/3- only. One of the deductions claimed was a sum of Rs. 27,51,510/12/9- under Section 5 (2) (a) (ii) of the Act which included a sum of Rs. 19,61,529/12/0, on account of sales of ropeways and their parts to collieries which were registered under the Bihar Sales Tax Act 1944. As the assessment period relates to 1946-47, we are concerned in this case mainly with the provisions of the Bihar Sales Tax Act of 1944.

The Sales Tax Officer refused to allow the deduction on the ground that the articles on account of which deduction was claimed were not shown in the certificate of registration of the purchasing dealers. The assessee then appealed to the Commissioner of Sales Tax, Chota Nagpur, who dismissed the appeal, and finally it moved the Board of Revenue with a similar result. It then applied to the Board of Revenue for a reference to this Court on certain questions of law which it alleged arose out of the order of the Board, but the Board refused to make a reference until this Court at the instance of the assessee called upon the Board to state a case.

It would appear from the facts narrated above that the dispute between the assessee and the Sales Tax Department is now confined merely to a claim for deduction in respect of a sum of Rs. 19,61,529/12/0 on account of sales and installations of ropeways and ropeways parts to collieries registered under the Act; and this deduction is claimed out of the gross turnover on the ground that it fell within the provisions of Section 5 (2) (a) (ii) of the said Act.

(3) This Court in its order dated the 13th of February, 1950, formulated the following points on which the Board of Revenue was directed to state a case:

"(1) Whether in the circumstances of the case the list prepared in July 1947, by the Sales Tax Officer and incorporated in the registration certificates of the purchasing dealers, can govern the assessment in question.

(2) Whether the applicant is not entitled under the terms of the original certificates of registration of the purchasing dealers to claim an exemption on the ground that ropeways and their parts are covered by the words 'colliery stores directly used in the raising of coal.'

(3) (a) Whether the Sales Tax Officer had any power to determine the goods or classes of goods by preparing a list of such goods as could be exempted from taxation within the meaning of Sub-clause (ii) of Clause (a) of Sub-section (2) of Section 5 of the Bihar Sales Tax Act VI (6) of 1944.

(b) Whether in any event the list mentioned in the registration certificates of the purchasing dealers was prepared in the prescribed manner as required by Section 5 (3) of the Bihar Sales Tax Act, XIX (19) of 1947.

(4) Whether the words "ropes and strings, bolts, nuts, rivets, rods, angles, electric fittings, and appliances, etc.' as specified in the list incorporated in the registration certificates do not cover ropeways and their parts.

(5) Whether the Sales Tax Officer was bound to make the usual deduction under Rule 4 of the relevant Bihar Sales Tax Rules.

(6) Whether the refusal of the Board of Revenue in its powers of revision to go into point (f) as mentioned in its resolution dated the 16th of November 1949, rejecting the applicant's application for making a reference to this Court under the provisions of the Bihar Sales Tax Act was warranted in law."

The Board of Revenue in submitting a case has not dealt with the questions formulated specifically. It appears to have followed a procedure which does not fulfil the intentions of the law in submitting a case to this Court on the relevant points. What the Member, Board of Revenue, seems to have done is to narrate how the case proceeded at its various stages before the Sales Tax Authorities, and after quoting from the various judgments of those authorities and his own decision, he proceeds to formulate the points already mentioned in the order of this Court. If I may point out with great respect, this is not what he should have done. The whole object of calling for a statement of the case is to enable the Board to place before this Court all the relevant facts bearing on each particular question with its own opinion based on those facts as to the manner in which the question should be answered. The opinion of the Board may or may not be acceptable to this Court but the statement of the relevant facts bearing on those questions was wholly material, and it was no use merely stating the grounds on which the deduction had been disallowed to the assessee by the various officers of the Sales Tax Department in the different stages of this case. I have, therefore, left somewhat embarrassed in answering the questions raised as I find that the materials supplied by the Board of Revenue on the relevant points are rather scanty. I do not consider it, however, necessary to remit the case for a fresh statement because, in my opinion, several of the questions raised do not strictly arise in the case.

(4) As the deduction claimed arose under Section (5) (2) (a) (ii) of the Sales Tax Act, it would be necessary to refer to this important provision. To quote the relevant portion, it runs thus:

"In this Act the expression 'taxable turnover' means that part of a dealer's gross turnover during any period which remains after deducting therefrom:

(a) his turnover during that period on

(ii) Sales to a registered dealer of goods specified in the purchasing dealer's certificate of registration as being intended for re-sale by him, or for use by him in the manufacture of any goods for sale or in the execution of any contract....."

It is not disputed that all the collieries who were purchasers from the assessee of ropeways and their parts have got certificates of registration, but the department has held that these articles were not specified in their certificates, and, therefore, the assessee was not entitled to claim any deduction on

that account. A copy of the certificate of registration of one of the collieries which has been printed in this paper book, namely, the Burrakur Coal Company, Limited, shows that for purposes of manufacture "colliery stores directly used in the raising of coal will be free from tax." Subsequently after the passing of the Act of 1947, these colliery stores were specified and a list of such stores was added to the registration certificate of the collieries. The specifications catalogue a large number of articles including ropes and strings, bolts, nuts, rivets, rods, angles, electric fittings and appliances, etc.

The Sales Tax Officer in refusing the deduction claimed took the view that ropeways and their parts were neither specifically mentioned in the certificate of registration nor could they be included in the list of colliery stores directly used in the raising of coal. The other officers were similarly of the same opinion. The Board of Revenue as also the other officers of the Department incidentally referred to the list of colliery stores attached to the various registration certificates after the Act of 1947 came into force, and they held that even those articles did not cover ropeways and their parts. On behalf of the assessee it has been vehemently argued that in the first place it was not open to the Sales Tax Department to refer to the list of 1947 in interpreting the certificate of registration as it stood prior to the introduction of the list; and, secondly, that in any case they should have taken into consideration the fact that the component parts of the ropeways installed by the assessee in the various collieries came within the articles enumerated in the list of 1947 as colliery stores. It was also contended that in any event the Department should have allowed a deduction for the labour charges which the assessee incurred in installing the ropeways in the collieries.

As I have already pointed out, before a detailed list of colliery stores came to be introduced in the registration certificates, the only exemption provided was in respect of colliery stores directly used in the raising of coal. The question is whether the ropeways and their parts answer to that description. The assessee in this connection has relied upon certain letters sent to him by various companies as also on the letter of the Chief Inspector of Mines in India which are to the effect that the sand-stowing plant for the gathering and transport of sand is necessary for the purpose of ensuring maximum extraction of coal of good quality from the various collieries and without such plants the work of extraction in the seams was bound to remain in abeyance and on which account the Chief Inspector of Mines and the Companies concerned were satisfied that the installation of ropeways and sand-stowing plant was directly necessary for the production of coal.

These materials have been considered by the Sales Tax Authorities who in spite of them have come to the conclusion that ropeways and their parts are not directly used in the raising of coal. This was a question of fact to be decided on the evidence in the case. As to whether a particular article is or is not directly used in the raising of coal is not a question of law but entirely a question of fact. The evidence of an expert like the Chief Inspector of Mines on a point like this may be very relevant and entitled to great weight, but if after consideration of the evidence the Sales Tax Authorities are unable to hold in favour of the assessee and to allow the deduction on that account, this Court, on a reference, cannot possibly interfere.

(5) It is then argued that the Sales Tax Authorities have not considered the case in its correct perspective: It is true that they have held that ropeways are not specified in the certificate of registration, nor do they come under colliery stores directly used in the raising of coal; but they have not considered whether the various components of ropeways would not be included under the heading of 'colliery stores directly used in the raising of coal.' In this connection it is further submitted that the Sales Tax Authorities have made use of the list of 1947 to the detriment of the assessee and not with a view to understand the meaning of the expression "Colliery Stores directly used in the raising of coal." The argument is attractive but not substantial.

The decision of the Sales Tax Officer shows that some such argument was advanced before him though he did not approve of that contention. Referring to the list of 1947 the officer says that these were the only articles which by Government order had been classified under colliery stores directly for the raising of coal. He further observes that the Company was requested to state as to which of the articles mentioned covered the sum of Rs. 19,61,629/12/0 for which ropeways and their parts were sold, and the Company in its reply quoted a number of articles out of the above list which were used in the manufacture of ropeways and their parts, and submitted to the officer that since the sale of those articles to the registered collieries was exempted from sales tax, the sale of ropeways also which were manufactured from them should be free of tax.

As I said, this argument did not commend itself to the Sales Tax Officer who characterised the argument as an abusurd interpretation of Section 5 (2) (a) (ii) of the Act. It was submitted that a similar argument was advanced before the Commissioner, but the Commissioner, having delivered judgment more than eight months after the hearing of the case, really forgot to deal with the question. On behalf of the Department Mr. Lalnarain Sinha pointes out that the grounds to the Commissioner do not indicate that any such question was presented to him, because the case was argued mainly on the footing that deductions were claimed in respect of ropeways and their parts as such and not in regard to the component parts used in the manufacture of ropeways, and it is for this reason that the learned Commissioner refused to exempt from sales-tax the sale of these articles and held that ropeways and their parts utilised for sand-stowing purposes could not be held to be directly used for purposes of raising coal. Mr. Lalnarain Sinha is, therefore, justified in submitting that this aspect of the case was not presented to the Commissioner. When the assessee moved the Board of Revenue, it did not again raise the question, as it should have asking the Board to consider whether even if the ropeways as such could not be directly used in the raising of coal, yet the component parts of the ropeways could come under that heading. The argument again before the Board of Revenue as also the evidence adduced seems to be on the footing that ropeways and their parts taken as a whole were necessary for the purpose of mining operations, and for that reason exemption was claimed. The Board rejected this contention.

It is true that all these officers did refer to the list of 1947, but they did so, because reliance was placed upon the enumeration of articles specified in the list to show that some of these items would cover the ropeways and their parts but the point which is now raised before us was not directly raised before the Board of Revenue either. That being so, it is now too late for the assessee to raise this contention before us. It may be also observed that even in the points suggested by the assessee or in the points formulated by this Court, the contention does not appear to arise.

(6) I might as well refer at this stage to the various questions formulated by this Court. The first question has to be answered in the negative obviously for the reason that the list prepared in July 1947, and incorporated in the registration certificate of the purchasing dealers was after the period of assessment, and such a list could not govern the assessment in the present case. I have already pointed out that the Sales Tax Authorities did not utilise his list as governing the assessment in the present case but only with a view to understand the connotation of the term "Colliery Stores directly used in the raising of coal", for, this was the expression used in the certificate of registration of the purchasing dealers before the introduction of the list. In my opinion, therefore, the answer to the question does not in any manner affect the legality of the assessment.

(7) Question No. 2 as framed, is entirely a question of fact. Mr. Mahabir Prasad, the learned Advocate-General, appearing on behalf of the assessee, contends that the question should be reframed in order to bring out the real point in controversy. He suggests that the question should be in the following form:

> "Whether the omission to consider that parts of ropeways are covered by the words 'Colliery Stores directly used in the raising of coal' as mentioned in the terms of the original certificate of registration of the purchasing dealers and thereby refusing to grant the exemption claimed by the assessee under Section 5 (2) (a) (ii), has affected the validity of the assessment."

This, of course, may raise a question of law but, as I have already discussed, the point in this form was not specifically urged before the Board of Revenue, and, therefore, does not arise on the face of its order. Moreover, it seems to me that even on a question of fact if the case were to be remitted for a fresh consideraion, it is far-fetched to suggest that the parts of ropeways would come within the meaning of "colliery stores directly used in the raising of coal." The emphasis is on the words "directly used in the raising of coal", and any material which does not directly come in for such use but may be remotely utilised in mining operations cannot fall under this category. For these reasons, I do not think that even by reframing the question any useful purpose will be served: and the answer to the question as it stands must be in the negative: in other words, the answer is that the assessee is not entitled to claim exemption.

(8) Question 3 (a) does not, in my opinion, arise in the present case as no such list seems to have been prepared by the Sales Tax Officer though it was open to him to hold on fact that ropeways and their parts do not come within the exemption provided in the certificate of registration of the purchasing dealers. Similarly, Question 3 (b) also becomes irrelevant in view of what I have said in regard to Question No. 1. I would be loath to answer any hypothetical questions of this kind, because whether the list of 1947 was or was not validly prepared was hardly germane to the legality of the present assessment. For the same reason Question No. 4 also having regard to the answer to Question No. 1 becomes irrelevant.

(9) The only other questions of some importance are Questions Nos. 5 and 6. These questions involve a consideration of the fact as to whether the assessee Company was entitled to a certain percentage of deduction on account of labour charges in fitting up or installing the ropeways in the various collieries. The Member, Board of Revenue has unfortunately not given the relevant facts bearing on these questions. All that one finds from his resolution dated the 16th of November 1949, disposing of the application of the assessee for reference to this Court is that the Board thought that point (f) in the assessee's petition of appeal which had a bearing on his deduction was purely a question of fact; viz., whether a deduction under Rule 4 of the Sales Tax Rules for labour should have been made. The unfortunate part of it is that this question was for the first time raised in the application in revision presented to the Board of Revenue, and the point was never at any stage canvassed before the Subordidate Sales Tax Authorities.

The return filed by the assessee shows that labour charges on account of contracts were claimed in respect of another amount, but there was no claim in the alternative in respect of this item at all. It is contended that the amount claimed for exemption under Section 5 (2) (a) (ii) covered labour charges as well. It is quite true that in assessing tax, assessment should not be made on account of labour charges at all because that has nothing to do with the sale of materials with which he Sale of Goods (sic. Sales Tax?) Act is concerned; but deduction on this score should have been specifically claimed and the proper materials placed before the Sales Tax Authorities in order to enable them to judge how much allowance should have been reasonable in the circumstances on account of labour charges in installing the ropeways sold to registered dealers.

Rule 4 of the Bihar Sales Tax Rules, 1944, requires that in calculating the sale price in respect of a contract a dealer may deduct from the amounts payable to him as consideration for carrying out such contract any sum up to 30 per cent of the amount so payable representing the cost of labour involved in the execution of any contract. The assessee never attempted or intended to do so and his return itself is silent on the point. The deduction claimed under Section 5 (2) (a) (ii) was all in one lump and the option allowed to the assessee under the above rule on account of labour charges was never exercised. On the other hand, if it was intended to be claimed as something distinct from the price of the goods sold, which, in my opinion, it is, should not have been included in the gross turnover of the assessee. The justice of the case indeed demanded that when the Sales Tax Authorities had refused to grant deductions on account of ropeways and their parts sold by the assessee Company to the registered dealers, they should have made appropriate allowance on account of labour charges incurred by the assessee in installing the ropeways; but unfortunately there are no materials before this Court on which it could come to any conclusion one way or the other.

The Board of Revenue of course enjoys comprehensive powers in revision and might well have looked into this aspect of the case and considered whether such an allowance should be made in favour of the assessee. As the materials stand, I am unable to hold that in the circumstances of the present case the Sales Tax Officer was bound to make the usual deduction, or that the Board of Revenue was bound to consider this point in the exercise of its powers of revision in rejecting the assessee's application for making a reference to this Court. Question No. 5 (five), therefore, has also to be answered in the negative and Question No. 6 in the affrmative.

(10) For the above reasons, the reference is answered accordingly. As the assessee has failed on all the substantial questions raised, it is liable to pay the costs of this hearing to the Sales Tax Authorities which is assessed at five gold mohurs.

(11) DAS, J.: I agree with my learned brother that the question should be answered in the manner indicated by him. I wish to add a few co-

servations only with regard to Questions (2), (5) and (6).

(12) It is rather unfortunate that in this case the questions have been mooted in such a way that some of them do not arise out of the order passed by the Board of Revenue, and some, if they arise out of such order, are not really questions of law. The petition has been made more difficult by the way in which the Board of Revenue has stated the case, and this has been pointed out by my learned brother. The result of all this has been that instead of attention being given to the point in dispute, unnecessary or irrelevant points have been introduced in the discussion—a rtsult for when an assessee is to a great extent responsible.

(13) Question (2) as framed is a question of fact. If I were satisfied that the taxing authorities had completely failed to consider the case from the point of view of the tax free clause as it stood in the original certificates of registration, I might be persuaded to reframe the question and ask for a fresh statement of the case; because, failure to consider the real question at issue will be a question of law. But having examined the orders of the Sales Tax Officer, Commissioner and Board of Revenue, I am satisfied that they did consider whether a ropeway or its parts came within the tax-free clause of "colliery stores directly used in the raising of coal, as it occurred in the original certificates of registration, and answered it in the negative.

(14) The argument that the component parts of a ropeway should have been considered separately as coming within the expression "colliery stores directly used in the raising of coal" also appears to have been dealt with by the taxing officer and the Commissioner, both of whom stressed the word "directly" occurring in the clause, and gave it a meaning different from "essentially." They may have been right or wrong; but there was no omission or failure to consider the real question at issue, though the list of 1947 was unnecessarily taken as illustrative of what was meant to be tax-free.

(15) Therefore, reframing the question in the way desired by the learned Advocate-General will not, in any way, improve matters; the taxing authorities have answered the question of fact that ropeway or its component parts taken collectively or separately do not come within the tax-free clause of "colliery stores directly used in the raising of coal." That, I think, is the end of the matter, so far as this question is concerned.

(16) Question (5): Apart from what my learned brother has pointed out, there is, I think, a further difficulty. Rule 4 of the Bihar Sales Tax Rules 1944, is referable to Section 2 (h) of the Act of 1944 which defines "sale-price" as meaning ('inter alia') the amount payable to a dealer as valuable consideration for the carrying out of any contract, less such portion as may be prescribed, of such amount representing the usual proportion of the cost of labour, etc., in carrying out the contract. The word 'contract' has a special meaning in the Act, unless the context indicates otherwise. See Clause (b) of Section 2. The assessee did not claim exemption on this ground in his return. He did so at a late stage, without getting any finding whether a ropeway used collectively, comes within the special meaning of the word 'contract.'

(17) Question (6): Though the claim of a deduction under Rule 4 was mentioned in the grounds of revision, it is not clear to me if this ground was pressed before the Board. The Resolution of the Board, dated the 21st July 1949, by which the revision petition was dismissed, does not mention this point. The point is mentioned as point (f) in the application for a reference to this Court; the Board then said that it was a question of fact. Though I do not understand what the Board meant by saying that it was a question of fact, I presume that it was open to the Board to refuse to consider in revision a claim which was not made earlier and for which full materials were not available

V.R.B. *Refererence answered.*

A. I. R. (39) 1952 Patna 208 [*C. N. 55 (19).*]

RAMASWAMI AND SINHA, JJ.

Mahadeo Prasad and another, Petitioners v. Srjug Prasad and others, Opposite Party.

Civil Revision No. 753 of 1950, D/- 11-12-1951.

Contract Act (1872), S. 5 — Offer to be bound by special oath — Resiling from before oath is taken —(Oaths Act (1873), Ss. 8, 9 and 10.)

Once an offer to be bound by the special oath of the other party has been made by a party and accepted by the other, it cannot be revoked. He cannot, therefore, be allowed to resile from his offer before the special oath has actually been taken. Ss. 8, 9 and 10 of the Oaths Act do not entitle a party to withdraw from the offer of being bound by special oath after once the said offer has been accepted by the other side. The Court, however, is not bound to administer the special oath and before the oath is taken, it is open to the Court to allow the party offering to be bound by such oath to resile from it for good and sufficient reasons. AIR (17) 1930 All 162 and AIR (22) 1935 All 276, Dissent from. (*Para 4*)

Anno: Contract Act, S. 5, N. 1, Oaths Act, S. 8 N. 1, S. 9, N. 1, S. 10, N. 3, Pt. 2.

Nandlal Untwalia and Jugeshwar Prasad, for Petitioners; K. P. Upadhya; N. P. Agarwala; G. P. Agarwala and Indra Bhanu Singh, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('95) 18 All 46: (1895 All W N 158) (Pr 4)
('30) 52 All 235: (AIR (17) 1930 All 162) (Pr 4)
('33) 55 All 298: (AIR (20) 1933 All 463) (Pr 4)
('35) AIR (22) 1935 All 276: (153 Ind Cas 686) (Pr 4)
('98) 22 Bom 281 (Pr 4)
('31) 35 Cal W N 130: (AIR (18) 1931 Cal 549) (Pr 4)
('99) 22 Mad 234 (Pr 4)
('46) AIR (33) 1946 Pat 272: (222 Ind Cas 210) (Pr 4)

SINHA, J.: The only question that arises for determination in this application is whether the plaintiffs-petitioners are entitled in law to resile from the agreement, dated the 30th of June 1949, by which the plaintiffs bound themselves to abide by the statement on special oath made by the defendants.

(2) The plaintiffs had filed a suit for partition of the joint family properties in the year 1948. Soon after, the dispute between the parties was referred to the sole arbitration of one Babu Mohan Lal Gupta. Thereafter there was an agreement on the 16th of December 1948, in writing between the parties regarding the division of the immoveable properties. Another agreement was entered into between the parties on the 30th of June 1949, in regard to the division and the manner of division of the moveables. The plaintiffs offered to abide

by the statement on special oath of the defendants Mathura Prasad and Sarjoo Prasad as to whether or not the money belonging to the joint family had been invested in the shop in dispute. This offer of the plaintiffs was accepted by the defendants. The relevant agreement is embodied in Clause 4. The arbitrator Babu Mohan Lal Gupta incorporated this agreement also in his award without dividing the properties or determining the extent of the same.

After certain objections filed by the parties, the award was remitted to the arbitrator for effecting complete partition. The said arbitrator, however, returned the writ without doing anything further, and on the 13th of December 1949, the Court recorded an order, an extract from which is as follows:

"He (the arbitrator) submitted his award and on consideraion of the objections filed by the parties to the award, it was remitted to him for partitioning the joint family properties completely and effectively according to the agreements and compromise made before him by the parties. Babu Mohanlal Gupta returned the writ unexecuted after it was remitted to him with certain directions. He did nothing, and now the question is what is to be done next. The 'parties do not want to resile from the positions taken by them before the arbitrator and from the terms of the agreements and compromises made by them before the arbitrator'.....The parties do not agree among themselves regarding the person to be appointed in place of Babu Mohanlal Gupta who has refused to act further and follow the directions of the Court....."

On the 14th of December 1949, however, the parties filed a petition and prayed that one Babu Kishore Narayan, Advocate, be appointed to effect partition. On the 21st of December 1949, however, the plaintiffs for the first time put in a petition with a prayer that the Court be pleased to order that the second agreement, dated the 30th June 1949, was unenforceable and not binding on the plaintiffs and to direct the Commissioner to be appointed by the Court to divide equally the jewelleries among the parties on the grounds mentioned in the petition. In this petition, it appears no reasons were given why the plaintiffs should be allowed to resile from the agreement, and on the 11th of February 1950, the Court held that, in the absence of any justifiable reasons, the plaintiffs could not withdraw from the agreement, but allowed the plaintiffs an opportunity to file a fresh application giving reasons for withdrawal of the plaintiffs from the agreement aforesaid. The plaintiffs accordingly filed an application giving reasons why they wanted to resile from the agreement, and this matter was ultimately disposed of by the learned Subordinate Judge by his order dated the 22nd of September 1950. He held that the reasons given were not sufficient and, therefore, the plaintiffs could not withdraw from the agreement. He also gave his finding on the merits in regard to the money invested in the shop in dispute. It is against this order that the present application in revision has been filed.

(3) The learned Counsel has urged the following points in support of this application: (i) that the arbitrator cannot decide on special oath; (ii) that the party offering himself to be bound by the special oath of the other side can resile from that offer any moment before the other side has actually taken the special oath; and (iii) that the finding about the shop as to whether the money invested in the shop belonged to the family or not should not have been given by the Court below upon the plaintiffs' application desiring to resile from their agreement.

(4) The first contention does not arise upon the facts of this case. The arbitrator in this case has not attempted to decide on special oath. When the agreement about special oath was made, the arbitrator very properly sent his award along with the agreement to the Court. I would, therefore, hold that there is no merit in this contention. The second is the main contention of the learned Counsel as to whether or not a party can be allowed to resile from his offer before the special oath has actually been taken. In my opinion, once an offer has been made by a party and accepted by the other, it cannot be revoked. Section 5 of the Indian Contract Act is quite clear on this point. It runs as follows:

"A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.
An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards."

In this case, as will appear from the facts mentioned above, the offer of the plaintiffs to abide by the special oath of the defendants had been accepted long before the plaintiffs filed an appln. to resile from that agreement, and it will appear from the passage underlined (here single quoted) by me in the order of the Court below, dated 13-12-1949, that even up to that date the plaintiffs had not thought of resiling from the agreement which had been made long before that date. Learned Counsel has relied upon two cases of the Allahabad High Court. In the case of 'TUMMAN SINGH v. SHEODARSHAN SINGH', 52 All 235, it was held that a party was entitled to resile from his offer to be bound by the special oath before the oath was actually taken. No authority is cited in support of that proposition in this case. The other Allahabad case, 'RUP SINGH v. MRS. ARJUN SEN', AIR (22) 1935 All 276, is a single Judge case. It was held in the case that a party can resile from his offer before the statement on oath has been taken. In neither of these two cases the provision contained in Section 5 of the Contract Act was considered, and it further appears that the earliest decision of the Allahabad High Court was not considered in either of these two cases. The earliest Allahabad case which had taken a contrary view is reported as 'RAM NARAIN SINGH v. BABU SINGH', 18 All 46, and their Lordships laid down the law as follows:

"When the proposal has been made by a party to a proceeding and the Court in pursuance of the proposal has asked the party required to take a particular form of oath whether he will do so, and the party so asked has agreed to take the oath, then, under such circumstances, no permission should be accorded to the party who made the proposal to withdraw from it, except upon the strongest possible grounds proved to the satisfaction of the Court to be genuine grounds for revoking the proposal."

The other Allahabad case to which I would like to refer is the case of 'SIYA RAM v. JAGANNATH', 55 All 298. This is a single Judge decision, but, in my view, it has correctly laid down the law. Niamat-ullah, J., after referring the facts of the case, says:

"There was thus a completed agreement on the 31st of March 1932, under which the controversy in the suit was to be settled in accordance with the evidence of Sheocharan..... The agreement between the parties arrived at on the 31st March 1932, has to be considered like any other agreement in which an offer is made on one side and acceptance on the other."

It appears that the view of several other High Courts is also the same. This view is supported by the authorities of the Bombay, Madras and the Calcutta High Courts: 'THOYI AMMAL v. SUBBAROYA MUDALI', 22 Mad 234; ABAJI v. BALA', 22 Bom 281 and 'KHAN MAHMUD v. SYEDALI', 35 Cal W N 130. In our own Court the cases mentioned above have been followed in the case of 'BALDEO SINGH v. NIRAS SINGH', AIR (33) 1946 Pat 272. After referring to the cases mentioned above, Sinha, J., has said as follows:

"These cases are authority for the proposition that an offer to be bound by the special oath of a particular person once accepted by the person concerned being a party to the suit cannot be withdrawn except on very cogent grounds which, in the opinion of the Court, justifies it in exercising its discretion not to allow the special oath being administered. But it is not open to the party to make such an offer, and then to withdraw it on frivolous grounds after it has been accepted by the other party. Such an offer may be withdrawn so long as it has not been accepted by the other party and acted upon."

Reference was made to Sections 8, 9 and 10 of the Indian Oaths Act by the learned Counsel appearing on behalf of the petitioners, but, in my opinion, these sections do not entitle a party to withdraw from the offer of being bound by special oath after once the said offer has been accepted by the other side. The Court, however, is not bound to administer the special oath and before the oath is taken, it is open to the Court to allow the party offering to be bound by such oath to resile from it for good and sufficient reasons. In this case, however, the Court below has rightly exercised its discretion in refusing the prayer of the plaintiffs to resile from their offer. I have, therefore, no hesitation in holding that in this case the petitioners are not entitled to resile from the offer of being bound by the statement on special oath of the defendants when the latter had already accepted the same.

(5) I, however, find it difficult to uphold the order of the Court below which purports to deal with the merits of the case so far as the shop in dispute is concerned. The question before the Court was as to whether or not the plaintiffs should be allowed to back out from the agreement relating to the special oath, and the Court should not have given any decision on the merits.

(6) I would, therefore, set aside the order of the Court below in regard to its finding upon the merits as to whether the money invested in the shop belonged to the joint family or not.

(7) If the Court cannot itself administer the special oath, it should act under the provisions of Section 10 of the Indian Oaths Act by issuing a commission to any person to administer the same. It may just as well be that the Commissioner already appointed by the Court may be authorised to administer this oath in accordance with the provisions of that section.

(8) In the result I would dismiss the application with the observations made above. In the circumstances of this case there will be no order for costs.

(9) RAMASWAMI, J.: I agree.

V.R.B. *Application dismissed.*

[C. N. 55 (20).]

* A. I. R. (39) 1952 Patna 210

RAMASWAMI AND SINHA, JJ.

Members of the Sasamusa Workers Union, Petitioners v. State of Bihar and others.

Miscellaneous Judicial Case No. 80 of 1950, D/-12-9-1951.

(a) *Industrial Disputes Act (1947), S. 2 ('k') — Strike notice containing demands, not served on management — Management not otherwise aware of such demands — No industrial dispute exists with reference to those demands.*

Where there is no material to show that the notice of strike by the Workers' Union, specifying certain demands was in fact served upon the management or that reasonable opportunity was given to the latter to comply with the demands made on behalf of the Workers' Union, or that the management was otherwise aware of those demands, it is impossible to hold that there was an 'industrial dispute' with reference to the demands specified in the notice within the meaning of S. 2 ('k'). (Para 4)

Anno: Industrial Disputes Act, S. 2 (k), N. 1.

† ✠ (b) *Industrial Disputes Act (1947), Ss. 10 (1) and 2 (k) — Strike notice containing several demands — Reference under S. 10 (1) in respect of only some is intra vires and legal — Mandamus directing State Government to refer remaining disputes cannot be issued — Constitution of India, Art. 226.*

According to the definition of industrial dispute contained in S. 2 ('k'), each demand when made by the Workers' Union and refused by the management gives rise to an 'industrial dispute.' Therefore the several demands in the strike notice on behalf of Workers' Union would give rise not to a single trade dispute but to an aggregate of such disputes. (Para 5)

The Government is not legally bound to refer all such disputes under S. 10 (1), even if a public utility service is involved and notice of strike under S. 22 has been given. It follows that the reference made by the State Government with reference to only some of the disputes is intra vires' and legal. (Paras 5, 6)

Section 10 (1) read with the proviso merely intends to give the appropriate Government a power to refer for settlement or adjudication an industrial dispute relating to a pubiic utility service when strike notice has been given notwithstanding that any proceedings under this Act in respect of the dispute may have commenced. It is a power or discretion which is given and not duty or obligation. (Para 5a)

In this view, no writ in the nature of mandamus can be issued by the High Court to the State Government directing them to refer the remaining matters which are alleged to be in dispute, between the Workers' Union and the management. (Para 6)

(c) *Industrial Disputes Act (1947), S. 12 — Parties to dispute agreeing that particular item may be decided by third party — Decision by such third party not illegal.*

Where as a result of the conciliation proceedings, the parties to the industrial dispute agree that a particular item may be decided by a third party (in this case by the Assistant Labour Commissioner), whose decision will be accepted as final, the de-

cision of the third party is not illegal and cannot be quashed. (*Para 7*)

T. K. Prasad, for Petitioners; Government Advocate, for the State.

Cases referred to:

('50) AIR (37) 1950 Pat 387: (51 Cri L J 1509 FB) (Pr 5)

(1920) 1 K B 155: (89 L J K B 116) (Pr 6)

RAMASWAMI, J.: In this case the petitioner who is the Secretary of the Sasamusa Workers Union has obtained a rule calling upon the State of Bihar and other respondents to show cause why a writ in the nature of mandamus under Article 226 of the Constitution of India should not be issued commanding the State of Bihar to refer "the entire dispute between the petitioner and Sasamusa Sugar Mills, Limited, for being decided by the Industrial Tribunal under Section 10 (1) of the Industrial Disputes Act."

(2) Cause was shown against the rule by the State of Bihar to whom notice of the rule was given. The other respondents, Nos. 2 and 3, have not entered appearance and contested the rule.

(3) The material facts are not controverted. On 28th of August 1949 the Sasamusa Workers' Union sent a letter to the Manager of the Sugar Mills in which they set out 15 demands with respect to certain disputed matters like non-implementation of certain awards. On 31st October 1949 further demands were made by the petitioner upon which conciliation proceedings were started at the instance of the Labour Commissioner of Bihar. A settlement was arrived at between the Workers' Union and the management with respect to most of the matters in dispute. The remaining points were left for the decision of the Assistant Commissioner of Labour by the agreement of both the parties. The Assistant Commissioner of Labour accordingly decided the point and the whole settlement was published on 9th of January 1950, in a Government Notification. Two days later the Workers' Union served a notice of strike on the factory management setting forth 44 specific demands. On 19th of January 1950 the Labour Officer visited Sasamusa and made a report after making certain enquiries. On 24th January 1950 the Labour Commissioner wrote a letter to the Secretary of the Workers' Union requesting him to attend a meeting at Mirganj intimating that the strike will be illegal in view of the fact that conciliation proceedings had already started. Shortly after the Government of Bihar acting under Section 10, Subsection (1) of the Industrial Disputes Act referred the industrial dispute existing between the managements of certain Sugar Mill Factories in the State of Bihar and their workers as represented by the Union regarding four matters which were specified in Schedule A of the notification.

(4) In support of this petition it was argued by Mr. T. K. Prasad, in the first place that the dispute between the management and the Workers' Union related to 44 specific items set forth in the notice of strike sent on 11th January 1950 and it was not competent for the State of Bihar to refer to Tribunal only the four matters specified in Annexure A of the notification. But there is no material in the present case adduced on behalf of the petitioner that there was industrial dispute within the meaning of the Act with reference to the "44 demands specified in the notice of strike." Learned Counsel was unable to point out that the notice of strike was in fact served upon the management or that reasonable opportunity was given to the latter to comply with the demands made on behalf of the Workers' Union. It is true that there is reference to the impending strike in the letter of the Labour Commissioner, dated 24th of January 1950, and also in the letter of the Assistant Commissioner of Labour dated 22nd of January 1950, printed at pages 24 and 26 of the paper book. But it is not stated in the affidavit filed on behalf of the petitioner that the notice of strike was in fact communicated to the management of the factory or that the management was otherwise aware of the demands made on behalf of the Workers' Union. It is impossible to hold upon the materials furnished that there was an "industrial dispute" with reference to the "44 demands" within the meaning of Section 2 (k) of the Industrial Disputes Act. It cannot, therefore, be held that the reference made by the State of Bihar in the notification of 6th February 1950 was only with respect to a 'part' of the industrial dispute as contended by the learned Counsel on behalf of the petitioner.

(5) Even assuming that there is material to establish that there was industrial dispute with respect to the 44 demands made by the Workers' Union in the strike notice it must nevertheless be held that the Government of the State had discretion to refer to Industrial Tribunal for adjudication only the matters specified in Annexure A of the notification. It was contended by the learned Counsel on behalf of the petitioner that the dispute itself comprised the entire list of 44 demands and it was beyond the jurisdiction of the State Government to refer only a part of the dispute, meaning thereby the items specified in Annexure A of the notification. In my opinion the argument of the learned counsel is untenable and cannot prevail. Section 2 (k) of the Act defines an industrial dispute to be:

> "any dispute or difference between employers and employers, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

According to this definition, each demand when made by the Workers' Union and refused by the management gives rise to an 'industrial dispute.' I conceive therefore that 44 demands in the strike notice would give rise not to a single trade dispute but to an aggregate of 44 such disputes. For the reasons that I shall presently state the Government is not legally bound to refer all such disputes under Section 10 (1), even if a public utility service is involved and notice of strike under Section 22 has been given. It follows that the reference made by the State Government with reference to the four matters mentioned in annexure A of the notification is intra vires and legal.

(5a) Section 10(1) of the Industrial Disputes Act states:

'If any industrial dispute exists or is apprehended, the appropriate Government may, by order in writing,

(a) refer the dispute to a Board for promoting a settlement thereof; or

(b) refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry; or

(c) refer the dispute to a Tribunal for adjudication."

There is a proviso to the effect that

> "where the dispute relates to a public utility service and a notice under S. 22 has been given, the appropriate Government 'shall', unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under

this Act in respect of the dispute may have commenced."

Reading the whole sub-section with the proviso it is clear that the statute has granted a power rather than imposed a duty, that it has conferred a discretion but did not impose an obligation. The section merely intends to give the appropriate Government a power to refer for settlement or adjudication an industrial dispute relating to a public utility service when strike notice has been given notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced. It is a power or discretion which is given and not duty or obligation. This construction is supported by the fact that the expressions, such as "unless it considers that the notice has been frivolously or vexatiously given" or "that it would be inexpedient so to do" confer a wide and unfettered discretion on the appropriate Government.

This view is supported by the decision of the Full Bench in 'BAGARAM TULOULE v. STATE OF BIHAR', AIR (37) 1950 Pat 387 in which it was held that a writ of mandamus under Art. 226 cannot be issued directing the Government to refer the dispute in a case where the State Government has refused to refer the industrial dispute under the proviso to sub-s. (1) of S. 10 of the Industrial Disputes Act.

(6) Reference should be made in this context to 'KING v. MARSHLAND SMEETH AND FEN DISTRICT COMMISSIONER', (1920) 1 K B 165 in which S. 1, Marshland Smeeth and Fen District Act, 1796 (36 Geo. III, C. 100) provided as follows:

"Be it enacted that the said tracts of common and waste lands called Marshland Smeeth and Marshland Fen, shall be effectually regulated, set out inclosed, divided, and allotted, by such Commissioners, in such manner and under such powers and authorities, and subject to such rules, orders and directions, as are hereinafter appointed, mentioned and declared."

One of the owners of land in the district alleged Commissioners had neglected to drain the district effectually, commanded them to do so. The Commissioners by their return to the writ alleged that they had carried out the order of the Court to the best of their ability. The plaintiff by his reply to the return joined issue thereon, and claimed damages for injury sustained by his land through the Commissioners' neglect to drain the district. One of the questions raised was whether the Commissioners were entitled to argue that the writ of mandamus should not have been issued by the Divisional Court. McCardie J. held that the Commissioners were so entitled. He then observed as follows:

"Concisely put, the defendants contend that the Acts which govern them are permissive rather than directory, and that the Commissioners have a discretion as to the carrying out of those Acts of Parliament which, if exercised bona fide, cannot be supervised, governed or directed. The validity of this contention must, I think, depend in every case upon the true construction of the enactment in question. If, for example, a jurisdiction be given to an inferior Court all that that Court can be called upon by the High Court to do, save in special circumstances, is to hear and determine the matters brought before it in a regular and proper manner. Hence, a mandamus is granted, if jurisdiction has been declined by the inferior Court, to hear and determine only. If the inferior Court has a discretion as to the decision it may give, then if that discretion be exercised bona fide and not arbitrarily or illegally and without reference to extraneous considerations the Court will not control the exercise of that discretion. See the cases cited in Short and Melior on Crown Officer Practice, edition 2, pages 200 and 201.

But I conceive that Acts of Parliament which confer a judicial discretion upon a subordinate Tribunal are fundamentally different from Acts of Parliament which place duties upon such bodies as canal companies, dock companies, land drainage corporations and the like. The object of the former enactments is to secure a hearing and determination. They could scarcely provide that a decision should be given contrary to the view of the tribunal. But the object of the latter class of enactments is wholly distinct. They aim at securing a benefit to the public or a particular section of the community by creating a body for the performance of certain public works and the discharge of the duties appropriate thereto. But even in the latter class it may be that the Act of Parliament has granted a power rather than imposed a duty, has conferred a discretion rather than an obligation. If a power or discretion only, as distinct from a duty, exists then the prerogative writ of mandamus will not be issued by the Court."

My conclusion therefore is that under S. 10(1) of the Industrial Disputes Act it is competent for the Government of the State to issue the notification which is impugned in the present case. I am also of the opinion that no writ in the nature of mandamus can be issued by this Court to the State Government directing them to refer the remaining matters which are alleged to be in dispute, between the Workers Union and the management of the Sasamusa Factory in the circumstances disclosed in the present case.

(7) An argument has been addressed by Mr. T. K. Prasad in support of this rule that the decision of the Assistant Labour Commissioner dated 7th December 1949 was illegal and it ought to be quashed. From page 11 of the paper book it is apparent that as a result of the conciliation proceedings it was agreed between the Workers Union on the one hand and the management on the other that as regards certain workers who had been discharged the Assistant Labour Commissioner should examine their cases and his decision will be final. In accordance with the agreement entered into between the parties the Assistant Labour Commissioner examined the cases of the workers concerned and pronounced his decision which is printed at pages 13 to 17 of the paper book. The argument of the learned counsel is founded on S. 12 of the Industrial Disputes Act which enacts:

"1. Where any industrial dispute exists or is apprehended, the conciliation officer may, or where the dispute relates to a public utility service and a notice under S. 22 has been given, shall, hold conciliation proceedings in the prescribed manner.
(2) The conciliation officer shall, for the purpose of bringing about a settlement of the dispute, without delay investigate the dispute and all matters affecting the merits and the right settlement thereof and may do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute.

(3) If a settlement of the dispute or any of the matters in dispute is arrived at in the course of the conciliation proceedings the conciliation officer shall send a report thereof to the appropriate Government together with a memorandum of the settlement signed by the parties to the dispute."

It was contended that the phrase "settlement of the dispute" could not include the decision given

by the Assistant Labour Commissioner in the present case. It is obvious that this argument is wholly untenable for the parties to a dispute may well agree that a particular item may be decided by a third party whose decision will be accepted as final. It is difficult therefore to hold that there is any illegality committed in the course of the conciliation proceedings or that the decision of the Assistant Labour Commissioner ought not to have been included in the notification published on the 9th January 1950 as a part of the conciliation proceedings.

(8) For the reasons assigned I hold that the application must be dismissed and the rule discharged with costs to respondent No. 1. Hearing fee five gold mohars.

(9) SINHA, J.: I agree.

V.B.B. *Rule discharged.*

[C. N 55 (21.)]

** A. I. R. (39) 1952 Patna 213

(FULL BENCH)

REUBEN, IMAM AND DAS, JJ.

Radheshyam and others, Appellants v. Devendra, Respondent.

A. F. O. O. No. 309 of 1948, D/- 11-12-1951.

†✠✠ *(a) Civil P. C. (1908), Ss. 38, 39, 41, 42, 46 and 50 and O. 21, Rr. 10, 21, 26, 28 and 30 — Decree transferred for execution to another Court— Limits of jurisdiction of transferor and transferee Courts — Certificate under Section 41 not received from transferee Court — Jurisdiction of Transferor Court to execute decree.*

Where a decree is transferred for execution to another Court, the transferee Court gets jurisdiction to execute the decree to the limits of its jurisdiction to execute its own decrees. It retains this jurisdiction until it sends a certifcate under Section 41, Civil P. C. The transferor Court is not, however, deprived of all its jurisdiction to execute the decree. The transferor Court still retains jurisdiction to execute the decree except to the extent that jurisdiction to execute the decree has been given to the transferee Court. The Court which passed the decree has, therefore, jurisdiction to execute the decree in certain circumstances inspite of the absence of any certificate under Section 41 from the transferee Court. AIR (15) 1928 PC 162, Rel on; AIR (3) 1916 PC 16, discussed. Observations to the contrary in AIR (27) 1940 Pat 677, held obiter; AIR (32) 1945 Pat 129, Considered. Case law referred.

(Paras 22, 25, 28, 30, 32)

Anno: C. P. C., S. 38 N. 10; S. 42 N. 3.

† ✠✠ *(b) Limitation Act (1908), Art. 182 (5) — Proper Court — Application for execution to Court passing decree before receipt of certificate under Section 41, Civil P. C. — If made to proper Court.*

(Per Full Bench): Where a decree is transferred for execution by another Court, the question whether an application for execution of the decree made to the transferor Court before the transferee Court has sent a certificate under S. 41, Civil P. C. is an application to the 'proper Court' within the meaning of Art. 182(5), Limitation Act depends on the relief applied for. If it is one which the transferor Court can grant the application is made to the 'proper Court.'

(Paras 25, 34)

(Per Imam, J.): The question would depend entirely upon the facts of a particular case. If the application for execution was with reference to property within the jurisdiction of the Court which passed the decree, or for the arrest of the judgment-debtor residing within its jurisdiction, then it would be the "proper Court." If, on the other hand, the application for execution sought the execution of the decree against property outside the jurisdiction of the Court which passed the decree, or for the arrest of the judgment-debtor residing beyond its jurisdiction, then such an application would not be to the "proper Court."

(Para 29)

Anno: Limitation Act, Art. 182 N. 89.

(c) Civil P. C. (1908), O. 21, R. 10 — Scope.

Order 21, Rule 10, Civil P. C. is concerned with defining the decree-holder's right to ask for the execution of his decree. Ordinarily, he must go for the purpose to the Court which passed the decree. In certain circumstances, however, he can go to another Court, namely, the Court to which the decree has been transferred for execution. This is all that the rule means. The effect of the word "then" in that rule is not intended to go back beyond the alternative word "or". It relates merely to the existence of the circumstances in which the decree-holder may apply for execution to a Court other than the decreeing Court. (Para 11)

Anno: C. P. C., O. 21, R. 10 N. 6.

Adityanarayan Lall, for Appellants; Bhabananda Mukherji, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('70-72) 14 Moo Ind App 529: (10 Beng L R 214 P C) (Prs 9, 13, 16)

('16) 43 Ind App 238: (AIR (3) 1916 P C 16) (Prs 14, 15, 16, 17, 18, 19, 20, 24, 33)

('28) 55 Ind App 227: (AIR (15) 1928 P C 162) (Prs 10, 18, 32)

('36) 1936 All L J 277: (AIR (23) 1936 All 655) (Pr 16)

('35) AIR (22) 1935 Lah 465: (157 Ind Cas 488 F B) (Prs 16, 21)

('28) AIR (15) 1928 Mad 493 (2): (110 Ind Cas 829) (Pr 16)

('38) ILR (1938) Mad 326: (AIR (25) 1938 Mad 113) (Prs 16, 23)

('41) 1941-1 Mad L J 837: (AIR (28) 1941 Mad 731) (Pr 23)

('18) 3 Pat L J 95: (AIR (5) 1918 Pat 427) (Prs 6, 16)

('23) 2 Pat 247: (AIR (10) 1923 Pat 384) (Prs 15, 16)

('26) 5 Pat 398: (AIR (13) 1926 Pat 274) (Pr 7)

('32) 11 Pat 513: (AIR (19) 1932 Pat 286) (Pr 7)

('38) 17 Pat 617: (AIR (26) 1939 Pat 144) (Pr 23)

('39) AIR (26) 1939 Pat 289: (180 Ind Cas 81) (Prs 16, 18, 20)

('40) 19 Pat 354: (AIR (27) 1940 Pat 677) (Prs 1, 19)

('44) 23 Pat 729: (AIR (32) 1945 Pat 129) (Prs 1, 18, 20)

('46) 25 Pat 145: (AIR (33) 1946 Pat 365) (Prs 19, 20)

('46) 25 Pat 790: (AIR (34) 1947 Pat 388) (Pr 20)

REUBEN, J.: This is a reference in an appeal from an original order of the Subordinate Judge, First Court, Chapra, dismissing an execution petition on the ground of limitation. The question referred to the Full Bench is:

"Whether, where a decree has been transferred for execution to another Court and the latter Court has not sent a certificate under S. 41, Civil P. C., an application for execution made to the former Court is an application to the 'Proper Court' within the meaning of Art. 182 (5) of the Limitation Act?"

The decree sought to be executed is a money decree for Rs. 5000 with future interest passed by the Additional Civil Judge, Banaras, on the 13th of August 1934. The decree was transferred for execution to the Subordinate Judge, First Court, Chapra. I give below the relevant dates after this order of transfer:

" 2-9-36. An application for execution of the decree was filed before the Subordinate Judge, First Court, Chapra.

15-4-40. The execution case was dismissed as infructuous.

22-3-41. The decree-holders again applied for execution before the Subordinate Judge, First Court, Chapra.

26-8-41. The execution case was dismissed as infructuous.

23-3-41. The decree-holders applied for execution in the Court of the Additional Civil Judge, Banaras."

The order-sheet of the Banaras Court is somewhat obscure as to what happened after this. It appears from the order of reference that the Banaras Court directed the decree-holders to produce the certificate of non-satisfaction under S. 41 of the Civil P. C. from the Chapra Court. Finally, on the 3rd of November 1944, the execution was dismissed, one of the grounds of dismissal being the failure to produce the certificate of non-satisfaction. On the 30th of July 1946, the Banaras Court, on an application of the decree-holders, again transferred the decree for execution to the Chapra Court (apparently, in the meantime the Chapra Court had sent the non-satisfaction certificate to the Banaras Court), and on the 12th of August 1946 the decree-holders applied for execution in the Chapra Court. On the objection of the judgment-debtor, Subordinate Judge dismissed the application as time-barred, holding that the final order on the application for execution filed on the 23rd March 1944 did not save limitation as the Banaras Court, in the absence of the certificate of non-satisfaction, had no jurisdiction to entertain the execution petition. He based his decision on 'RAMESHWARLAL v. TILOKECHAND', 23 Pat 729 and 'BHISHUNDEO NARAIN v. RAGHUNATH PRASAD', 19 Pat 354. Their Lordships have made this reference because they felt doubtful about the correctness of these decisions.

(2) I reproduce below the relevant portion of Art. 182 (5):

"Description of application:

For the execution of a decree or order of any civil Court not provided for by Art. 183 or by S. 48 of the Civil P. C., 1908 (V (5) of 1908)

Period of Limitation:

Three years; or, where a certified copy of the decree or order has been registered, six years.

Time from which period begins to run:

* * * * *

5. (Where the application next hereinafter mentioned has been made) the date of 'the final order passed on an application made' in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree or order.

* * *

Explanation II: 'Proper Court' means the Court whose duty it is to execute the decree or order."

The words in square brackets (here in single inverted commas) were substituted in 1927 for the word "applying".

(3) For answering the question which has been referred to us, we have to consider two points:

1. Whether, after transferring a decree for execution by another Court and before receiving the certificate of non-satisfaction, the transferor Court retains any power to execute the decree? That is to say, does the Court which passed the decree divest itself of its power to execute the decree by transferring the decree for execution by another Court?

2. Whether, supposing the answer to the first point is in the affirmative, the execution petition filed before the Banaras Court was for a relief which that Court had the power to grant?

(4) As regards the second point, we are under a difficulty, as the particulars of the relief asked for in the petition of the 23rd March 1944 do not appear from the order of reference and the execution petition is not before us.

(5) For the consideration of the first point it is necessary to examine the provisions in the Code of Civil Procedure.

(6) Naturally, the Court, whose duty it ordinarily is to execute a decree, is the Court which passed that decree. There may be circumstances, however, in which a Court finds it difficult to execute its decree. For instance, the judgment-debtor may not have enough property within its jurisdiction to satisfy the decree, or the judgment-debtor may be outside the jurisdiction of the Court so that a warrant against his person cannot be executed against him ('KRISHNA PRASAD v. BIDYA NANDA', 3 Pat L J 95). Section 38 of the Code, therefore, provides that a decree may be executed "either by the Court which passed it or by the Court to which it is sent for execution". There is nothing in the terms of the section to exclude the jurisdiction of the decreeing Court where the decree has been transferred for execution. Section 39 of the Code provides for the transfer and defines the circumstances in which it may be made. It speaks of sending "it" (the decree) for execution to another Court but I do not take this to indicate that the transfer divests the transferring Court of its power to execute the decree. As I shall show later there can be simultaneous executions of a decree. Therefore, the sending of the decree to another Court does not necessarily mean that the decreeing Court does not retain any portion of its power to execute the decree. Under Cl. (b) of sub-s. (1) of S. 39 the decree can be transferred for execution if the judgment-debtor

"has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree."

It does not require the decreeing Court to execute the decree against the judgment-debtor's property within its jurisdiction before transferring the decree for execution. Thus, it is possible, that, after an order for transfer has been made, there may be property of the judgment-debtor within the jurisdiction of the decreeing Court against which the decree-holder may wish to proceed. Also, there is the possibility of the judgment-debtor acquiring property within the jurisdiction of the decreeing Court after the order for transfer has been made or of property of the judgment-debtor within the jurisdiction of the decreeing Court being discovered after the order of transfer was made. The absence of an express provision restraining the decreeing Court from proceeding against such property is, therefore, noticeable.

(7) Section 41 provides that the transferee Court shall certify to the transferor Court the

fact of execution in its Court or, where it has failed to execute the decree, the circumstances attending such failure. On the face of it, the section merely lays a duty on the transferee Court. Obviously, this is intended to be the final act of the transferee Court in respect of the execution of the decree, and it has been held that on the sending of the certificate the power of the transferee Court to execute the decree ceases ('MUHAMMAD IBRAHIM v. CHHATTO LAL', 5 Pat 398; 'SHESHAIYAR RAJAMANNER v. MADANMOHAN', 11 Pat 513).

(8) Section 42 defines the powers of the transferee Court which are to be "the same powers in executing such decree" as if the decree had been passed by itself. What is thus given to the transferee Court is "the 'same' powers" as that of the transferor Court and not "the powers of the transferor Court." The section, therefore, cannot be read as meaning that by the transfer the transferor Court is deprived of its power to execute the decree.

(9) That the transferor Court does not by its order of transfer divest itself entirely of its powers in respect of the execution of the decree appears from S. 46 which empowers the transferor Court to issue a precept to any other Court which would be competent to execute the decree to attach any property of the judgment-debtor specified in the precept and lying within the jurisdiction of the Court. The attachment made by that Court in pursuance of the precept will continue for two months and the period may be extended by the decreeing Court. It will continue without such an order of extension if in the mean time the decree has been transferred to the attaching Court for execution and the decree-holder has applied for the sale of the property. The intention is clear. The judgment-debtor is to be prevented from disposing of his property before the decree-holder can get the decree transferred and take steps in the proper Court for execution against the property. This intention would be defeated if the fact that an order of transfer under S. 39 has been made and a certificate under S. 41 has not been sent deprives the decreeing Court of the power to issue a precept. The terms of the section do not indicate that the power of the Court is dependent on there being no subsisting order of transfer under S. 39.

The system of precepts was introduced by the Civil Procedure Code of 1908. Previous to this, the Judicial Committee in 'SARODA PROSAD MULLICK v. LUCHMEEPUT SINGH DEOGUR', 14 Moo Ind App 529, had supported an order of a decreeing Court in East Burdwan sending the decree for execution to three different Courts, and directing two of them to attach the property of the judgment-debtor in their respective jurisdictions and await the result of execution in the third Court. The introduction of a special provision for the issue of precepts does not mean that it is no longer open to the decreeing Court to pass such an order. The general terms in which the decreeing Court is empowered to transfer the decree for execution and the wide powers given to it by Order XXI Rules 26 and 28 to the terms of which I shall refer below, suggest that such an order can still be passed. All that the new provision does is that it provides a more speedy method by which the decreeing Court can prevent the judgment-debtor from avoiding payment of his dues under the decree. The limitation of the effect of the precept to two months and the requirement about the transfer of the decree provides an argument in favour of the possibility of simultaneous executions in two Courts. The legislature does not wish the judgment-debtor to be unnecessarily harassed and requires the decree-holder to show his good faith by taking prompt steps for the transfer of the decree to the Court to which the precept has issued and by filing within the time prescribed an execution petition in that Court. If before the decree could be transferred to that Court it had to be recalled from another Court to which it had been previously transferred, the period prescribed would have been longer so as not to interfere with the completion of execution proceedings in the first transferee Court.

(10) Another section by which power in respect of the execution of the decree is expressly retained in the transferor Court is S. 50. This provides that, in case a judgment-debtor dies before the decree has been fully satisfied, the decree-holder may apply to the decreeing Court "to execute" the decree against the legal representative of the judgment-debtor. It is noticeable that the application is one "to execute" the decree. That is to say, the decreeing Court does not by the order of transfer part with its jurisdiction to execute the decree. It has been argued by Mr. Bhabananda Mukherji for the respondent-judgment-debtor that the death of the judgment-debtor retransfers to the decreeing Court the jurisdiction to execute the decree because the transferee Court by the death loses its jurisdiction to execute the decree. 'JANG BAHADUR v. BANK OF UPPER INDIA LTD.', 55 Ind App 227 (P C), furnishes the answer to this argument. In that case, the application for permission to execute against the legal representative was through mistake filed before the transferee Court and had been allowed by it. If on the death of the judgment-debtor the transferee Court lost its jurisdiction to execute the decree, this order would have been of no avail to the decree-holder. Their Lordships of the Judicial Committee, however held that the transferee Court did not lose its jurisdiction, that the requirement that the application should be filed before the transferor Court was a matter of procedure and not of jurisdiction, and that the mistake in procedure, having been acquiesced in by the judgment-debtor, did not invalidate the proceedings.

(11) Order XXI, Rule 6 prescribes the procedure to be adopted by the transferring Court in sending its decree for execution by another Court. It does not call for comment. Order XXI. Rule 10, which deals with the filing of an application for execution is of some importance. It provides that, where the decree-holder desires to execute the decree, he shall apply

> "to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court than to such Court or to the officer thereof."

In some decisions, stress has been laid on the word "than" as indicating that if a decree has been sent for execution to another Court, the application for execution can be filed only before that Court. With respect, I am unable to agree. The rule is concerned with defining the decree-holder's right to ask for the execution of his decree. Ordinarily, he must go for the purpose to the Court which passed the decree. In certain circumstances, however, he can go to another Court, namely, the Court to which the decree has been transferred for execution. This is all that the rule means. The effect of the word "then" is not intended to go back beyond the alternative word "or". It relates merely to the existence of the circumstances in which the decree-holder may apply for execution to a Court other than the decreeing Court. Section 51 of the Code pres-

cribes several modes in which a decree-holder may proceed against his judgment-debtor for realising his decree. Supposing his decree is one for the realisation of money, he may proceed by attachment and sale of the judgment-debtor's property, or by the appointment of a receiver or, in the existence of appropriate circumstances, by the arrest and detention in person of the judgment-debtor. Under Order XXI, Rule 21, the Court may in its descretion refuse execution "at the same time" against the person and property of the judgment-debtor. This implies that the decree-holder may with the permission of the Court proceed against the judgment-debtor in more modes of execution than one. Such execution is expressly contemplated by Order XXI, Rule 30; to give the word "then" in Order XXI Rule 10, the effect sought to be given to it is inconsistent with what appears from this to be the general Scheme of the Code, viz., subject to the control of the Court to facilitate the task of the decree-holder in recovering his legitimate dues from his judgment-debtor.

(12) Order XXI, Rules 26 and 28 are of importance as showing that the transferee Court retains jurisdiction in respect of the execution of the decree and as furnishing a reply to the contention that simultaneous executions in different Courts will enable the decree-holder to proceed in fraud of the judgment-detbor. Rule 26 empowers the transferor Court to stay execution proceedings in the transferee Court or to pass "any other order relating to the decree or execution which might have been made by the transferor Court if execution had been issued thereby or if application for execution had been made thereto. Under Rule 28, any such order of the transferor Court is binding upon the transferee Court. Under these provisions, the proceedings in execution before the transferee Court are entirely under the control of the transferor Court, and the transferee Court seems in the matter of execution of the decree to be merely the agent of the transferor Court. This control of the transferor Court would extend to all executions of the decree which might be going on simultaneously and, since there would be one Court controlling them, there is no danger of the decree-holder being able to act in fraud of the judgment-debtor. The control thus given to the decreeing Court seems to me to be a strong argument in favour of the possibility of simultaneous executions in several Courts. Under S. 42 the transferee Court has the same powers as regards execution as the transferor Court. If the legislature intended that the transferee Court would be the only one empowered to execute the decree during the subsistence of the transfer, the wide power given to the transferor Court by Order XXI Rules 26 and 28 would have been unnecessary.

(13) The possibility of simultaneous executions of a decree in more Courts than one was recognised by their Lordships of the Judicial Committee in 'SARODA PROSAD MULLICK'S CASE', 14 Moo Ind App 529 (supra). The decree in that case was obtained in the zilla Court of East Burdwan. As the property of the judgment-debtor in that zilla did not realise on sale the amount of the decree, the decreeing Court directed a copy of the decree and a certificate of the Court with specification of the properties in Zillas Murshidabad, Hoogli and Dinajpur to be sent to the Judges of each of these three Districts, directing the Judge of Murshidabad to proceed to attachment and sale of the properties within his jurisdiction, and the Judges of Hoogli and Dinajpur to attach the specified properties within their respective jurisdiction under S. 235 of the Code of Civil Procedure, 1859. The proceeds of the sale of the Murshidabad property was small. In consequence, she applied again to the East Burdwan Court, and, on completing the execution proceedings in Dinajpore, became a purchaser of the judgment-debtor's properties in Dinajpur. The validity of this sale arose for consideration in the appeal which went to the Judicial Committee. Under the Code of 1859, there was no provision for a precept, and the Judicial Committee held the order of transfer to the three Zillas to be a transmission of the decree for execution with a direction that the first process of execution, namely, by attachment, should take place in all, and that further proceedings under the attachment should not be taken in Hoogli and Dinajpur until the result of the completed execution in Murshidabad was known. They decided that the decreeing Court had acted within its power and that the sale in Dinajpur was valid.

(14) The decisions the correctness of which has been doubted are largely based upon a decision of the Judicial Committee reported in 'MAHARAJAH OF BOBBILI v. NARASARAJU', 43 Ind App 238. The decree under execution in that case was obtained in the Court of the District Judge of Vizagapatam in April 1904. In September 1904, it was sent to the Court of the Munsif of Parvatipur for execution against property within the jurisdiction of that Court. It remained unexecuted in that Court till August 1910. On December 13th, 1907, the decree-holder applied to the District Judge of Vizagapatam for the execution of the decree. No conclusive action was taken on this application. The decree-holder again filed an execution petition before the District Judge on April 27th, 1910. The question arose whether limitation was saved by the execution petition of December 13th, 1907. Their Lordships of the Judicial Committee gave their reasons for holding that it did not in these words:

> "As the decree of April 5, 1904, had by order of the Court of the District Judge been sent on September 30, 1904, to the Court of the Munsif of Parvatipur for execution by the latter Court, and as the copy of the decree with the non-satisfaction certificate was not returned to the Court of the District Judge until August 3, 1910, and as the petition of December 13, 1907, was for 'execution of the decree by sale of the immovable property of' the respondents which was within the local limits of the jurisdiction of the Munsif's Court, their Lordships, having regard particularly to Ss. 223, 224, 228 and 230 of the Civil P. C., 1882, are satisfied that when that petition of December 13, 1907, was presented to the Court of the District Judge that Court was not the proper Court to which the application to execute the 'decree by sale of the immovable property which had been' attached by the Court of the Munsif should have been made, & that proper Court to which that appln. should have been made was the Court of the Munsif of Parvatipur, as that was the Court whose duty it then was to execute the decree so far as it could be executed by that Court. Consequently, the application by the petition of April 27, 1910, was, when made, time-barred under Art. 182 of the First Schedule of the Indian Limitation Act, 1908, as no application had been made within three years in accordance with law to the proper Court for execution, or to take some step in aid of execution, of the decree."

The italics (here single quoted) are mine. The case was decided strictly on its own facts. The defect which prevented the petition of December 13, 1907, from forming a new source of limitation was that it related to property in the juris-

diction of the Munsif of Parvatipur, to whom the decree stood transferred for execution. The decision is no authority for the proposition that by the act of transfer the transferring Court parts entirely with its power to execute the decree. The words "so far as it could be executed by that Court" indicate that the Munsif of Parvatipur got only a limited jurisdiction. The word 'that', which I have placed in italics (here single quoted), also points to the same conclusion. The jurisdiction given to the Munsif being a restricted one, it does not seem reasonable to infer that by sending the decree to him for execution the District Judge parted with his own power of executing the decree himself outside the jurisdiction of the Munsif.

(15) The earliest reported Patna case in which the point arose is 'JNANENDRA NATH v. JOGENDRA NARAIN', 2 Pat 247. The decree, obtained in Calcutta, had been transferred to Pakaur for execution. A petition was filed after this in the Calcutta Court for the issue of a sealed warrant in connection with the decree. Subsequently another execution case was instituted in Pakaur and the petition filed in Calcutta was relied on as saving limitation. Das, J., with whom Adami, J. agreed, rejected the contention observing briefly that on a consideration of Ss. 38 and 39 of the Code there can be simultaneous execution in two Courts, and that the Judicial Committee had taken that view in 'MAHARAJAH OF BOBBILI'S CASE', 43 Ind App 238 P C.

(16) In following this decision in 'KAMAKHYA NARAIN SINGH v. KALIPADO DUTT', AIR (26) 1939 Pat 289, Wort, J. referred to S. 38 of the Code and O. XXI, R. 10, the latter of which provisions in his opinion makes it clear that the transferee Court has exclusive jurisdiction to execute the decree. He took the same view of the effect of 'MAHARAJAH OF BOBBILI'S CASE', 43 Ind App 238 P C, as was taken by Das, J. It does not appear if his attention was drawn to the decisions of other Courts in which that decision has been understood in the manner I have set out above ('MAHADUM BEG v. MUHAMMAD MEERA SAHIB', AIR (15) 1928 Mad 493 (2); 'KANTI NARAIN v. MADAN GOPAL', AIR (22) 1935 Lah 465; 'MAKKHAN LAL v. BHAGWANA KUER', 1936 All L J 277 and 'MUTHU RAMA REDDI v. MOTILAL DAGA', ILR (1938) Mad 326.) Regarding 'SARODA PROSAUD MULLICK'S CASE', 14 Moo Ind App 529 PC, his Lordship observed that it merely applied the principle laid down in S. 46 of the Code of 1908. With respect I would submit that at that time there was no provision in the Code for the issue of precepts, and what the decreeing Court had done was to send the decree to three different Courts for 'execution'. Manohar Lall, J. delivered a concurring judgment relying on the decision in 'JNANENDRA NATH GHOSH'S CASE', 2 Pat 247, and treating 'MAHARAJAH OF BOBBILI'S CASE' as applying to the facts of the case before him.

(17) The point again arose in 'BISHUNDEO NARAIN MISSIR'S CASE', 19 Pat 354. Meredith J. (as he then was), with whom Wort, J. agreed accepted without discussion the decision in 'MAHARAJAH OF BOBBILI'S CASE', 43 Ind App 238 P C, as authority that without the certificate of non-satisfaction the transferor Court cannot entertain a petition for execution of the decree. The observation was made 'obiter', and it was held on another ground that limitation was saved.

(18) In 'RAMESHWAR LAL'S CASE', 23 Pat 729, B. P. Sinha, J. (as he then was) made a reference to a Division Bench, doubting the correctness of the decision in 'KAMAKHYA NARAIN SINGH'S CASE', AIR (26) 1939 Pat 289. The facts were that the decree passed by a Court at Bhagalpur was transferred to Madhipura for execution. Before the sending of certificate of non-satisfaction to the Bhagalpur Court the decree-holder applied to it for execution against the person of the judgment-debtor. In a subsequent execution case in Madhipura the question arose if the execution petition in Bhagalpur was available to save limitation. The Division Bench answered the question in the negative. Chatterji. J. who delivered the judgment of the Court pointed out in the course of it that 'MAHARAJAH OF BOBBILI'S CASE' 43 Ind App 238 P C, proceeded mainly on the ground that the District Judge of Vizagapatam had no jurisdiction to sell the property which had been attached by the Munsif of Parvatipur and that other High Courts in India had placed an interpretation on that decision different from the view taken by this Court hitherto. Relying, however, on Order XXI, Rule 10 and the observation of the Privy Council in 'MAHARAJAH OF BOBBILI'S CASE', that the Munsif of Parvatipur was "the Court whose duty it then was to execute the decree so far as it could be executed by the Court" he was not prepared to hold that the previous decisions of the Patna High Court were incorrect. I have already made my comments on the provisions of Order XXI, Rule 10. As regards the observation of the Privy Council I would suggest with respect that it supports the contrary view. Their Lordships of the Privy Council do not say that after the transfer of the decree it was only the Munsif of Parvatipur who could execute it. They carefully qualify their observation by adding "so far as it could be executed by that Court". That is to say, the authority of the Munsif to execute that decree operated to the extent of his ordinary jurisdiction to execute a decree. To that extent it was not open to the decreeing Court to entertain a petition for execution. It does not follow from this that the decreeing Court had not the power to execute the decree outside the limits of the ordinary jurisdiction of the Munsif of Parvatipur. In this view I am supported by the observation of the Privy Council in 'JANG BAHADUR'S CASE', 55 Ind App 227 P C.

> "Under Cl. (c) of S. 39, sub-s. 1 of the Code of 1908, a decree, directing the sale of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, may be transferred for purposes of execution to the Court within whose jurisdiction the property is situated. On such transfer the former Court does not altogether lose seisin of the decree. But the Court of transfer obtains jurisdiction to deal with that particular execution proceeding, and retains such jurisdiction until such execution is withdrawn or stayed or until it certifies to the Court which passed the decree either that the decree has been executed or if it fails to execute the decree, the circumstances attending such failure(Section 41)."

The effect of the transfer under S. 38 is to give the transferee Court authority to execute the decree to a limited extent. If it is held that at the same time it completely divests the decreeing Court of its power to execute the decree, it takes away the decree-holder's right to simultaneous execution, a right he undoubtedly had before the transfer. I do not see why, in the absence of clear statutory provision, we should hold that to be the effect of the provisions of the Code relating to the transfer of decrees.

(19) In 'DARSAN SINGH v. BALDEO DAS', 25 Pat 145, Meredith J. (as he then was) expressed

a view which was not consistent with that expressed by him in 'BISHUNDEO NARAIN MISSIR'S CASE', 19 Pat 354. Again his observations were made 'obiter', the case being disposed of on the finding that the certificate of non-satisfaction was sent before the application was made to the transferor Court. The decree under execution was passed by the High Court at Calcutta and had been transferred to Bhagalpur. It was contended that in the absence of certificate under S. 41 of the Code of Civil Procedure the Calcutta High Court had no jurisdiction to pass an order for execution by the appointment of a receiver. In repelling this contention Meredith J. distinguished 'MAHARAJAH OF BOBBILI'S CASE', 43 Ind App 238 P C, on the ground that the application before the District Judge of Vizagapatam related to property in Parvatipur and he relied among other authorities on Jang Bahadur's case.

(20) The question next arose in 'KRISHNA v. GANGA PRASAD', 25 Pat 790, in which the leading judgment was delivered by Daniel, J. His Lordship did not think it necessary to consider the correctness of the Patna view as to the real effect of 'MAHARAJAH OF BOBBILI'S CASE' 43 Ind App 238 P C, in view of the plain wording of Order XXI, Rule 10, which had been relied on in the previous decisions in 'KAMAKHYA NARAIN SINGH'S CASE', AIR (26) 1939 Pat 289 and 'RAMESHWARLAL'S CASE', 23 Pat 729. He distinguished the decision in 'DARSAN SINGH'S CASE', 25 Pat 145, on the ground that the point of limitation was not raised in it. The other member of the Bench, B. P. Sinha, J. (as he then was), was evidently still doubtful of the correctness of the view taken in the earlier Patna cases, for he confined his concurrence to "the order proposed". It appears that, having failed to convince his brother Judge in this case and his reference to the Division Bench in 'RAMESHWARLAL'S CASE' having been unfruitful, he did not care to press his view.

(21) The view that the decreeing Court does not by an order of transfer under S. 39 of the Code divest itself entirely of its jurisdiction to execute the decree has been taken in several reported decisions of other High Courts. In the light of what I have said above I need not do more than refer to the decision of the Full Bench in 'KANTI NARAIN'S CASE', AIR (22) 1935 Lah 465, which contains a careful analysis of a large number of relevant decisions.

(22) For the reasons which I have given, I am of the opinion that the transferor Court retains jurisdiction to execute the decree except to the extent that jurisdiction to execute the decree has been given to the transferee Court.

(23) This brings me to the second point which I have formulated. To save limitation the application for execution or to take a step in aid of execution must be made to the "proper Court". This expression is defined in the explanation to Art. 182 as the Court whose duty it is to execute the decree or order. The term "the Court whose duty it is to execute the decree" occurs in Order XXI, Rule 1 of the Civil P. C. relating to payment of money due under a decree and Order XXI, R. 2 relating to the certification of the payment or the adjustment of a decree made outside the Court. The Code does not in express terms lay on any Court the duty of executing a decree. Such a duty necessarily follows from the provisions empowering certain Courts to execute the decree read with the provisions entitling the decree-holder to apply to them for execution. When a person applies to a Court for a relief which that Court is empowered to grant and establishes his right to that relief, the Court is bound to grant it. The definition in Explanation II has been characterised as a loose one by Fazl Ali, J. in a case in which the application made to the transferor Court was not for execution but for taking a step in aid of execution, 'DWARKADAS GOBINDRAM FIRM v. SALIGRAM REKHRAJ FIRM', 17 Pat 617. His Lordship observed:

> "Now once it is held that the Court which has transferred the decree to another Court has the power to recall the execution proceedings from that Court, the application made by the decree-holder on 4-3-1935 must be held to be a step-in-aid of execution made in accordance with law before the proper Court. The expression 'proper Court' has been somewhat loosely defined in Explanation II of Article 182 'as the Court whose duty it is to execute the decree'. It was contended before us on behalf of the appellant that this definition was wide enough to include a Court which has transferred a decree for execution to another Court. In view, however, of the authorities on the subject it appears to me to be not permissible to give to this expression the wide meaning attributed to it on behalf of the appellant. But if the Court which has transferred the decree has the power to execute it after it has been recalled, it must be held that the Court at Wardhra was the "proper Court" for dealing with the application which was made by the decree-holder in this case on the 14th March 1932. In my opinion the application of the decree-holder dated the 14th March 1932 was made to a proper Court and it saves limitation."

A similar difficulty was felt in 'KANDASAMI CHETTIAR v. GOKULDAS MADANJI & CO.', (1941) 1 Mad L J 837, where the saving application relied on was one filed to the decreeing Court to transfer a decree to a Court to which it had already been transferred for execution. Their Lordships took a slightly different view. Referring to 'MUTHU RAMA REDDI v. MOTILAL DAGA', ILR (1938) Mad 326, with approval, they observed:

> "A very similar question has been dealt with by a Bench of this Court in 'MUTHU RAMA REDDI v. MOTILAL DAGA'. The facts are not of course precisely similar, for the question there dealt with was an application asking for a decree to be transmitted to an entirely new Court, but the principles upon which the learned Judges have based their decision clearly apply to the present case. They have analysed various provisions of the Civil Procedure Code and have held that when a Court transmits a decree to another Court for execution, it does not thereby divest itself of all its jurisdiction. It still retains that jurisdiction for some specific purposes which are set out by them. Article 182 defines the 'proper Court' as the Court whose duty it is to execute the decree or order, and if inspite of the transmission of the decree to another Court there still remains the duty in the transmitting Court to take certain measures in execution, it is obvious, it seems to us, that it is the proper Court within the meaning of this definition."

(24) It is not necessary to consider this point here as the reference has been made to us on a petition for execution filed in the transferor Court. On my finding above, the Court which passed the decree, after it has sent it for execution to another Court, still retains the power to execute that decree to the extent that the jurisdiction to execute it has not been transferred to the other Court. It does not follow, however, that it is therefore a proper Court for all execution petitions filed before

it for the execution of the decree. The relief asked for must be a relief which it can grant. For example, the Court of the District Judge of Vizagapatam was for this reason held not be the proper Court in 'MAHARAJAH OF BOBILI'S CASE', 43 Ind App 238 P C. As the petition for execution is not before us and we do not know what was the nature of the relief asked for, we cannot give a more definite reply.

(25) For the reasons set out above, I would answer thus the question which has been referred to the Full Bench. Where a decree is transferred for execution by another Court, the transferee Court gets jurisdiction to execute the decree to the limits of its jurisdiction to execute its own decrees. The transferee Court retains this jurisdiction until it sends a certificate under S. 41 of the Code. Outside the limits indicated the transferor Court retains the power to execute the decree. Whether an application for execution of the decree filed to the transferor Court before the sending of the certificate under Section 41 is an application to the "proper Court" within the meaning of Article 182(5) of the Schedule to the Limitation Act depepnds on the relief applied for. If it is one which the transferor Court can grant, the application is made to the "proper Court."

(26) IMAM, J.: I have had the advantage of reading the judgment of my learned brother, Reuben, J. and would respectfully agree with it.

(27) The question referred to the Full Bench involves, in my opinion, two questions: (1) whether the Court, which transferred its decree for execution to another Court, has jurisdiction to entertain an application for execution in the absence of a certificate under Section 41 of the Code of Civil Procedure from the Court to which the decree was transferred, and (2) whether the application for execution made to the Court which passed the decree would be an application to the "proper Court."

(28) The Code of Civil Procedure has expressly given jurisdiction to the Court which passed the decree to execute it. Unless that jurisdiction is taken away expressly by some provision of the Code, it continues. It may be possible by reading the various provisions of the Code to come to the conclusion that by necessary implication the jurisdiction of the Court, which passed the decree, to execute it is taken away in certain circumstances. I cannot for myself read the provisions of Section 41 of the Code to express anything of the kind suggested in the course of the argument that the Court which passed the decree would not execute it in any circumstance in the absence of a certificate from the Court to which the decree had been transferred for execution. Section 41 of the Code is not in the nature of a prohibition to the Court which passed the decree to execute it in any circumstance in the absence of a certificate. As I read Section 41, it conveys to me the meaning that it is the bounden duty of the Court, to which the decree was sent for execution, to certify to the Court which passed the decree that such execution had taken place, or where there had been failure to execute it, the circumstances attending such failure. From the earliest times it has been recognised by the Courts in India as well as by their Lordships of the Judicial Committee that simultaneous execution of a decree in different Courts can take place. It is too late now to contend otherwise. That being so, simultaneous execution of a decree by different Courts necessarily implies that such Courts have jurisdiction to execute it. I can quite see that where a decree has been sent for execution to another Court, an application to the Court which passed the decree to execute it as against property not within its jurisdiction or to cause the arrest of the judgment-debtor not residing within its jurisdiction would be beyond the jurisdiction of such Court. There is, however, nothing in the provisions of the Code of Civil Procedure which would prevent the Court which passed the decree to execute it as against property within its jurisdiction or to cause the arrest of the judgment-debtor residing within its jurisdiction, although the decree had been transferred to another Court for execution. The Court to which the decree had been transferred could only execute it as against property within its jurisdiction, or cause the arrest of the judgment-debtor residing within its jurisdiction. The Court which passed the decree could never execute it as against property outside its jurisdiction or cause the arrest of the judgment-debtor residing outside its jurisdiction. My learned brother, Reuben, J., had dealt with the question referred to the Full Bench elaborately and I need not repeat what he has said. In my opinion, the answer to the question referred to the Full Bench should be, so far as jurisdiction is concerned, that the Court which passed the decree has jurisdiction to execute it in certain circumstances inspite of the absence of any certificate under Section 41 of the Code from the Court to which the decree had been transferred for execution.

(29) As to whether the Court which passed the decree would be the "proper Court" if an application for execution was filed before it would depend I think, entirely upon the facts of a particular case. If the application for execution was with reference to property within the jurisdiction of the Court which passed the decree, or for the arrest of the judgment-debtor residing within its jurisdiction, then, in my opinion, it would be the "proper Court." If, on the other hand, the application for execution sought the execution of the decree against property outside the jurisdiction of the Court which passed the decree, or for the arrest of the judgment-debtor residing beyond its jurisdiction, then such an application would not be to the "proper Court".

(30) DAS, J.: I have had the advantage of reading the judgments prepared by my learned brotheren Reuben and Imam, JJ. and I agree that the answer to the question referred to the Full Bench should be as indicated by Reuben, J.

(31) This reference to the Full Bench is under Rule 3 of Chapter V, page 25 of the Rules of this Court, and we have to return the case for final adjudication by the Division Bench which referred it, after expressing our opinion on the point of law referred to us.

(32) As explained by my learned bretheren, the question referred to us really involves two questions, one of pure law & the other depending on facts. The question of law is whether the transferor Court has any jurisdiction to execute a decree which it has already transferred to another Court,in the absence of a certificate under S. 41 of the Code of Civil Procedure from the transferee Court. In my opinion, the answer to this question of law is furnished by the decision of their Lordships of the Judicial Committee in 'JANG BAHADUR'S CASE', 55 Ind App 227 (P C), where the limits of the jurisdiction of two Courts were indicated in the following words:

> "Under Cl. (c) of S. 39, sub-s. 1 of the Code of 1908, a decree, directing the sale of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, may be transferred for purposes of execution to the Court within whose jurisdiction the property is situated. On such transfer the former Court

does not altogether lose seisin of the decree. But the Court of transfer obtains jurisdiction to deal with that particular execution proceeding, and retains such jurisdiction until such execution is withdrawn or stayed or until it certifies to the Court which passed the decree either that the decree has been executed or if it fails to execute the decree, the circumstances attending such failure (Section 41)."

The point emphasised by their Lordships is that the transferee Court obtained jurisdiction to deal with 'that particular execution proceeding', while the 'transferor' Court 'does not altogether lose seisin of the decree'. The words underlined (here single quoted) bring out, I think, the limits of the jurisdiction of the two Courts.

(33) This decision is not, in any way, inconsistent with the earlier decision in 'MAHARAJAH OF BOBBILI'S CASE', 43 Ind App 238 (P C), if we only remember the facts of the case. In 'MAHARAJAH OF BOBBILI'S CASE', the decree-holder applied to the District Judge of Vizagapatam for the execution of the decree against property within the jurisdiction of the Munsif of Parvatipur. In that circumstance, it was held that the District Judge of Vizagapatam was not the proper Court within the meaning of Art. 182 of the Limitation Act. The decision was not a decision on the question of law referred to above, but rather on the second question whether a particular Court was the proper Court within the meaning of Art. 182, which question depended on the facts of the case.

(34) The second question whether a particular application for execution to the transferor Court is an application to the proper Court within the meaning of Art. 182 (5) of the Schedule to the Limitation Act, depends on facts, such as the nature of the relief claimed, mode of execution, etc. I do not think that that question can be answered as a pure question of law. If the application is in respect of a relief which the transferor Court can grant, the application is made to the proper Court; otherwise, it is not. The answer to the second question cannot be put in any more definite or categorical form.

K.S. *Answer accordingly.*

A. I. R. (39) 1952 Patna 220 *[C. N. 55 (22).]*

SPECIAL BENCH

SHEARER, RAMASWAMI AND SARJOO PROSAD JJ.

Mohammad Anzar Husnain, Petitioner v. State of Bihar and others, Opposite Party.

Criminal Misc. No. 12 of 1951, D/- 7-1-1952.

† *(a) Essential Supplies (Temporary Powers) Act (1946), Ss. 3, 4 and 6 — Validity — (Constitution of India, Art. 246 — Delegated legislation).*

There is nothing in Ss. 3 and 4 of the Essential Supplies (Temporary Powers) Act to lead one to hold that there is any illegal delegation of legislative functions. The policy of the law has been fully indicated in the Act itself and it is only with the object of fulfilling the intentions of the law and of making it adaptable to the working of the complex administrative machinery that the said provisions have been incorporated in the law. Legislations of this character cannot be held to be delegated legislations but merely conditional legislations or delegation of authority for ancillary purposes of the law itself. The authority which has created the agent can always and at any time destroy the same and recall the power which it entrusted to the agent. Section 6 of the Act has to be read in the light of this principle. If so far as an order under S. 3 may be inconsistent with any other existing legislation the effect of the order would not be to repeal that legislation but only to save the order itself which will continue to be operative. Section 6 is, therefore, a saving section which affords protection to the order under S. 3 as against the onslaught of any other law merely by reason of its inconsistency. The provisions of the Essential Supplies (Temporary Powers) Act are not void on account of an improper delegation of legislative powers to agencies other than the legislative authority itself.

(Para 29)

(b) Constitution of India, Arts. 19 (1) (f) and (g) and (5) — Bihar Agriculturists Levy Order (1950) — Validity.

The substantive provision in the Bihar Agriculturists Levy Order, 1950, which imposes on a person a restriction in the exercise of his fundamental right to acquire, hold and dispose of property is contained in Cl. (5) of the Order, which requires him to deliver, on demand, such quantity of foodgrains as may be specified in the order making the demand. It cannot, however, be said that this was an unreasonable restriction, or a restriction which was not imposed in the interests of the general public. It cannot be said that if under this order arbitrary and unreasonable action may conceivably be taken, the order must, on that ground, be held to be an invalid order. There is some risk of abuse when wide power is committed to a large body of men, but the constitutional validity of a law cannot be contested on the ground of such apprehension. It is, therefore, impossible to hold that either the substantive or procedural part of the Bihar Agriculturists Levy Order is unreasonable, that is, not necessary or appropriate for the accomplishment of the object aimed at. AIR (37) 1950 S C 211; AIR (37) 1950 Bom 363, Disting.

(Paras 7, 23)

(c) Constitution of India, Art. 14 — Bihar Agriculturists Levy Order (1950) — Validity.

The guarantee of equal protection under Art. 14 is not absolute. It cannot also be the purpose of Art. 14 to take away from the legislature the right or the power to classify the subjects of legislation. It is true that classification must be reasonable but a legislature has a wide discretion and an Act will not be held invalid unless the classification is clearly unreasonable and arbitrary. What classification is reasonable rests in the discretion of the legislative body in the first instance. The question is not whether the Court considers the classification reasonable to its satisfaction or whether in its opinion the Government could have devised a more equitable scheme. The question must be posed on the other hand — is the statute so clearly arbitrary that legislators acting reasonably could not have believed it to be necessary in the public interest? To put it in other words, the question is whether there was 'any' rational basis for legislative action. The Bihar Agriculturists Levy Order, 1950, may divide large producers into a number of artificial sub-classes. But it cannot fairly, or indeed at all, be said that the object of the Ministry in making this order was to benefit one sub-class of producers at the expense of any other sub-class. There is, clearly, nothing objec-

tionable in the levy being a progressive one, that is, in any comparatively large producer being required to deliver to the State a proportionately greater quantity of his grain than a smaller producer. The Bihar Agriculturists Levy Order considered as a whole and notwithstanding certain anamolies, does not violate the guarantee under Art. 14 of the Constitution. (*Paras 10, 26*)

Basanta Chandra Ghosh, S. S. Ashghar Hussain, Awadh Kishore Pd., A. C. Mitra and Satyanand Jamuar, for Petitioner; Government Pleader and S. C. Chakravarty, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) 1950 S C R 759: (AIR (38) 1951 S C 118) (Pr 10)
('50) 1950 S C R 519: (AIR (37) 1950 S C 211: 52 Cri L J 550) (Pr 7)
('51) AIR (38) 1951 S C 332: (1951 S C R 747) (Pr 6)
('51) AIR (38) 1951 S C 41: (1950 S C R 869) (Pr 10)
('50) AIR (37) 1950 Bom 363: (52 Cri L J 120 FB) (Pr 7)
('50) 29 Pat 410: (AIR (37) 1950 Pat 332: 51 Cri L J 1251) (Pr 30)
('50) 29 Pat 461: (AIR (37) 1950 Pat 322 F B) (Prs 7, 11)
('51) 30 Pat 454: (AIR (38) 1951 Pat 91 S B) (Pr 10)
(1884) 9 A C 117: (53 L J P C 1) (Pr 19)
(1938) A C 708: (AIR (26) 1939 P C 36) (Prs 4, 21)
(1931) 46 Comm-W L R 73 (Ans) (Prs 3, 5, 20)
(1825) 6 Law Ed 253: (10 U S 1) (Pr 6)
(1935) 294 U S 580: (79 Law Ed 1070) (Pr 26)

SHEARER, J.: An order of demand made under the Bihar Agriculturists' Levy Order, 1950 was served on the petitioner Syed Mohammad Anzar Husnain, requiring him to deliver a certain quantity of paddy to a person and at a place named in the order. The petitioner did not comply with the order and was, in consequence, prosecuted. An application was then made to this Court under Article 228 of the Constitution, and as questions of constitutional law arose, this Court withdrew the case from the Court of the trying Magistrate in order that these questions might be decided. The questions that arose are, in the first place, whether the extent of the delegation of legislative or quasi legislative power made by the legislature to the executive in Section 3 of the Essential Supplies (Temporary Powers) Act, 1946, is in excess of that permissible under the Constitution, & secondly, whether certain provisions contained in the Bihar Agriculturists' Levy Order, 1950, violate the fundamental rights conferred by Article 14 and Article 19, Clauses (f) and (g) of the Constitution. These questions are of far-reaching importance, and his Lordship the Chief Justice constituted myself and my brothers Ramaswami and Sarjoo Prosad, JJ. as a Special Bench to determine them.

(2) The impugned Act is not a mere skeleton or frame-work, that is, it does not merely state in general terms the object which the legislature has in view and then delegate to an outside authority a completely untrammelled power to take any steps whatever which it may consider necessary or desirable to achieve that object. It is interesting to compare it with the Food-stuffs (Prevention of Exploitation) Act, 1931, which was enacted by British Parliament when Great Britain went off the gold standard in order to meet a situation comparable with that with which the Indian legislature had to deal. The English Act is described in the preamble as:

> "an Act to authorise the Board of Trade in case of need to take exceptional measures for preventing or remedying shortages in, or unreasonable increase in the price of, certain articles of food or drink."

Section 1(1) of the Act left it entirely to the Board of Trade to decide what the articles of food or drink should be, merely postulating that in its opinion they should be articles of food or drink of general consumption.

The impugned Act, on the other hand, defines with the greatest particularity what an essential commodity is. Again, the English Act, after conferring on the Board of Trade a power to make regulations, went on to state that such regulations might

> "confer or impose on any person or body of persons, such powers or duties as the Board of Trade may consider necessary or expedient for effecting the purpose aforesaid."

Sub-section (2) of Section 3 of the impugned Act, on the other hand, lays down the broad outlines of the policy which the Indian legislature wished to adopt in order to achieve its purpose. It is true, that while laying down the policy Parliament left it to the executive to work out in detail the administrative measures necessary to render the policy effective and successful. It was inevitable that legislation of this kind should take the form which it did. India is a sub-continent and conditions vary greatly in different parts of it. Clause (b) of Section 3(2) of the impugned Act authorises the making of orders for the purpose of bringing waste or arable land under cultivation. It is obvious that in one part of India there may be a great deal more waste or arable land than in another, and that steps effective to bring such land under cultivation in one part of India may be quite ineffective in another.

Clause (i) of Section 3(2) authorizes the making of orders requiring certain persons to maintain and produce for inspection books, accounts and records, relating to their business. It is obvious that the books, accounts and records, which it might be reasonable to require such persons to maintain in Madras, might be books, accounts & records, which it would be impossible for such persons to maintain in Bihar. Before the necessary data relating to such matters as these could have been collected and collated, much valuable time would have been wasted. To have legislated in detail regarding them would have been quite impracticable & would have been likely to do more harm than good. Cl. (g) of S. 3(2) of the Act confers a power to make orders

> "for regulating or prohibiting any class of commercial or financial transaction relating to food-stuffs or cotton textiles which, in the opinion of the authority making the order, are, or if unregulated are likely to be, detrimental to public interests."

When a famine occurs, or is threatened, attempts are likely to be made to buy up or obtain control of large quantities of food-stuffs.

That, it is notorious, is what happened in the recent famine in Bengal, and made that famine a far more serious one than it would otherwise have been. Parliament, it is obvious, could not possibly foresee what action might be taken by speculators, and if it had attempted to lay down or even to indicate the kind of transactions which it was necessary to prohibit, speculators would merely have been stimulated into evading the provisions of the Act. If, on each occasion on

which they succeeded in doing so, Parliament had had to be summoned and the Act had had to be amended, great harm would or might have been done before any remedial step could possibly be taken. It was inevitable that very wide discretion should be conferred by Parliament on the executive to meeet rapidly and effectively a danger of this kind.

(3) Mr. B. C. Ghosh, in attacking the impugned Act, relies mainly on the provisions contained in sub-section (1) of Section 3, Section 4 and Section 6. The learned advocate for the petitioner points out that jurisdiction to legislate on the subject-matter of Section 3 (1) of the Act, is under the Constitution, assigned to the States and that the power which Parliament at present has to legislate or it is (sic) or was originally derived from a statute of the British Parliament (9 and 10, George VI, Caput 39). Mr. Ghosh also points out that the articles of trade or commerce which are set out in the English statute are precisely the articles which are defined in the impugned Act as essential commodities. In this situation, Mr. Ghosh contended, Parliament, in enacting Section 3(1), has delegated its whole power to legislate on this particular matter, and under the Constitution it was not entitled and had no power to do this. This argument which Mr. Ghosh puts forward is substantially the argument which commended itself to Evatt, J. of the Australian High Court in 'VICTORIAN STEVEDORING & GENERAL CONTRACTING CO. v. DIGNAN', (1931) 46 Comm-W LR 73 at p. 123.

Evatt, J. there said that a law might be a law with respect to the legislative power of the Commonwealth and yet might also be a law with respect to one of the matters on which the Parliament of the Commonwealth was empowered to legislate, in which case the law would be a valid law. If, on the other hand, a law of the Commonwealth Parliament was a law with respect to legislative power and if that were the only description to which it answered it would not be valid. I do not think that the criterion adopted by Evatt, J. can be applied in India, or at all events, can be applied to an Act passed by the Indian Parliament. In Australia, Parliament is, under the Constitution, empowered to legislate on certain specified matters concurrently with the States and exclusively on a small number of other matters and residuary powers are vested in the States. In this situation it may well be said that if a law enacted by Parliament does not answer the description of a law relating to one or other of the specified matters set out in the Constitution Act, it is not a law which Parliament had legislative jurisdiction to make.

In India, however, residuary powers of legislation are vested in Parliament, and, in consequence any law which Parliament may enact which does **not** come under any of the other entries in the Union or Concurrent Lists must come under entry No. 97 in the Union List unless, of course, it comes under some entry in the State List in which case it is invalid on quite another ground. Apart, however, from this it seems to me quite clear that if the criterion laid down by Evatt, J. were applied to the impugned Act, it would have to be held that it was 'intra vires.' It has to be remembered that Evatt, J. had in mind a hypothetical case in which an enactment was passed to the following effect:

> "The executive Government may make regulations having the force of law upon the subject of trade and commerce with other countries or among the States."

Now, even if sub-s. (1) of S. 3 of the impugned Act is considered in isolation from the context in which it appears, it clearly does not go quite so far as that. It, for instance, stipulates that the power or discretion conferred on the executive is to be exercised only for certain specific purposes. Section 3(1) cannot, however, be divorced from sub-section (2) of Section 3 which immediately follows it. Sub-section (2), as I have already said, indicates with some precision the steps which Parliament considered ought to be taken to achieve its purpose. The reason, it seems clear, why sub-section (1) was inserted was to enable other similar steps, of which Parliament had not foreseen the necessity, being taken as soon the occasion for taking them should arise. The draftsman accomplished this by inserting in the Act a general provision, and then following it up with another and detailed special provision.

(4) Section 4 of the impugned Act, Mr. B. C. Ghosh contended, authorized a further delegation of legislative power which was not permissible. No authority was cited by Mr. Ghosh for the latter contention and on general principle, there appears to be no reason why Parliament, in authorizing the executive to exercise legislative or quasi-legislative power, should not also authorise the executive to re-delegate that power to another person or body. The British Parliament has frequently done so. It did it, for instance, in the Food-stuffs (Prevention of Exploitation) Act, 1931, to which I have already referred. The legislature of British Columbia in Canada also did it in enacting the Natural Products (Marketting) British Columbia Act and when on this among other grounds the validity of the Act was challenged, their Lordships of the Judicial Committee rejected the argument summarily. (Vide 'SHANNON v. LOWER MAINLAND DAIRY PRODUCTS BOARD', (1938) A C 708 at p. 722.

In any case it is not, I think, correct to say that Parliament, in this particular case, authorised any further delegation of the power which it had conferred on the executive. S. 4 no doubt provides that orders may be made by the State Governments, but it requires the concurrence of the executive of the Union in such orders before they can become operative. In effect, therefore, it may be said that an order which purports, on the face of it, to be an order of a State Government is really an order of the Union Government.

(5) Section 6 of the Act was attacked by Mr. Ghosh on the ground that it conferred a power to repeal or modify existing laws. This, however, is not so. On general principle, when the provisions contained in a latter statute are wholly at variance with and repugnant to provisions in an earlier statute, there is, by necessary implication, a repeal of the latter by the former. The section would appear to have been inserted in order to remove any doubt that might arise on this point, and make it clear that an order made under the impugned Act had the same force and effect as a statute The Australian Act, of which the validity was questioned, in 'VICTORIAN STEVEDORING AND GENERAL CONTRACTING COMPANY v. DIGNAN', 46 Comm-W L R 73, contained a similar provision, and so far as I have been able to gather from the reports, little or no reliance was placed on this by those who sought to have it declared unconstitutional.

(6) Mr. B. C. Ghosh, for the petitioner referred us to a number of passages in the judgments of their Lordships of the Supreme Court in the recent case, 'IN RE ART. 143, CONSTITUTION OF INDIA AND DELHI LAWS ACT (1912) .ETC.',

AIR (38) 1951 S C 332. The question at issue there was whether it was within the competence of Parliament to confer on the executive a power to bring certain Acts into operation in certain specified local areas, and also, in doing so, to make modification or amendments in those Acts and to repeal, in whole or part, other Acts which were in operation in the local areas in question. The question now at issue is whether it is within the competence of Parliament to confer on the executive a power of ancillary or subordinate legislation in order to implement a policy set out in the Act conferring the power. The one type of delegated legislation is radically different from the other type. Nevertheless, as appears from the judgments of their Lordships the principle to be applied in deciding on the validity of the Act conferring either power is the same. Such limitation as exists on the competence of Parliament to delegate legislative authority must be found in the division of powers which the Constitution makes between the three organs of Government, the legislature, the judiciary and the executive.

It was primarily on the existence of such a division in the Australian Constitution that the High Court of Australia was, in the case to which I have already referred, called upon to say whether or not the legislature in Australia had in this matter as absolute power as the British Parliament. The High Court of Australia came to the conclusion that, if there was in fact any limitation on its powers the limitation was so very slight as for all practical purposes to be non-existent. The Supreme Court has taken the view that in this matter the power of the Indian Parliament is more restricted. As I understand the judgments, an Act of Parliament, conferring on the executive powers of subordinate or ancillary legislation on certain matters is liable to be pronounced unconstitutional if it can be said that Parliament ought itself to have legislated on the matters in question, and ought not to have devolved the responsibility of doing so, which under the Constitution lay on it, to an outside authority, and in deciding whether in fact Parliament ought to have legislated itself, it is irrelevant that it still retains the power to set aside any subordinate or ancillary legislation which the outside authority may have enacted. It will obviously be a matter of the very greatest difficulty to say in any particular case whether Parliament has transgressed or has kept within the permissible limits.

As early as 1825, Chief Justice Marshall of the Supreme Court of America observed:

"The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." 'WAYMAN v. SOUTHARD', (1825) 6 Law Ed 253.

Obviously also, in deciding whether or not Parliament has transgressed the limits, regard must be had to the object which Parliament had in view in enacting the statute, of which the validity is attacked and to the circumstances which led to its enactment. Kania, C. J., one of the dissenting Judges, appears to have recognised this when he said:

"The extent of the specific and detailed lines of the rule of conduct to be laid down may vary according to the circumstances or exigencies of each case. The result will be that if owing to unusual circumstances or exigencies the legislature does not choose to lay down detailed rules or regulations that work may be left to another body which is then deemed to have subordinate legislative powers."

The impugned Act was placed on the statute book in order to enable steps to be taken to deal with an economic situation of great complexity which had arisen and which, if permitted to develop uncontrolled, might have proved a serious danger to the stability of the State and certainly to the well-being of the great majority of its citizens. As I have pointed out, it would have been quite impracticable for Parliament to have legislated in any detail regarding certain of the matters referred to in Sub-section (2) of Section 3 of the impugned Act, and for it to have attempted to legislate more particularly regarding at least one matter, would have been both impracticable and dangerous. When the provisions in Sub-section (2) of Section 3 of the impugned Act are examined clause by clause, it will, I think, be found difficult to say with any degree of certainty that Parliament could and ought to have legislated in greater detail than it did.

Mr. Ghosh complained bitterly that it had been left entirely to the discretion of the Provincial Government to determine how much his client should be paid for the paddy which he was compelled to deliver, and at one time I was disposed to think that Parliament could and ought, in enacting Clause (f) of Section 3 (2) to have stipulated that the price should not be less than the wholesale price which had obtained at a certain prior date. On further consideration, however, it may well have been inexpedient, and perhaps highly inexpedient, for such a provision to have been made. The impugned Act sets out the object the legislature had in view, and sets out also, in sufficient details, the action which the legislature thought necessary or advisable to be taken to achieve that object. It left to the executive the task of working out in detail the administrative measures necessary in order to ensure that the action which it wished to be taken should be effective.

More exception can, perhaps, be taken to the ostensibly wider power of subordinate legislation conferred by Sub-section (1) of Section 3. As, however, I have already said, that sub-section would appear to have been enacted in order to confer on the executive a power to take action similar or analogous to the action which it was authorised to take in the various clauses contained in Sub-section (2). To deny to the legislature authority to delegate such a power might well render it more difficult for the executive to grapple effectively with a situation such as that at which the impugned Act was aimed, and I am not prepared to say that such a delegation was beyond the power of Parliament to make. In any event, Sub-section (2) can be severed from Sub-section (1) of Section 3; and the Bihar Agriculturists' Levy Order, 1950, was made in pursuance of one or other of the special powers conferred by Sub-section (2), and not in pursuance of the general power conferred by Sub-section (1) of Section 3.

(7) Mr. B. C. Ghosh for the petitioner next attacked the Bihar Agriculturists' Levy Order, 1950, and contended that it deprives his client of the fundamental rights conferred on him by Clauses (f) and (g) of Article 19 (1) of the Constitution. It is, I think, open to doubt whether it can fairly be said that a proprietor or tenure-holder or cultivator falling within the definition of a large producer contained in Sub-clause (f) of Clause (2) of the Order carries on an occupation, trade or business. Even, however, if he can be said to do so, the restrictions imposed on his right

to carry on his occupation or business are, in the first place, that he must make a declaration of his stocks; secondly, that he must take out a license; and thirdly, that under the license he must submit a monthly return showing the stocks which he has acquired and disposed of in the preceding month. Clearly, it cannot be said that such restrictions are not reasonable restrictions, and are not imposed in the interests of the general public. Mr. Ghosh in fact did not press this point very seriously, and concentrated his attention on Clause (f) of Article 19 (1).

An order requiring a person to deliver a quantity of paddy is in effect an order depriving him of property, and the order which is now attacked might, I am inclined to think, be said to be a law falling under Article 31 (1) of the Constitution. This point was not, however, raised in the course of the argument, and I shall proceed to deal with the case on the assumption that the Bihar Agriculturists' Levy Order, in so far as it prevents large producers from holding up stocks of grain and disposing of them in the most advantageous market, interferes with their exercise of the fundamental right conferred by Clause (f) of Article 19 (1). A considerable part of the argument which was addressed to us by Mr. B. C. Ghosh was devoted to an attempt to show that under the order very arbitrary action could be, and was likely to be, taken by subordinate function arises. Mr. Ghosh, for instance, complained that the order did not provide for the making of any enquiry or for any opportunity being given to a large producer to be heard before a demand was made on him. Again, Mr. Ghosh said, a large producer might be required to deliver paddy at some place far away from his residence, that payment to him might be most unreasonably delayed, and even that when payment was eventually made, it need not necessarily be made in money. The rate of payment which had been fixed, Mr. Ghosh said, and in support of his assertion produced a notification issued by the Provincial Government, was a rate which was the same for every part of the province, no account being taken either of the quality of the paddy or of variations in the market price which, Mr. Ghosh said, notoriously obtained not only in different parts of the province but often in different parts of the same district. The sum and substance of this part of the learned Advocate's argument was that the order, in so far as it permits arbitrary action of this kind to be taken, is an unreasonable order, and as such must be held to be unconstitutional. Mr. Ghosh found support for this contention in the judgment of Meredith, C. J., in 'BRAJNANDAN SHARMA v. STATE OF BIHAR', 29 Pat 461 FB, and more particularly in an observation contained in the judgment that "a law which enables such things to be done is not a reasonable law."

I was myself a party to that decision, and found it necessary to dissent from the learned Chief Justice and stated my own point of view in these words:

> "What is the criterion to be adopted by the Courts in deciding whether legislation of this kind is or is not valid legislation? What is the question to which the Courts are bound to address themselves? The answer given by the Constitution is that the question is this: "Are the restrictions which have been or can be imposed reasonable restrictions in the interests of the general public? That, it seems to me, is equivalent to saying: "Are the restrictions reasonably necessary in the interests of the general public? or, to depart still further from the language used in the Constitution: "Is the extent to which the rights of individuals are or are liable to be interfered with no more than is reasonably necessary for the protection of the public? "If that is the criterion to be adopted, then it is, I think, immaterial that there may be ancillary provisions in the statute which may lead to hardship in individual cases. Whether such provisions were reasonable or not was a matter for the legislature to determine, and the judiciary cannot now sit in review over what the legislature has done."

Mr. Ghosh for the petitioner has said that the Supreme Court has endorsed the opinion expressed by Meredith, C. J., and has dissented from the opinion which I expressed. I very much doubt, however, if their Lordships intended to endorse the particular observation of Meredith, C. J., which I have quoted and which is the basis of the argument which has been addressed to us. What Kania, C. J., said was:

> "The law providing reasonable restrictions on the exercise of the right conferred by Article 19 may contain substantive provisions as well as procedural provisions. While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law": 'DR. N. B. KHARE v. STATE OF DELHI', 1950, S C R 519 at 524.

In his judgment, while approving of the decision of Meredith, C. J., and Das, J., the learned Chief Justice also referred with approval to a decision of the Bombay High Court: 'JESINGBHAI ISHWARLAL v. EMPEROR', AIR (37) 1950 Bom 363 FB.)

In that case Chagla, C. J., had observed:

> "In order to decide whether a restriction is reasonable or not, the Court must look at the nature of the restriction, the manner in which it is imposed, its extent both territorial and temporal, and if after considering all this the Court comes to the conclusion that the restriction is unreasonable, then the restriction is not justified and the Court will not uphold that restriction."

There is nothing in either of the decisions to support the contention of Mr. Ghosh that if under this order arbitrary and unreasonable action may conceivably be taken, the order must, on that ground, be held to be an invalid order. No doubt the view which I had myself expressed that the reasonableness of any purely ancillary provisions contained in an order of this Court was a matter for the authority making the order to determine, and not a matter for the Courts to go into, was overruled. The substantive provision in the Bihar Agriculturists' Levy Order, 1950, which imposes on the petitioner a restriction in the exercise of his fundamental right to acquire, hold and dispose of property is contained in Clause (5) of the Order, which requires him to deliver, on demand, such quantity of food-grains as may be specified in the order making the demand.

It cannot be said, and indeed was not said, by Mr. Ghosh that this was an unreasonable restriction, or a restriction which was not imposed in the interests of the general public. What Mr. Ghosh attacked in the order were the ancillary or procedural provisions as to the fixation of the amount of the demand, the rate and mode of payment, and so on. In other countries in which the State has found it necessary to requisition part of the crops raised by substantial cultivators it has sometimes happened that so much has been

taken that the cultivators have been discouraged from growing as much as they could in subsequent agricultural year. In fact so much has sometimes been taken that they have not been left with enough for their own subsistence or for seed. It is clear that this danger was realised by the Government of Bihar and that it took (sic) large producer has to make he is required to state the acreage of land held under each kind of crop and also the number of his dependants and the number of servants who depend on him for their supply of food. Presumably, the reason why such particulars were required was to ensure that every large producer should be left with sufficient grain to enable him to feed his dependents and to have seed for the next agricultural season.

Indeed, it is clear from the license which large producers are required to take out that many of them at least are intended to be left with a surplus of grain over and above what they themselves require which they are to be at liberty to sell, Finally, the scale of levy is based on the assumption that in Bihar the average gross produce of paddy from one acre of land is 12 maunds or 8 maunds, according as the land is or is not canal irrigated, and that in Chotanagpur and the Santhal Parganas the average gross produce is 12,8 or 4 maunds of paddy according as the land is first, second or third class land, respectively. Presumably, the data on which these estimates were made was found in the various settlement reports. I have myself little or no experience of Chota Nagpur, but in the earlier part of my service I had a fair amount of experience of rent commutation cases in certain parts of Bihar, and if my recollection is correct the average outturn of paddy from one acre of land, which was canal-irrigated, was appreciably more than 12 maunds of paddy, and the average outturn of one acre of land which was not so irrigated was appreciably more than 8 maunds.

Throughout Bihar and Chota Nagpur except in Khas Mahal villages, the State has no officials capable of appraising crops, and to have recruited a staff for this purpose would, I imagine, have been quite impracticable. Moreover, appraising standing crops is a very difficult task and serious errors are likely to be made one way or the other. Even if it had been possibly to do this, and it would, in my opinion, have been quite impossible, more hardship would have been likely to have been caused than is likely to be caused by the procedure adopted, namely by assessing the amount of the demand in each case on the assumption that the average outturn will be a certain quantity of paddy per acre, the national (sic) figure taken being well on the low side.

Finally, it has to be remembered that the Order contains provisions entitling any large producer, on whom a demand is made, to apply for a revision of the assessment, and if the assessment is not revised to his satisfaction, to appeal against it. Mr. Ghosh complained that no large producer could apply in revision, or appeal unless and until he had complied partially with the demand. When however, an application in revision is made, only one-fourth of the quantity demanded is to be supplied, and when an appeal is preferred, only one-half. There ought to be very few instances in which four times as much as has been demanded as ought to have been demanded, and still fewer instances in which, after a review, the amount of the demand is still twice what it ought to have been. Without some provision of this kind it is clear that very many quite frivolous applications in revision and appeals would have been preferred, and that as, inevitably much delay would have occurred in their being disposed of, the maintenance of supplies would have been very seriously interfered with.

Mr. Ghosh said that there must be non-canal-irrigated land in Bihar of which the gross outturn was less than 8 maunds of paddy and complained that the Order did not permit of the responsible authority assessing it at less. The heading to Clause 5 of the Order, namely, Scale of Levy, perhaps suggests this. But, having regard to the petition (sic) of that clause in the Order, I am not satisfied that it is not open to the authority entitled to review an order of demand to make the assessment on what, it is satisfied, is the actual outturn. The power conferred on the Commissioner by Clause 5 (5) to reduce the scale of levy in a particular area when there has been a failure of crops is not inconsistent with the reviewing or appellate authority having discretion to modify an assessment in any way it thinks proper.

(8) The most serious difficulty which must confront those who are charged with the administration of this Order is the ascertaining of the acreage which any large producer actually has under paddy or wheat. Mr. Ghosh complained that the Order did not provide for any inquiry, and that there was a danger of the authority responsible for making a demand making it on thoroughly unreliable information — information indeed, which might have been supplied by persons who had a grudge against the persons to be assessed. Such a danger may, no doubt, exist. On the other hand, it is difficult to see how detailed provisions could have been made as to the kind of inquiry which ought to be held. It has to be remembered that every large producer is required to make a declaration and take out a license and submit monthly returns, and when that has been done and the large producer has acted with complete honesty, the declaration and the returns will, by themselves, contain a great deal of the material necessary to enable an assessment to be made.

If any large producer wilfully neglects to comply with the law, and inquiries have to be made, he can have no real complaint if these inquiries result in a demand being made on him which is an excessive demand. Moreover, in such a case, it is still open to him to make amends and ask for permission to make the declaration which he ought to have made earlier, and, presumably, if he can put forward any reasonable excuse for not having complied with the law, the Subdivisional Magistrate will exercise the discretion given to him by Clause 3 (2) of the Order and permit a declaration to be made before he deals with the application for review.

(9) Mr. Ghosh drew our attention to Clause 5 (2) (a) and said that it was unreasonable that the demand made on a large producer, who was a proprietor or a tenure-holder or 'thikadar', should be based on the produce that he was likely to get from his tenants as rent in kind, and not on the produce which he actually got from them. As I understand it, however a demand is made before the crop is actually harvested, or, at all events, before any 'bataidars' of a proprietor or tenure-holder actually pay him their rent in kind. If the making of a demand is deferred until the whole of the crop has been got in, the large producer will not know how much of it he is entitled to sell, and he may, for one reason or another, wish to sell it as soon as possible. Also, it is, if my recollection is correct, not uncommon for crops to be sold while they are still standing. If a demand is based on the assumption that a proprietor or tenure-holder is likely to receive more from his 'bataidars' than he himself estimates, it

is open to him to apply for a review of the order and to ask that the hearing should be deferred until he has received the whole of the rent in kind due to him in order that he may be able to satisfy the Court how much exactly be received.

There is, I consider, nothing in Mr. Ghosh's complaint that power ought not to have been conferred on the District Magistrate, the District Supply Officer or the Sub-divisional Magistrate to prescribe the mode of payment for grain delivered in pursuance of a demand. When grain is delivered to the person in charge of a State godown, that person can scarcely be entrusted with the money to pay for it, and some procedure must be laid down as to how the supplier is to receive payment from the treasury. A more substantial complaint made by Mr. Ghosh was that the Provincial Government was authorized to fix, and had fixed, on flat rate of payment for the whole of the province, and that the rate so fixed was applicable to paddy of every quality. On the other hand, it appears that the wholesale price of paddy has also been fixed by the State, and that the rate so fixed is a flat rate for the whole of the province and for every kind of paddy grown in Bihar.

In other words, a large producer is paid for the paddy taken from him at one flat rate and is required to sell so much of his surplus paddy as he wishes to dispose of at another flat rate. Mr. Ghosh also complained that the difference between the rate at which the state purchased paddy and the date (sic) at which it sold it was excessive. We have not the materials on which we can go into this point, nor in my opinion, are we entitled to do so.

(10) The scale of levy is a graduated scale according as the amount of the produce exceeds 200 maunds, 400 maunds, 600 maunds and 800 maunds of paddy. This results in certain anomalies which are most marked in the case of produce derived from canal-irrigated land. A large producer, who receives 400 maunds of paddy grown on such land is left with 325 maunds whereas a producer who receives 401 maunds is left with only 250 5/8 maunds. A producer who receives 800 maunds of paddy from canal-irrigated land, is left with 400 maunds whereas a producer who receives 801 maunds is left with only 200 1/4 maunds. A producer who has in one agricultural year obtained no more than 800 maunds will not, in a subsequent agricultural year be allowed to retain more than 400 maunds unless he increases his outturn to 1,600 maunds or more. Mr. Ghosh said, pertinently enough, that under the scheme there was no incentive for certain producers to increase their outturn, and that, on the contrary, they might be under a temptation to reduce it, and went on to argue that the objection which the legislature had in view, namely, the maintenance of supplies of foodgrains would not be achieved.

The learned Advocate for the petitioner relied on 'CHINTAMAN RAO v. STATE OF MADHYA PRADESH', 1950 S C R 759. This decision is not, in my opinion, in point. The mere circumstance that a very limited number of producers may be deprived of any incentive to grow more food, is immaterial, if the scheme as a whole results in the maintenance of supplies and it is quite clear that the scheme is likely to have that effect. Mr. Ghosh was on firmer ground when he attacked these provisions in the Order on the ground that they were a violation of the fundamental right conferred on his client by Article 14 of the Constitution. Much reliance was placed on 'KAMESHWAR SINGH v. STATE OF BIHAR', 30 Pat 454 (SB), a decision to which I was a party. Under the Bihar Land Reforms Act, 1950, the State proposed to acquire the estates of proprietors and tenure-holders, and also proposed to take over the collection of arrears of rent due to such proprietors and tenure-holders, paying to them one-half of the amount of arrears.

As proprietors and tenure-holders were to receive half the arrears of rent due to them a payment had in every case to be made and this was euphemistically described in the Act as compensation. It was shown that the amount which would thus be paid to the owners of the bigger zamindaris in the province would be less than the amount due to them as arrears of rent at the time when their estates were taken over. In other words, the estates of such proprietors were, in effect, confiscated without any compensation whatever. On the other hand, it was shown that a very large number of the smaller proprietors and tenure-holders in the province would, in all probability, receive as compensation more than the market-value of their property. The Bihar Land Reforms Act contained no provisions relating to the raising of money to finance the scheme, and it was admitted that the intention of the State was to make a profit out of the bigger estates which it acquired for nothing or for much less than their market-value and so raise the money with which eventually the smaller estates and tenures would be acquired at a fair & perhaps even a generous price.

The Act was thus aimed at a comparatively small section of persons belonging to a class, and the intention was to benefit a large number of other persons belonging to that class at their expense. Relying on the construction which the Supreme Court had put on Article 14 in 'CHARANJIT LAL v. UNION OF INDIA', AIR (38) 1951 S C 41, my learned brothers and myself came to the conclusion that the Bihar Land Reforms Act was a discriminatory piece of class legislation and was on that ground unconstitutional. The Bihar Agriculturists Levy Order, 1950, may divide large producers into a number of artificial sub-classes, in very much the same way as the Bihar Land Reforms Act, 1950, divided proprietors and tenure-holders. The analogy between the Order and the Act, however stops there. It cannot fairly, or indeed at all, be said that the object of the Ministry in making this Order was to benefit one sub-class of producers at the expense of any other sub-class. There is, clearly, nothing objectionable in the levy being a progressive one, that is in any comparatively large producer being required to deliver to the state a proportionately greater quantity of his grain than a smaller producer.

Mr. Ghosh in fact does not question the propriety of this, but says each producer should be required to deliver the same proportion of the first 200 maunds of paddy which he receives, the same proportion of the next 200 maunds, and so on, or alternatively, that there should be a provision that no producer in a higher sub-class should be required to deliver more paddy than a producer in the sub-class immediately below him. Even in America, however, the Fourteenth Amendment does not appear to have been given so extended an application. For instance, the Courts have, as a rule, been reluctant to apply it in income-tax cases. In the absence of authority, I am not prepared to construe Article 14 of the Constitution in the way in which the learned Advocate for the petitioner invites me to construe it. It has to be remembered that the paddy which a producer is required to deliver is not confiscated. The producer is paid for it, and the difference between what he receives from the State and what he would have obtained

if he had sold it at the controlled wholesale price is not very great. No doubt, it would be more convenient for him to sell it in the open market, and not to have to deal with minor officials. But too much ought not to be allowed to be made of such a grievance, and none at all of the grievance that he might, quite possibly, be able to obtain from some speculator more than the controlled wholesale price.

(11) To sum up, India is a predominantly agricultural country, and yet at the moment cannot produce enough food for its rapidly increasing population. In such a situation, in order to prevent famine occurring in particular local areas, it is necessary that the State should control the distribution of grain and in order to enable it to do this, it must have control of large stocks of grain itself. The only way in which it can do t is is to require producers to deliver a part of their stocks to the State or agents of the State. As I have already said, the quantity of grain which any producer is required to deliver is not so high that it does not leave him with sufficient for his own consumption and for seed, and indeed, in some cases, also with a certain surplus which he is at liberty to sell. That being so, the restriction imposed on producers is a reasonable restriction, and is imposed in the interests of the general public. In the view which I took in 'BRAJNANDAN SHARMA v. STATE OF BIHAR', 29 Pat 461, that would be sufficient to dispose of this case. But, in consequence of the later pronouncement of the Supreme Court I am also required to consider whether the ancillary and procedural provisions contained in this Order are reasonable.

I must confess that that is a task which any Court must find it extremely difficult to discharge. What the reasons were, which weighed with the officials responsible for the drawing up of this Order, it is impossible for this Court to discover. It has, however, to bear in mind that in this province there are no State Officials in the villages, and that the records of rights are not kept up-to-date. That alone must make the task of administering a scheme of this kind extremely difficult, and must also involve a very great deal being left to the discretion of Collectors, District Supply Officers and Sub-divisional Magistrates who are acquainted with local conditions. I am not prepared to say that any of the ancillary or procedural provisions in the Order is unreasonable except possibly the provisions to which I have just referred as to the scale of the levy and if these are unreasonable, they are unreasonable only in the case of a limited number of producers. What proportion these are to the entire body of producers I have no means of ascertaining. The validity of this provision must, in my opinion, be tested by reference to Article 14 and not by reference to Article 19 (f) of the Constitution, and for the reasons already given it does not transgress Article 14.

Also, unless and until the Supreme Court decides otherwise, I am not prepared to hold that the circumstances that one of a number of purely ancillary or procedural provisions in the Order is unreasonable is sufficient to render the Order 'ultra vires.' Important as is the part assigned in the Constitution to the judiciary, I do not think that it was ever intended that it should be within the power of the judiciary to bring this procurement scheme to a complete standstill unless and until it was amended in some such particular to its satisfaction. Nor do I think myself that a rule of that kind is one which the judiciary can adequately sustain. It does not know, and cannot fully appreciate the difficulties which confront the executives in working out administrative measures of this kind.

(12) In the result, then I would say that neither the Essential Supplies (Temporary Provisions) Act nor the Bihar Agriculturists Levy Order, 1950, is an unconstitutional law and would remand the case to the learned trying Magistrate to be disposed of according to law. There ought not, I consider, to be any order for costs.

(13) RAMASWAMI, J.: The main questions argued in this case are (1) whether Section 3 (1) and Section 4 of the Essential Supplies (Temporary Powers) Act, 1946, improperly delegate legislative power to the Executive authorities, and (2) whether certain provisions of the Bihar Agriculturists Levy Order 1950 violate the constitutional guarantees under Article 14 and Article 19 (1) (f) and (g) of the Constitution.

(14) Act XXIV of 1946 is entitled as:

"an Act to provide for the continuance during a limited period of powers to control the production, supply and distribution of, and trade and commerce in, certain commodities."

Section 2 defines 'essential commodity' to mean particular classes of commodities which are set out in detail. Section 3 (1) empowers the Central Government, so far as it appears to it to be necessary, or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices, to make provision for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Section 3 (2) illustrates with some precision in what manner the Central Government should exercise the power delegated.

Under Section 3 (2) the Central Government is empowered (a) by license or permit to regulate the production or manufacture of any essential commodity, (b) to provide for bringing under cultivation any waste or arable land, (c) to control the prices at which all essential commodity may be bought and sold, (d) to regulate by license, permit or otherwise the transport, distribution, acquisition and use of any essential commodity, (e) to prohibit the withholding of sale of any essential commodity ordinarily kept for sale, (f) to require any person holding stock of an essential commodity to sell the whole or a specified part of such stock at such price and to such person or in such circumstances specified in the order, (g) to regulate or prohibit any class of transactions relating to foodstuffs or cotton textiles which, in the opinion of the authority making the order, are if unregulated likely to be detrimental to the public interest, (h) to collect information and statistics with a view to regulate or prohibit any of the aforesaid matters, (i) to require persons engaged in production or commerce of any essential commodity to maintain and produce for inspection books, accounts and records and to furnish information, (j) to provide for incidental and supplementary matters including in particular search and seizure of articles in respect of which there is reason to believe that a contravention of the order is being or is about to be committed, to provide for the grant and issue of licenses and the charging of fees thereof.

Section 4 states:

"The Central Government may by notified order direct that the power to make orders under Section 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by —(a) such officer or authority subordinate to the Central Government, or (b) such State Government or such officer or authority sub-

ordinate to a State Government, as may be specified in the direction."

(15) On 21st October 1946, the Central Government issued a Notification No. P Y 603 (2)—1 directing that the powers conferred on it by Subsection (1) of Section 3 shall, in relation to foodstuffs be exercisable also by the Provincial Government subject to the conditions that, (a) before making any order relating to any matter specified in Clauses (a), (b), (c), (d), (f) and (g) of the said Sub-section (2), the Provincial Government shall obtain the concurrence of the Central Government; (b) no order made in the exercise of the aforesaid powers shall have effect so as to prohibit or restrict the export, from any place in the province to any place outside India, of any articles.

(16) On 16th October 1950, the State Government with the concurrence of the Central Government promulgated the Bihar Agriculturists' Levy Order, 1950, the validity of which is attacked in the present case.

(17) The first argument on behalf of the petitioner is that Sections 3 and 4 of the Essential Supplies Act are unconstitutional since there is an improper delegation of legislative power to the Executive Government. Learned Counsel pointed out that Section 3 of the Essential Supplies Act conferred a very wide and uncertain authority to the Central Government to legislate with respect to production, supply and distribution of a large number of essential commodities. It was argued that Section 4 of the Act enabled the Central Government to further delegate its power to make orders under Section 3 to an officer or authority subordinate to the Central Government or to a Provincial Government or an officer or authority subordinate to the Provincial Government. It was contended that there was no definite policy or standard laid down by the legislature to limit and guide the Executive Government in exercising the power delegated. It was stressed that the legislature has practically effaced itself and surrendered its legislative responsibilities to the Central or State Government or their subordinate officers.

(18) In my opinion the argument is attractive but wholly unsound. The power of subordinate legislation conferred on the Executive Government is not unconfined or vagrant. Section 2 of the Act defines with great particularity what an 'essential commodity' is. Section 3 (2) indicates with sufficient precision the contour of the policy intended by Parliament for achieving the object. It is true that Section 3 and Section 4 confer a wide power and discretion on the executive authorities. But the object of the Act was to control a complex and rapidly deteriorating economic situation caused by the scarcity of foodgrains, the tendency of the agriculturists to withhold stock and the anti-social activities of speculators. As the social and economic conditions notoriously vary in the Indian States it was manifestly impracticable for Parliament to provide for detailed machinery. It was inevitable in the circumstance that a wide power of subordinate law-making should be conferred on the Central and State Governments for enacting measures to carry out the policy of Parliament.

It was argued that by enacting Ss. 3 and 4 the legislature has effaced itself and abdicated its essential legislative function. The argument is not correct. For Parliament retains its whole power of control intact and Parliament can whenever it pleases destroy the agency which it has created and take the matter directly into its own hands. The powers conferred by Ss. 3 and 4 can be taken away by Parliament at any moment and the orders made by the Executive Government can doubtless be annulled or repealed. In my opinion the delegation of legislative power made under S. 3 or 4 of the Act is permissible and is not in conflict with any constitutional principle.

(19) A delegation of similar width and amplitude has been upheld as valid in a 'catena' of leading authorities. In 'HODGE v. REG', (1884) 9 A C 117, the question was whether certain regulations made under S. 4 of the Liquor License Act, 1877, of Ontario amounted to an improper delegation of legislative power. It was contended that the legislature had no power to authorise the License Commissioners to make regulations, create offences or annex penalties. The argument was rejected by the Judicial Committee.

At page 132 Sir Barnes Peacock said:

"When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in S. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by S. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect....."

(20) In 'THE VICTORIAN STEVEDORING AND GENERAL CONTRACTING CO. v. DIGNAN', (1931) 46 Comm-W L R 73 the question arose whether it was within the legislative power of Parliament to confer upon the Governor-General power to make regulations under S. 3 of the Transport Workers Act. The Act empowered the Governor-General to make regulations which shall have the force of law, with respect to the employment of transport workers, and in particular for regulating the engagement, service, and discharge of transport workers, and the licensing of persons as transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers. In exercise of the power conferred by the section the Governor-General had on June 26, 1931, issued the 'Waters de Employment Regulations' which provided amongst other things that transport workers of certain kinds should be given priority in employment. The regulation conflicted to a certain extent with an award of the Court of Conciliation and Arbitration made under a previous Act.

It was argued that S. 3 was ultra vires on the ground that it delegated legislative power to the Governor-General. The High Court rejected the argument holding that it was within the legislative power of the Parliament to confer upon the Governor-General power of making regulations under S. 3 of the Transport Workers Act 1928-29.

(21) The same doctrine has been laid down by the Judicial Committee in 'SHANNON v. LOWER MAINLAND DAIRY PRODUCTS BOARD', (1938) A C 708, in which the validity of the Natural Products Marketing (British Columbia) Act, 1936, was attacked on the ground that there was delegation of legislative power to the Lieutenant-Governor in

Council and by the latter to the Marketing Boards. It was objected that it was only a 'skeleton of an Act' and that the legislature had 'surrendered its legislative responsibility to another body'. The objection was summarily rejected by the Judicial Committee and the Act was held to be constitutionally valid. At page 722 Lord Atkin states:

"The third objection is that it is not within the power of the Provincial Legislature to delegate so-called legislative power to the Lieutenant-Governor in Council, or to give him powers of further delegation. This objection appears to their Lordships subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the Constitution has granted legislative powers. Within its appointed sphere the Provincial legislature is as supreme as any other Parliament; and it is unnecessary to try to enumerate the innumerable occasions on which legislatures, Provincial, Dominion and Imperial, have entrusted various persons and bodies with similar powers to those contained in the Act."

(22) Upon principle and precedent it is manifest that Ss. 3 and 4 of the Essential Supplies Act do not improperly delegate legislative power to the Executive authorities, and the argument of Mr. B. C. Ghosh on this part of the case must fail.

(23) The next argument is that by promulgating the Bihar Agriculturists Levy Order 1950 the Government of the State has violated the guarantee under Art. 19(1)(f) and (g) of the Constitution. Article 19(1)(f) states that all citizens shall have the right to acquire, hold, or dispose of property. Article 19(1)(g) declares that all citizens shall have the right to practise any profession or trade or business. But these rights are not absolute or sacred for Art. 19 Cl. 5 enacts that the State may make a law imposing reasonable restrictions on the guaranteed rights in the interests of the general public. Learned advocate for the petitioner however argued that the restrictions imposed under the impugned order were unreasonable. Mr. B. C. Ghosh pointed out that under Cl. 3 a large producer is required to make a declaration of his stock before the Sub-divisional Magistrate; that under Cl. 4 he cannot sell or store any foodgrain except in accordance with a license; and that under the terms of the license, he must submit a monthly return showing the stock acquired and sold in the preceding month. It is difficult to accept the argument that these conditions are unreasonable.

Clause 5 of the Order requires that a large producer should deliver on demand from the District Magistrate, District Supply Officer, or the Subdivisional Magistrate such quantity of foodgrain to such person at such place within such period as may be specified in the order making the demand. Mr. B. C. Ghosh complained that the local officers have been granted a discretion 'carte blanche' which they are likely to abuse. Mr. Ghosh also complained that the provisions for appeal and revision are hedged with drastic restrictions and that the Order did not make provision for any preliminary enquiry before the officer proceeds to make assessment. But these arguments are without substance. The Order enjoins upon every large producer to make a declaration of his stock of foodgrain, the acreage of land held under cultivation by himself, acreage of land held under each kind of crops, total yield of each kind of crop, number of tenants who pay rent in kind, rent received from each tenant and so on. In many cases, the declaration itself must form the basis upon which the officers must proceed to make the assessment. It should be remembered in this connection that the greater part of the land in the State is held under zemindari system, that the settlement records are obsolete and that the Government have no papers to show the names of the large producers and the areas they hold and cultivate. It is unavoidable in these circumstances that a large measure of discretion should be conferred on the local officers if the object of the legislature was to be rapidly carried out. It was argued by Mr. Ghosh that if under the Order arbitrary or unreasonable action may conceivably be taken, the Order must be held to be invalid. This argument is not correct. There is some risk of abuse when wide power is committed to a large body of men, but the constitutional validity of a law cannot be contested on the ground of such apprehension. It is, therefore, impossible to hold that either the substantive or procedural part of the Bihar Agriculturists Levy Order is unreasonable — that is, not necessary or appropriate for the accomplishment of the object aimed at.

(24) It cannot be questioned that the State has a right to regulate the acquisition and disposal of property in order to promote social advantage. Property is a bundle of legal rights — which exist only because the State recognises and protects them. But the regulations of the State must be reasonable — the test of reasonableness is whether the regulation is necessary and appropriate for the accomplishment of the object aimed at or whether the restrictions imposed are arbitrary and excessive. It is impossible in the present case to hold that the provisions of the Paddy Levy Order are arbitrary or that they are not necessary and appropriate for the accomplishment of the object specified. In this connection it is important to remember the principle that every possible presumption should be made in favour of the constitutionality of a statute. The Court must presume that the legislative body acted advisedly and in good faith, with full knowledge of existing facts and conditions upon which the legislation is based. "To the legislature no less than to the Courts is committed the guardianship of deeply cherished liberties", observed Justice Frankfurter in a recent case,

"to fight out the wise use of legislative authority in the forum of public opinion and before the legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."

(25) The next argument is that the Order in question violates the guarantee under Art. 14 of the Constitution. Counsel for the petitioner pointed out that the scale of levy was progressive according as the amount of the produce exceeds 200 maunds, 400 maunds, 600 maunds and 800 maunds of paddy. Mr. Ghosh argued that this created certain anomalies, which are prominent in the case of produce from canal irrigated land. For instance, a large producer who grows 800 maunds of paddy from canal irrigated land is left with 400 maunds; but if a large producer grows 801 maunds, he is left only with 200¼ maunds. Similarly a producer who owns 100 acres of canal irrigated land was required to deliver 250 maunds whereas a producer with 101 acres of land was required to deliver 303 maunds. But these cases are extreme illustrations and they do not furnish a test of the practical operation of the classification.

Mr. Ghosh did not dispute that a progressive rate of levy was reasonable. But counsel contended that the levy should have been on a 'slab system' — that each producer should be required to deliver the same proportion on the first 200 maunds of paddy, the same proportion on the next 200 maunds and so on — or alternatively there should

be a provision that no producer in a higher class should be required to deliver more paddy than a producer in the class immediately below him. It was also submitted by learned counsel that the exemption limit of 50 acres or 200 maunds of paddy might work hardship in certain cases and that the Government should have fixed a higher limit.

(26) In my opinion the argument proceeds on misconception. The guarantee of equal protection of laws under Article 14 is not absolute. The equality which the Constitution safeguards is equally in a social organisation which requires the protection of law against evils which menace the health, safety and welfare of the people. The rights and powers of the Constitution are largely means of protecting important social and individual interests; and because it is necessary that these interests should be balanced, the Articles of the Constitution cannot be construed in an absolute sense. For instance Art. 38 imposes a duty upon the State to promote the welfare of the people by securing and protecting a social order in which justice social and economic shall inform (sic) the institutions of national life. Article 46 similarly enjoins upon the State the duty of promoting with special care the educational and economic interests of the weaker sections of the people. Likewise Art. 47 states that the State shall regard the raising of the level of nutrition and the standard of living of the people and the improvement of public health as among its primary duties.

Interpreted in the context of these important constitutional provisions it is manifest that the guarantee of equal protection under Art. 14 is not absolute. It cannot also be purpose of Art. 14 to take away from the legislature the right or the power to classify the subjects of legislation. It is true that classification must be reasonable but a legislature has a wide discretion and an Act will not be held invalid unless the classification is clearly unreasonable and arbitrary. What classification is reasonable rests in the discretion of the legislative body in the first instance. The question is not whether the Court considers the classification reasonable to its satisfaction or whether in its opinion the Government could have devised a more equitable scheme. The question must be posed on the other hand — Is the statute so clearly arbitrary that legislators acting reasonably could not have believed it to be necessary in the public interest. To put it in other words, the question is whether there was 'any' rational basis for legislative action. Applying this test, it is obvious that the Bihar Agriculturists' Levy Order considered as a whole and notwithstanding certain anomalies, does not violate the guarantee under Art. 14 of the Constitution.

To adopt the words of Justice Stone:

> "It is a salutary principle of judicial decision long emphasised and followed by this Court that the burden of establishing the unconstitutionality of a statute rests on him who assails it and that Courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of the equal protection of the laws if any state of facts reasonably may be conceived to justify it 'METROPOLITAN CASUALTY INSURANCE CO. v. BROWNELL', (1935) 294 U S 580."

(27) For the reasons assigned I agree with my learned brother Shearer J. that both the Essential Supplies (Temporary Powers) Act and the Bihar Agriculturists Levy Order are constitutionally valid, and that the case should be remanded to the trying Magistrate for being dealt with in accordance with law.

(28) SARJOO PROSAD, J.: The salient points raised in argument by Counsel for the parties have been elaborately considered by my learned brothers. I have no inclination to add much to the discussion in their judgments. I will, however, state my own reactions as briefly as I can.

(29) I agree that the provisions of the Essential Supplies (Temporary Powers) Act, 1946 (Act XXIV of 1946) are not void on account of an improper delegation of legislative powers to agencies other than the Legislative authority itself. I can see nothing in Ss. 3 and 4 of the impugned Act to lead me to hold that there is any illegal delegation of legislative functions. The policy of the law has been fully indicated in the Act itself and it is only with the object of fulfilling the intentions of the law and of making it adaptable to the working of the complex administrative machinery that the said provisions have been incorporated in the law. It is true that sub-s. (1) of S. 3 gives wide powers to the Central Government but having regard to the purpose of the enactment this was not only unavoidable but inevitable. The Legislature could not possibly provide for all the administrative details and the eventualities that the Executive Government was likely to face in giving effect to the law, and it was only wise and expedient to arm Government with ancillary powers to meet the exigencies of the situation.

Moreover, the Central Government could not function alone. It had to control an emergent situation in regard to essential supplies in different parts of the country, and this it could only do effectively through the different State Governments or their subordinate authorities who were better acquainted with local needs and local problems. The fact that the Legislature foresaw these contingencies and provided for them shows that it acted judiciously in making allowance for these conditions. Legislations of this character cannot be held to be delegated legislations but merely conditional legislations or delegation of authority for ancillary purposes of the law itself. It is important to note that the Legislature on the face of the provisions themselves has been careful not to abdicate its authority completely but to make the agencies work under the directions prescribed by the law. This is clearly borne out by the language of sub-ss. (3) and (4) of S. 3 as also by S. 4 itself.

I was, however, impressed with the argument that S. 6 of the impugned Act gave definite legislative recognition to the orders passed by the Central Government or its delegates under S. 3 of the Act, and it went to the length of asserting that such an order "shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act etc". It was contended that this tantamounts to complete abdication of legislative powers by the Legislature. It was argued — not without some show of reason, — that even if the Central Legislature were to pass a law to the contrary that law would be ineffective as against the order of the Central Executive Government or any delegated authority under S. 3 of the Act.

This argument though quite plausible does not bear the test of scrutiny. If the Central Legislature were to pass a law to the contrary it will have the effect of abrogating the Act to the extent so provided. The authority which has created the agent can always and at any time destroy

the same and recall the power which it entrusted to the agent. Section 6 of the Act has, therefore, to be read in the light of that principle. In so far as an order under S. 3 may be inconsistent with any other existing legislation, in my opinion, the effect of the order would not be to repeal that legislation but only to save the order itself which will continue to be operative. Section 6, in other words, is, therefore, a saving section which affords protection to the order under S. 3 as against the onslaught of any other law merely by reason of its inconsistency. I therefore am satisfied on the whole that the impugned Act is not invalid on the ground of improper delegation of powers of legislation.

(30) The other question is whether the Bihar Agriculturists Levy Order of 1950 brought into being by virtue of sub-s. (1) of section 3 of the aforesaid Act violates the constitutional guarantees given under Arts. 14 and 19(1)(f) and (g) of the Constitution. On this point I find myself in agreement with the views expressed by my learned brothers. The anomalies pointed out by Mr. Ghosh are undoubtedly there so much so that in examining some of the clauses of the Order in regard to the scale of levy I felt that they led to ridiculous results. The learned Government Advocate is, however, right in contending that the scale could not be fixed on a precise mathematical basis and some rough and ready method had to be adopted — some workable formula. Therefore, the line had to be drawn somewhere in fixing the classification of produce and the scale of levy. Such a classification could not be held to be unreasonable so as to bring it within the mischief of either of the two Articles of the Constitution aforesaid.

Under Art. 19(5) of the Constitution it is, of course, the duty of the Court to see whether the restrictions imposed, by any legislation or order, on the right of a citizen to acquire, hold and dispose of property or to carry on any trade or business, are 'reasonable'. In order to do that the Court must of necessity examine all the provisions of the impugned legislation or order as a whole including the substantive and the procedural part of it. This, however, does not imply that the Court should do so with such meticulous care that if it thinks that any particular provision thereof in its application to particular set of facts is likely to lead to some undesirable or unreasonable consequences, it must straightway proceed to declare the same invalid for want of reasonableness. What the Court has to consider is the effect of the Statute or Order in its entirety and the purpose which it intends to serve; — unless some part of it is so flagrantly unreasonable as to affect the reasonableness of the entire structure.

My learned brother Shearer, J. has correctly pointed out, if I am allowed to say so with respect, that in most cases the Court has not all the materials before it on which to pronounce whether the data adopted by the framers of the legislation or those promulgating the Order in question were altogether unreasonable or that they were ill-advised in incorporating a certain provision therein which under given circumstances may be open to exception. Besides, the test of reasonableness is often so elusive. "But ideas of reasonableness are apt to vary widely" observed Meredith, C. J. in 'RATAN ROY v. STATE OF BIHAR', 29 Pat 410 at p. 417:

> "Take for example, laws relating to prohibition; or take such a matter as adultery which the Indian law regards as a crime punishable with imprisonment, but the English law does not."

The argument, therefore, on its ultimate analysis does not commend itself to me. I think I have said enough to indicate that none of the points urged by the learned Counsel for the petitioner is sustainable.

(31) I am also, therefore, of the opinion that both the Essential Supplies Act and the Bihar Agriculturists Levy Order are constitutionally valid and that the case should now be remanded for trial according to law.

D.H. *Case remanded.*

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DAS AND C. P. SINHA JJ.

Rudreshwari Pd. Sinha, Appellant v. Sm. Ramabati Devi and others, Respondents.

A. F. O. O. No. 159 of 1950, D/- 11-5-1951.

Civil P. C. (1908), O. 40 R. 1 — Simple mortgage — Suit or execution of decree thereon — Appointment of receiver — When can be made.

In a suit on a simple mortgage for sale the Court has jurisdiction to appoint a receiver to take possession of the mortgaged property and to realise the rents, issues and profits of the property. But this does not necessarily lead to the conclusion that a receiver may be claimed by the mortgagee in a suit on a simple mortgage as a matter of right and as a matter of course. Ordinarily, a Court of justice should be disinclined to take the mortgaged property out of the possession of the mortgagor who is entitled to continue in possession of the same until ownership has passed out of his hands by a sale held in execution of the final decree in the action. A receiver in such a suit, or in execution proceedings resulting from a decree in such a suit, can only be appointed in exceptional circumstances when a special case is made out for putting the property in charge of an officer of the Court. AIR (32) 1945 Pat 404 and AIR (36) 1949 Pat 24, Relied on.

'Held' (1) there were exceptional circumstances in the case justifying the appointment of a receiver of the mortgaged property.

(2) It was just and convenient to appoint the judgment-debtor himself to be the receiver instead of a stranger. *(Paras 8, 9, 10)*

Anno: Civil P. C., O. 40 R. 1 N. 4 Pt. 2a.

Mahabir Pd. S. C. Majumdar and S. K. Majumdar, for Appellant; B. C. De, D. L. Nandkeolyar and P. B. Gupta, for Respondents.

Cases referred to:

('32) 13 Pat L T 525: (AIR (19) 1932 Pat 360) (Pr 8)

('45) 24 Pat 282: (AIR (32) 1945 Pat 404) (Prs 7, 8)

('48) 27 Pat 534: (AIR (36) 1949 Pat 24) (Prs 7, 8)

C. P. SINHA, J.: This appeal has been preferred by the judgment-debtor against an order of the learned Subordinate Judge of Bhagalpur dated the 1st of May 1950, by which one Mr. Shakil, pleader, has been appointed receiver of the properties which have been directed by the final decree in a mortgage action to be sold.

(2) The Court below has pleased to direct by its order dated the 16th of July 1949 that a receiver be appointed till the properties were brought to sale. No appeal was preferred against that order which became final. The judgment-debtor wanted that he should himself be appointed as receiver. The Court below allowed him opportunities to deposit certain sums of money and observed that, if

the money were deposited within the time allowed by the Court, the Court would consider the desirability of appointing the judgment-debtor as receiver. The judgment-debtor having failed to deposit the entire amount, the Court below has appointed the aforesaid pleader as receiver.

(3) The facts can be briefly stated as follows: The judgment-debtor had executed a simple mortgage bond dated the 1st of April 1937 to secure a sum of Rs. 1,10,000/-. A mortgage suit No. 27 of 1941 was instituted and a preliminary decree was obtained on 23-4-1943 and the final decree was passed for a sum of Rs. 2,12,068/14/- on the 12th of November 1946, and execution of the decree was taken out in the year 1947. The judgment-debtor having taken objection that the properties were not saleable, the matter came to this Court and is now pending decision by the Supreme Court. As there was delay in bringing the properties to sale, an application was made on the 10th April, 1947, on behalf of the decree-holders for the appointment of a receiver till the decretal amount was fully realised by the sale of the mortgaged properties. The decree-holders happened to be the landlords of the properties in question and they were entitled to rent, and the Court by its order dated the 16th of July, 1949, had directed the payment of all the arrears of rent, and, as I have mentioned already, the entire amount of arrears not having been paid within the time allowed, a receiver has been appointed.

(4) An application was made on the 19th of April, 1950, under S. 11 of the Bihar Money Lenders (Regulation of Transactions) Act (VII of 1939) for payment of the decree by instalments. That application is still undisposed of and the proceeding for valuation of the properties under S. 13 of the said Act is also pending before the Court.

(5) The learned Advocate General on behalf of the appellant has urged that, because of the provisions contained in O. 40, R. 1, sub-cl. (2) of the Civil P. C., no receiver can be appointed in a mortgage action on the foot of a simple mortgage bond so as to remove from possession of the property the mortgagor who is entitled to remain in possession of the properties until they are brought to sale as provided by the decree and that a receiver cannot be asked to pay interest on the mortgage from out of the rents and profits of the properties because the decree-holder in execution of a simple mortgage decree is only entitled to realise his dues, both principal and interest, from the sale proceeds of the mortgaged properties after they have been brought to sale.

(6) Order 40, R. 1, sub-cl. (2) runs as follows:

> "Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

(7) If the question were 'res integra', it would be necessary for this Court to consider the authorities bearing upon that point; but this contention of the learned Advocate General is concluded by the authorities of this Court in the cases of 'HARGOPAL NANDY v. DEONITI PRASAD', 24 Pat 282 and 'AMARNATH v. ABHOY KUMAR', 27 Pat 534.

(8) In 'HARGOPAL NANDY v. DEONITI PRASAD', 24 Pat 282, a receiver was sought to be appointed during execution proceedings and summing up the contentions bearing on this point their Lordships observed as follows:

> "The first three contentions really resolve into this: whether a receiver can be appointed in a suit on a simple mortgage or in execution proceedings taken to enforce the decree for sale."

And after a detailed review of several cases of the different High Courts including the case of 'NRISINGHA CHARAN v. RAJNITI PRASAD', 13 Pat L T 525 on which very great reliance was placed by the learned Advocate General, their Lordships have laid down the law that

> "in a suit on a simple mortgage for sale the Court has jurisdiction to appoint a receiver to take possession of the mortgaged property and to realise the rents, issues and profits of the property. But this does not necessarily lead to the conclusion that a receiver may be claimed by the mortgagee in a suit on a simple mortgage as a matter of right and as a matter of course. Ordinarily, a Court of justice should be disinclined to take the mortgaged property out of the possession of the mortgagor who is entitled to continue in possession of the same until ownership has passed out of his hands by a sale held in execution of the final decree in the action. A receiver in such a suit, or in execution proceedings resulting from a decree in such a suit, can only be appointed in exceptional circumstances when a special case is made out for putting the property in charge of an officer of the Court.....In the present case the execution stage has been reached. So far as the execution stage is concerned, the position is clearer still by virtue of the enactment of S. 51(d) of the Civil P. C. which provides that the appointment of a receiver is one of the modes of execution available to a decree-holder in a proper case. The provisions of O. XL, R. 1 of the Code also were suitably amended by adding the words 'whether before or after decree' in Cl. (a) to bring it in conformity with the new provisions contained in S. 51. It is hardly necessary to point out that the provisions of S. 51(d) have got to be read along with those of O. XL, R. 1 of the Code in order to grant relief to a decree-holder by the appointment of a receiver."

After having settled the question of law raised in that case, their Lordships proceeded to examine the facts of that case and came to the conclusion that

> "the receiver to be appointed in this case would only take charge of the properties pending the conclusion of the execution proceedings ending with the confirmation of the sale."

This decision, in my judgment, cannot be distinguished on any ground whatsoever. The only submission made by the learned Advocate General was that the decision on the question of law was a mere obiter dictum because, in his opinion, the matter could have been decided only upon the facts of that particular case. There is no merit in this contention because the decision on the question of law, apart from the facts of the case, was absolutely essential upon the contentions raised in the case, and it was only after having decided the general question of law that their Lordships had to address themselves to the particular facts of that case. This point of view as taken in the '24 Pat 282 case' has been accepted in another Division Bench decision of this Court in 'AMARNATH v. ABHOY KUMAR', 27 Pat 534. Though the facts of that case were a little different from the facts of the present case inasmuch as, according to the terms of the mortgage bond themselves, there was a provision for the appointment of a receiver on the happening of certain events, this distinction on the facts does not, in my opinion, affect the decision on the question of law.

(9) So far as the present case is concerned, I feel satisfied that it was a fit case where a receiver should have been appointed, as has been pointed out by the Court below. According to the judg-

ment-debtor himself, there is only a net income of Rs. 12,000/- is hardly sufficient to pay off even the annual interest upon the amount of the decree. The application made by the decree-holders on the 10th of April 1947 shows that there is a huge amount of rent due to the landlords decree-holders both in the shape of rent decree and rent suits which were pending at the time besides rents for which suits had not till then been brought and that the judgment-debtor appellant had not chosen to pay any rent to the landlords ever since the mortgage bond was executed in the year 1937 or even from before that date. It appears from paragraph 4 of that application that since 1341, corresponding to the year 1934, no rents had been paid. The Court below, therefore, in my judgment, was fully justified in holding that in this case a receiver should be appointed.

(10) The only serious question that remains to be considered is whether it would be just and convenient in this case to appoint the judgment-debtor himself as Receiver of the properties until they are brought to sale in the execution case. As I have said, the annual net income of the properties is only Rs. 12,000/- and, if a stranger Receiver is appointed a large burden will be thrown upon the estate and the net annual income of Rs. 12,000/- will be reduced considerably. It is suggested that the properties in question consist of some valuable mines and that is mentioned as one of the grounds why it would be advantageous for the judgment-debtor to be appointed a Receiver. There is no allegation, however, by the judgment-debtor that any of these mines of china clay, mica, lead or coal has been prospected. We understand that the Supreme Court will not take a very long time to decide the matter as to whether the properties in execution are liable to be sold or not. Taking all these matters into consideration, I am of the opinion that it would be to the advantage of the estate itself and to the parties concerned if, in place of a stranger, the judgment-debtor himself is appointed Receiver, and I would accordingly appoint the judgment-debtor himself as the Receiver of the properties in execution until those properties are brought to sale in execution of the final decree in the mortgage action. The judgment-debtor will be taken to have been appointed as Receiver of these properties by the Court below who will give suitable directions in regard to the payment of the current rent and cess and other charges of public decrees & also payments towards interest on the amount of the decree as the Court below will consider fit and proper. The judgment-debtor will be liable to be discharged from receivership if he fails to carry out any of the directions of the Court below.

(11) I would further direct the Court below to conclude as speedily as possible the hearing of the valuation matter as also the application for payment of the decree by instalments pending before it.

(12) The appeal is accordingly allowed, but in the circumstances of the case I would order each party to bear his own costs of this Court.

(13) DAS, J.: I agree.

D.R.R. *Appeal allowed.*

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DAS J.

Mt. Suratia and others v. Jailal Thakur and others.

Criminal Ref. No. 49 of 1951, D/- 3-12-1951.

Criminal P. C. (1898), Ss. 145, 146 — Fact of actual possession must be decided — Magistrate unable to come to any finding — Procedure.

In a proceeding under S. 145 the Magistrate is concerned only with the question of actual physical possession and he must determine that question irrespective of the right to possession. He cannot give possession to a party on a finding that he has "a better right of possession". AIR (36) 1949 Pat 146 F B, Foll. (Para 6)

If the learned Magistrate is unable to satisfy himself as to which of the parties was in actual physical possession, or if he decides that none of the parties was in such possession, it is open to him to attach the subject of dispute; but the power to attach given under S. 146 must not be exercised light heartedly. AIR (11) 1924 Pat 804; AIR (27) 1940 Pat 113, Relied on. (Para 7)

Anno: Criminal P. C. S. 145 N. 25, 43; S. 146 N. 2, 4 & 5.

Sayed Hasan, for Reference; S. Anwar Ahmad, Against Respondent.

Cases referred to:

('24) 5 Pat L T 589: (AIR (11) 1924 Pat 804: 25 Cri L J 1295) (Pr 7)

('40) 21 Pat L T 306: (AIR (27) 1940 Pat 113: 41 Cri L J 101) (Pr 7)

('49) 27 Pat 1027: (AIR (36) 1949 Pat 146: 50 Cri L J 299 F B) (Pr 6)

ORDER: This is a reference by the Sessions Judge of Muzaffarpur in which the learned Sessions Judge has recommended that the order of the learned Munsif Magistrate of Muzaffarpur in a proceeding under S. 145, Code of Criminal Procedure, should be reversed in the following circumstances.

(2) The dispute which gave rise to the proceeding under S. 145, Code of Criminal Procedure, related to some lands comprised in two khatas, khata No. 13 and khata No. 20, situate in village Bandhpura, police station Katra in the district of Muzaffarpur. Very shortly stated, the case of the first party before the learned Magistrate was that she, namely, Mt. Suratia, was the mother of Rambilas, who admittedly was the last male owner of the lands. Mt. Suratia said that after the death of her son, she came in possession of the lands, and cultivated them through her bataidars who were other members of the first party. The case of the second party before the learned Magistrate was that Rambilas left a widow, named Mt. Jagtia, and she sold the lands to some of the members of the second party by means of sale deeds executed on the 31st May 1949. Soon after, the local police submitted a report of an apprehension of a breach of the peace, and on that report, first a proceeding under S. 144, Code of Criminal Procedure, and then a proceeding under S. 145, Code of Criminal Procedure, were started.

(3) The learned Munsif Magistrate, who dealt with the proceeding under S. 145 Cr. P. C., held by his order dated the 9th February 1951, that the second party was in possession of the lands in dispute on the date of the order under S. 145 Cr. P. C.

(4) The main ground on which the learned Sessions Judge has recommended that the order of the learned Magistrate should be set aside, is that the learned Magistrate failed to appreciate what was the real question to be decided in a proceeding under S. 145, Code of Criminal Procedure. The learned Magistrate has found that Mt. Jagtia was the widow of Rambilas. Then he said as follows:

"As regards the oral evidence on the point of possession, both the parties have examined a number of witnesses to state about their respective possession over the disputed land. There is practically oath against oath and it would not

be quite safe to come to a finding from the oral evidence alone. Each of them has, more or less, been shaken in their respective cross-examination. We have, therefore, to fall back upon the documents adduced by both the parties and I find that the kebalas (Ex. A series) are dated the 31st May 1949, i.e. over five months before the date of the order under S. 145, Cr. P. C. These are in favour of the members of the second party and have been executed by a person who alone had authority to execute the same. They give a better right to the second party with respect to their possession and title to the disputed lands. There is nothing to show that these kebalas were not acted upon and the second party did not come in possession over the conveyed lands."

(5) It would appear from the extract quoted above that the learned Magistrate failed to appreciate the real question which he had to decide in a proceeding under S. 145, Code of Criminal Procedure. He based his order merely on a finding that "the second party had a better right to possession". This, the learned Magistrate was not authorised to do. Sub-s. (4) of S. 145, Code of Criminal Procedure, makes the position quite clear. It states:

> "The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, etc., and if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject."

(6) It is obvious that what the learned Magistrate has to decide is the fact of actual, physical possession. The question as to how far there can be an investigation of title in a proceeding under S. 145, Code of Criminal Procedure, has been dealt with very carefully in a recent Full Bench decision of this Court in 'S. M. YAQUB v. T. N. BASU', 27 Pat 1027. Sinha, J. as he then was, formulated certain conclusions after an exhaustive consideration of the case law on the subject. I invite the attention of the learned Magistrate to those conclusions, particularly the first conclusion which read:

> "In a proceeding under S. 145 of the Code of Criminal Procedure the Magistrate is concerned only with the question of actual physical possession, and he must determine that question irrespective of the right to possession."

I think that in this case the learned Magistrate has failed to appreciate what is the real question to be decided in a proceeding under S. 145, Code of Criminal Procedure, and the order passed by him is vitiated by such failure.

(7) The case must, therefore, go back on remand to the learned Magistrate for a fresh consideration in the light of the observations made above. The learned Sessions Judge has also pointed out that on the question as to whether Mt. Jagtia was the widow of Rambilas, the learned Magistrate failed to consider an important document, namely Ex. 1/j. The learned Magistrate must consider that document also when hearing the parties afresh. No fresh evidence would be allowed to be led by any of the parties. The matter should be re-heard in the light of the observations made above, particularly in the light of the Full Bench decision, to which I have drawn the attention of the learned Magistrate. I must add a word of caution. If the learned Magistrate is unable to satisfy himself as to which of the parties was in actual physical possession, or if he decides that none of the parties was in such possession, it is open to him to attach the subject of dispute; but the power to attach given under S. 146 Criminal P. C. must not be exercised light heartedly. I invite the attention of the learned Magistrate to the decisions of this Court in 'RAM BAHAL SINGH v. RANG BAHADUR SINGH', 5 Pat L T 589 and 'NAND KISHORE SINGH v. BIGAN LOHAR', 21 Pat L T 306, where the principles on which the power under S. 146 Criminal P. C. is to be exercised, have been clearly laid down.

(8) The result, therefore, is that I accept the reference, set aside the order of the learned Magistrate dated the 9th February 1951, and remand the case for a fresh hearing in the light of the observations made above.

R.G.D. *Case remanded.*

A. I. R. 1952 Patna 234

DAS, J.

Khartar Sao v. Pradip Singh and others.

Criminal Ref. No. 48 of 1951, D/- 4-12-1951.

(a) Criminal P. C. (1898), S. 145 — Possession at the date of preliminary order — Question of title.

In a proceeding under S. 145, Criminal P.C., what the Magistrate has to determine is the fact of actual physical possession at the date of the preliminary order under S. 145 (1). The Magistrate is not entitled to determine the question of title and pass an order on the footing that possession follows title. AIR (36) 1949 Pat 146 (FB) Rel. on. (Para 2)

(b) Criminal P. C. (1898), S. 145 — Subject of dispute.

The subject-matter of dispute must be ascertained definitely and described clearly in the preliminary order. Absence of clear specification of the subject of dispute is a vital defect and the final order passed in the proceeding can have no meaning, unless it is known for certain what is the subject of dispute in respect of which the final order has been passed. (Para 3)

Anno: Criminal P. C., S. 145, N. 13.

U. N. Sinha and B. B. Sen, In support of the reference; S. C. Misra, Against the reference.

Case referred to:

('49) 27 Pat 1027: (AIR (36) 1949 Pat 146: 50 Cri L J 299 (FB)). (Pr 2)

ORDER.: This is a reference made by the Sessions Judge of Bhagalpur in respect of an order passed by the learned Munsiff Magistrate of Banka in a proceeding under Section 145 of the Code of Criminal Procedure. In the view which I have taken, it is unnecessary to state the facts. The facts are clearly stated in the letter of reference of the learned Sessions Judge. The two main grounds on which the learned Sessions Judge has made this reference are: (1) that the learned Munsiff Magistrate failed to appreciate the real question he had to determine in a proceeding under Section 145, Code of Criminal Procedure; and (2) that the proceeding was defective, inasmuch as it gave no details of the subject-matter of dispute. In my opinion, both these grounds are valid and vitiate the order passed by the learned Munsiff Magistrate.

(2) On the question of possession, the learned Munsiff Magistrate expressed himself as follows:

> "As regards possession, possession must be deemed to follow title. I have said that the title of the second party (second party here is a mistake for first party) over this land by virtue of the kebalas is not opposed by any counter title to the land because the kebalas (Exs. A-2 and A-3)

do not relate to Plot No. 1902 in which the disputed land lies. The admission of the second party witnesses especially those who are heirs of the recorded tenants is a clear indicator of the fact that the lands have been long abandoned by the recorded tenants and the same have passed on to the tenure-holder Khagpat Rai. The possession, therefore, must be deemed to be with the first party."

It is clear to me that this is not the kind of determination which is required in a proceeding under Section 145, Code of Criminal Procedure. Sub-section (4) of Section 145, 'inter alia', states:

"The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, etc., and if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject."

What has to be determined in a proceeding under Section 145, Code of Criminal Procedure, was laid down very clearly in a recent Full Bench decision of this Court in 'S. M. YAQUB v. T. N. BASU', 27 Pat 1027, Sinha, J., (as he then was) formulated in that decision certain conclusions, & I invite particular attention of the learned Munsiff Magistrate to conclusion No. (1) which indicates what has to be determined in a proceeding under Section 145, Code of Criminal Procedure. The learned Munsiff Magistrate was in error in thinking that he could pass an order in a proceeding under Section 145, Criminal P.C., on the footing that possession follows title, or that somebody must be deemed to be in possession. What he has to determine, in terms of Sub-section (4) of Section 145, is the fact of actual physical possession at the date of the order under Sub-section (1) of Section 145, Code of Criminal Procedure. It is, clear, therefore that the learned Munsiff Magistrate did not appreciate the real question that he had to determine in the proceeding.

(3) I am also satisfied that the proceeding was materially defective. In his letter of reference, the learned Sessions Judge has referred to various defects. It was not made clear as to whether the dispute related to the lands of Plot No. 1902, or to the right to collect 'mahua' flowers or fruits from some trees standing on the plot. It was not made clear whether the dispute related to the entire area of Plot No. 1902, or to a part of the area only. If the dispute related to the right to collect 'Mahua' flowers or fruits, it was not made clear whether the dispute was about such right in respect of all the trees or some of the trees only of Plot No. 1902. The learned Munsiff Magistrate gave certain boundaries of the subject-matter of dispute. The learned Sessions Judge has noted that it was conceded before him that those boundaries were the boundaries of the entire area of 167 acres and odd comprised within Plot No. 1902. Mr. S. C. Misra, appearing for the opposite party before me, has stated that the boundaries were not the boundaries of the entire 167 acres and odd, but were the boundaries of the lands which were assigned in favour of Mr. Misra's clients by the settlees of the tenure-holder. It is not possible for me, on the materials before me, to say whether the boundaries are correct boundaries of the subject-matter of dispute. It has been stated before me that the dispute related to the entire area of Plot No. 1902. The learned Munsiff Magistrate seemed to think that the dispute related only to 101 acres & odd out of the entire area of Plot No. 1902. These are defects which are vital, and the final order passed in the proceeding can have no meaning, unless it is known for certain what is the subject of dispute in respect of which the final order has been passed.

(4) For these reasons, I would accept the reference and set aside the order of the learned Munsiff Magistrate. If the learned Magistrate is still satisfied that there is an apprehension of a breach of the peace between the parties, he will draw up proper proceedings stating clearly what is the subject of dispute, and then determine the case afresh in the light of the evidence given. In determining the case, he must clearly bear in mind the question that he has to determine in a proceeding under Section 145, Code of Criminal Procedure. I have already drawn the attention of the Magistrate to the recent Full Bench decision of this Court which shows clearly enough what is the principal point for decision in a proceeding under Section 145, Code of Criminal Procedure.

K.S. *Case remanded.*

A. I R. 1952 Patna 235

REUBEN AND NARAYAN, JJ.

Raghubar Mandal Harihar Mandal, Petitioners v. The State of Bihar.

Misc. Judicial Cases Nos. 13 to 19 of 1949, D/- 8-1-1952.

(a) *Sales-tax — Bihar Sales-tax Act (VI (6) of 1944), S. 10(4) — Best judgment assessment — Income-tax Act (1922), S. 23(4).*

The provisions of Sec. 23(4) of the Income-tax Act are analogous to the provisions of Section 10(4) of the Bihar Sales-tax Act. When no return is submitted the assessment has to be made under both these Acts by the Officers concerned to the best of their judgment. There must necessarily be guess-work in the matter and the only thing required is that the guess-work should be honest guess-work. The assessment must be to some extent arbitrary because if the dealer does not furnish correct returns or correct accounts, the assessment must be a pure guess-work. An assessment under Section 10(4) like an assessment under Sec. 23(4) of the Income-tax Act, has to be made upon inadequate materials. If the assessing officer is not satisfied with the account, then after following the procedure laid down he alone has to determine the amount of the assessment and the sum payable. It is a pure question of fact of which he has been made the sole judge, and he is compelled to draw inferences and to consider materials which would not be justified by the Evidence Act. Even the general repute of the man and local knowledge have been regarded as good materials for making the assessment. AIR (24) 1937 P C 133, Foll. (Para 6)

Anno: Income-tax Act, S. 23 N. 4.

(b) *Income-tax Act (1922), S. 23(3) and (4) — Assessment under — Difference.*

In construing Section 23(3) of the Income-tax Act the Court can get no help from S. 13. In substance there is little difference between an assessment under S. 23(3) and an assessment under Section 23(4). In either case the assessment has to be made according to the best of judgment. If the Income-tax Officer makes fair observation of his own in an honest

attempt to arrive at a decision he is perfectly justified in doing so and in acting upon it. If the Income-tax Officer has got materials before him on which he can assess, he must consider them and make an assessment to the best of his judgment. Material is, of course, not the same thing as evidence in a Court of law. The only difference between an assessment under sub-s. (3) in a case in which the accounts have been found to be incorrect and dishonest and an assessment under sub-section (4) is that the Act contemplates a more summary method when the Income-tax Officer is acting under sub-section (4) on account of the deliberate default of the assessee. 3 ITC 48 (All); AIR (26) 1939 Mad 371 (FB), Relied on. (*Para 7*)

Anno: Income-tax Act, S. 23 N. 3, 4.

(c) *Sales-tax — Bihar Sales-tax Act (VI (6) of 1944), S. 10(2)(b) and (4) — Difference.*

If in substance there is no difference between an assessment under S. 23(3) and an assessment under Section 23(4) of the Income-tax Act, on the same principle there is no real difference between an assessment under Section 10(2)(b) and an assessment under Section 10(4) of the Bihar Sales-tax Act. (*Para 7*)

(d) *Sales-tax — Bihar Sales-tax Act (VI (6) of 1944), S. 21(3) — Application to state case in matters of fair figure of assessment — Income-tax Act (1922), S. 66.*

The application to state cases must be discouraged in matters which, on ultimate analysis, are really only questions of a fair figure of assessment. AIR (34) 1947 P C 176, Foll. (*Para 7*)

Anno: Income-tax Act, S. 66 N. 6.

A. B. N. Sinha, Tarkeshwar Nath and V. D. Narayan, for Petitioners; Government Pleader, for the State.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('37) 64 Ind App 102: (AIR (24) 1937 PC 133) (Pr 6)

('38) 1938-6 ITR 36: (AIR (25) 1938 PC 1) (Pr 7)

('47) 1947-15 ITR 445: (AIR (34) 1947 PC 176) (Pr 7)

('28) 3 ITC 48 (All) (Pr 7)

('39) 1939-7 ITR 21: (AIR (26) 1939 Mad 371 F B) (Pr 7)

('31) 9 Rang 281: (AIR (18) 1931 Rang 194 F B) (Pr 6)

NARAYAN, J.: This is a case which has been stated under Section 21(3) of the Bihar Sales-tax Act, 1944. The assessee is a firm which carries on its business at Laheria Sarai, Darbhanga, under the name and style of Messrs. Raghubar Mandal Harihar Mandal and they were assessed to sales-tax for the quarters ending 31-12-1945, 31-3-1946, 30-6-1946, 30-9-1946, 31-12-1946, 31-3-1947 and 30-6-1947. With regard to the quarters ending 31-12-1945, 31-3-1947 and 30-6-1947 the assessment was made under Section 10(4) of the Act and with regard to the remaining quarters under Section 10(2)(b) of the Act. There was an appeal preferred to the Commissioner of Sales-tax against these assessments, but the appeal was dismissed. The Board of Revenue was then moved in revision, but by its order dated 31-7-1948 it rejected the petitions in revision. The Board was then moved with the request to refer the cases to the High Court on two questions, but by its order dated 10-12-1948 it refused to make a reference to this Court.

The assessee then moved this Court, and by its order dated 27-4-1949 passed in miscellaneous Judicial Cases Nos. 13 to 19 of 1949, this Court asked the Board of Revenue to state a case on the following point formulated by it:

> "Whether the Sales-tax Officer is entitled under Section 10(2)(b) to make an assessment on any figure of gross turnover without giving any basis to justify the adoption of that figure.'

A slight inaccuracy has crept in this order, inasmuch as, as I have already pointed out, three of the assessments were made not under Section 10(2)(b) but under Section 10(4) of the Act. The Board of Revenue has reported that the assessee firm was continually engaged in the

> "dishonest practice of suppressing some of their transactions from their account-books, and for this purpose they adopted more than one device even going to the sinful extent of disposing of some of the silver as having gone to the temple."

The Board of Revenue thinks, that in such circumstances the Sales-tax Officer was justified in rejecting the entire account for all the quarters concerned as false and unreliable and "in making determination according to the best of his judgment for each and every one of these quarters". The Board of Revenue was not inclined to hold that there had been any gross over-assessment.

(2) Before I answer the question formulated I should like to point out in brief as to how the assessment with regard to each of these quarters was made. With regard to the first quarter, which is the quarter 1-10-1945 to 31-12-1945, the dealer did not furnish any return and he produced his books of account in response to the notice issued to him under S. 10(4) of the Act. The books of account showed a gross turnover of Rs. 72,762/- only, and the Sales Tax Officer made the assessment on the basis of a gross turnover of Rs. 3,00,000/-. In his order he says that there were irregularities in the account-books which could not be satisfactorily explained and that through enquiry from private sources it had appeared to him that the dealer had imported by rail large quantities of bullion in the names of his confederates. The Sales Tax Officer says that the dealer had adopted several devices for concealing almost all his large imports of bullion and their sales and that

> "it is with enormous labour that the few above mentioned irregularities and dexterous devices of concealment have been detected."

(3) With regard to the quarter 1-1-1946 to 31-3-1946 the assessment was made under S. 10 (2) (b) of the Act, on a gross turnover of Rs. 3,00,000/-, though the return submitted showed a gross turnover of Rs. 1,10,700/15/0 only. The returns were found to be untrustworthy, and in the order with regard to the quarter also it had been stated that it had

transpired after confidential enquiries that the dealer had imported very large quantities of bullion in his own name and in the names of several confederates. A certain purchase was said to have been wrongly shown as purchase on account of temple.

With regard to the third quarter 1-4-1946 to 30-6-1946, the assessment was made on a gross turnover of Rs. 4,00,000/- though the return had indicated a gross turnover of Rs. 2,48,370/- only. The dealer produced his accounts in verification of the return which showed a gross turnover of Rs. 1,48,204/- as against Rs. 2,48,370/- as shown in the return. These discrepancies and differences were not explained satisfactorily and hence the return and the accounts were rejected as unreliable. With regard to the quarter 1-7-1946 to 30-9-1946, it is stated that the return was not submitted in time and that when the dealer was proceeded against under S. 10(4), after the expiry of about one year from the due date of furnishing the return, the return was presented showing a ridiculously low turnover. In the order with regard to this quarter also it is said that the accounts were not properly kept by the dealer. The assessment was made on a gross turnover of Rs. 3,00,000/- though the return indicated a gross turnover of Rs. 68,445/12/0 only.

(4) With regard to the quarter 1-10-1946 to 31-12-1946, the assessment was made under S. 10 (2) (b) of the Act, on a gross turnover of Rs. 3,00,000/- though the return showed a gross turnover of Rs. 48,519/15/0 only. The papers produced were found to be unreliable and the return was not accepted as correct.

(5) With regard to the quarter 1-1-1947 to 31-3-1947 and the quarter 1-4-1947 to 30-6-1947, the assessment was made under S. 10(4) of the Act, after the accounts were found to be incorrect, the assessment with regard to these two quarters having been made on the gross turnover of Rs. 3,00,000/- and Rs. 4,00,000/- respectively.

(6) The dealer has no case whatsoever so far as the first, the sixth and seventh quarters are concerned with regard to which the assessment was made under S. 10(4) of the Act. The principles laid down by the Judicial Committee in 'COMMISSIONER OF INCOME-TAX, U P & C P v. BADRIDAS RAMRAJ SHOP', 64 Ind App 102 (P C), would apply so far as these assessments are concerned. Their Lordships observed as follows in this case:

"Their Lordships find it impossible to extract these requirements from the language of the Act, which after all is, in such matters, the primary and safest guide. The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly or vindictively or capriciously, because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by & assessments of the assessee, & all other matters which he thinks will assist him in arriving at a fair and proper estimate and though there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense, too, the assessment must be to some extent arbitrary. Their Lordships think that the section places the officer in the position of a person whose decision as to amount is final and subject to no appeal; but whose decision, if it can be shown to have been arrived at without an honest exercise of judgment, may be revised or reviewed by the Commissioner under the powers conferred upon that official by S. 33."

It need hardly be pointed out that the provisions of S. 23(4) of the Income-tax Act are analogous for our present purpose to the provisions of S. 10(4) of the Bihar Sales Tax Act. When no return is submitted the assessment has to be made under both these Acts by the Officers concerned to the best of their judgment, and their Lordships have tried to explain how the judgment has to be formed. There must necessarily be guess-work in the matter and the only thing required is that the guess-work should be honest guess-work. Their Lordships' observation that the assessment must be to some extent arbitrary is an important observation, because if the dealer does not furnish correct returns or correct accounts, the assessment must be a pure guess-work. An assessment under Section 10 (4) like an assessment under S. 23(4) of the Income-tax Act, has to be made upon inadequate materials.

Their Lordships of the Judicial Committee agreed with the views expressed by the High Court at Rangoon in 'ABDUL BARI v. COMMISSIONER OF INCOME-TAX, BURMA', 9 Rang 281 (F B), in which the following observation of Lord Mackenzie was quoted:

"With regard to the practical difficulty of finding out the amount of profits upon which the assessment is to be laid, I can only say this, that it is not necessary to arrive at any satisfactory conclusion upon that matter, because it is not a matter with which the Court is concerned. If the Act of Parliament says the amount of profits is to be ascertained, ascertained they must be whether that can be done in a satisfactory method or not."

In this case the several orders of the Sales Tax Officer very clearly go to show that this dealer had resorted to several dishonest devices. Mr. A. B. N. Sinha, who appeared before us on behalf of this dealer made a grievance that the assessing officer referred to the accounts of previous years for coming to the conclusion that the accounts submitted for these questions were not correct and that the import of bullions had not been shown in the papers. In the order with regard to the first quarter 1-10-1945 to 31-12-1945, there is mention of the accounts of 1353 fasli, and it is noted that the purchases of silver were not recorded in the purchase account-book of the dealer but "had been carried underground by showing in the account of temple." I need hardly repeat that if the assessing officer is not satisfied with the account, then after following the procedure laid down he alone has to determine the amount of the assessment and the sum payable. It is a pure question of fact of which he has been made the sole judge, and he is compelled to draw inferences and to consider materials which would not be justified by the Indian Evidence Act. Even the general repute of the man and local knowledge have been regarded as good materials for making the assessment.

(7) The next question is as to whether the assessment with regard to the remaining four

quarters made under S. 10 (2) (b) of the Act, is justified. It is necessary here to refer to some of the sub-sections of S. 10. Sub-section (1) lays down that if the Commissioner is satisfied without requiring the presence of a registered dealer or the production by him of any evidence that the returns furnished in respect of any period are correct and complete, he shall assess the amount of tax due from the dealer on the basis of such returns. This, of course, is not the case here. Sub-section (2) (a) lays down that if the Commissioner is not satisfied without requiring the presence of a registered dealer who furnished the returns, he shall serve on him a notice requiring him on a date and at a place to be specified therein, either to attend in person or to produce or to cause to be produced there any evidence on which such dealer may rely in support of such returns.

And sub-section (2) (b) says that on the day specified in the notice or as soon afterwards as may be, the Commissioner, after hearing such evidence as the Commissioner may require on specified points, shall assess the amount of tax due from the dealer. Sub-section (4) will be applicable when the registered dealer does not produce any return by the prescribed date. The learned counsel contended that sub-section (2) (b) of S. 10, cannot be regarded as analogous to sub-section (3) of S. 23 of the Indian Income-tax Act, inasmuch as in S. 13 of the Income-tax Act, there is a proviso which lays down that if the method of accounting adopted by the dealer is such that profits and gains cannot properly be deducted therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine.

In my opinion in construing S. 23(3) of the Indian Income-tax Act, we can have no assistance from the wordings of S. 13 of the Act. As was pointed out by a Full Bench of the Madras High Court in 'SUBBAYYA v. COMMR., OF INCOME TAX, MADRAS', (1939) 7 I T R 21 (Mad) (F B), Section 13 adds nothing to and takes nothing away from S. 23(3), and that all that the section says is this that if the method of accounting employed by the assessee is a method which does not properly disclose the income, profits and gains of the assessee the Income-tax Officer, can adopt his own method. In 'COMMISSIONER OF INCOME TAX, BOMBAY v. SARANGPUR COTTON MANUFACTURING COMPANY LTD., ALLAHABAD', 1938-6 I T R 36 (P C), their Lordships of the Judicial Committee observed that the section relates to a method of accounting regularly employed by the assessee for his own purposes and does not relate to a method of making up the statutory return for assessment to income-tax. Their Lordships further pointed out that the section clearly makes such a method of accounting a compulsory basis of computation, unless, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom and that it is misleading to describe the duty imposed on the Income-tax Officer, under the proviso to S. 13 as a discretionary power.

In face of these authoritative pronouncements we would be disinclined to follow any decision in which any contrary observation might have been made. Our considered opinion, therefore, is that in construing S. 23(3) of the Income-tax Act, we can get no help from S. 13 of the Act. And we find ourselves in respectful agreement with the view that was taken by the Madras High Court in the case of 'SUBBAYYA', (1939) 7 I T R 21 (MAD) (FB). This case is also an authority in support of the proposition that in substance there is little difference between an assessment under S. 23(3) of the Income-tax Act, and an assessment under S. 23 (4) of that Act. In either case the assessment has to be made according to the best of judgment. Whether it is an assessment under S. 23(3) or an assessment under S. 23(4) the assessment must be to the best of judgment and it must be based on a consideration of the facts relating to the income of the assessee.

The principle, as indicated by their Lordships of the Madras High Court, applies equally when the Income-tax Officer is acting under sub-section (3) and if the Income-tax Officer has got materials before him on which he can assess, he must consider them and make an assessment to the best of his judgment. Material is, of course, not the same thing as evidence in a Court of law. We respectfully agree with their Lordships' view that the only difference between an assessment under sub-section (3) in a case in which the accounts have been found to be incorrect and dishonest and as assessment under sub-section (4) is that the Act contemplates a more summary method when the Income-tax Officer is acting under sub-section (4) on account of the deliberate default of the assessee.

As pointed out by the Allahabad High Court in 'BHAGAT HALWAI', 3 I T C 48 (All), S. 23 (1) and S. 23 (2) deal with the two cases in which, on the one hand, the Income-tax Officer is satisfied with the return and in which, on the other hand, he is not satisfied with the return, and in each case, after following the procedure laid down, he, and he alone is to determine the amount of the assessment and the sum payable. It is only if he is dissatisfied with the return that he has to issue notice to the assessee and the determination has to be made after hearing the evidence produced by the assessee or after considering such other evidence as the Income-tax Officer may require on specified points. As was observed by their Lordships of the Allahabad High Court, it is to some extent a private inquisition, it is confidential, it is not supposed to be disclosed to the public and it is certainly not open to review, especially, because frequently, the Income-tax Officer is compelled to draw inferences and to consider evidence which might not be justified by the Evidence Act.

I respectfully agree with the observation of a well-known Judge in England, quoted with approval in this Allahabad case, that there is no rule of law compelling a Judge to accept evidence, even though it is uncontradicted, which he believes to be a pack of lies, and, similarly, if the Income-tax Officer makes fair observation of his own in an honest attempt to arrive at a decision, he is perfectly justified in doing so and in acting upon it. I further agree with their Lordships' view that the sooner it is understood that these are questions of fact the better it is and that the application to state cases must be discouraged in matters which, on ultimate analysis, are

really only questions of a fair figure of assessment. The Privy Council decision in 'MALIK DAMSAZ KHAN v. COMMR. OF INCOME-TAX, PUNJAB & N.W.F.P.', (1947) 15 I T R 445 (P C) also adds strength to the view which I have taken. If in substance there is no difference between an assessment under S. 23 (3) and an assessment under S. 23 (4) of the Income-tax Act, on the same principle there is no real difference between an assessment under S. 10 (2) (b) and an assessment under S. 10 (4) of the Bihar Sales Tax Act.

(8) In the result, the question raised is answered in the affirmative. There will be no order for the costs of this proceeding.

(9) REUBEN, J.: I agree.

D.H. *Answer in the affirmative.*

A. I. R. 1952 Patna 239

LAKSHMIKANTA JHA C. J. AND REUBEN J.

Sm. Ramkumari Devi and others, Appellants v. Hari Das Mukherji and others, Respondents.

A. F. A. D. No. 1816 of 1950, D/- 21-12-1951.

(a) *(Bengal) Cess Act (IX (9) of 1880), S. 41 — Liability to pay cess — Contract exempting party from statutory liability under S. 41 — Construction — Principles.*

Though the liability to pay cess is statutory one, it is now well settled that as between themselves a landlord and his tenant can contract themselves out of the provisions of S. 41, Bengal Cess Act. Two important principles to be observed in determining this question are: Firstly, the contract under which exemption from the statutory liability is claimed must be strictly construed against the claimant and it must appear from its terms, beyond the possibility of any dispute, that the parties intended to vary the liability as imposed by the statute. In the second place, the construction to be placed on the deed ought to be such as will render it reasonable rather than unreasonable and will make it just to both the parties rather than unjust to one of them. 8 Cal L J 525, Rel. on. (Para 5)

'Held' on a construction of the Kabuliat in question that there was nothing in the Kabuliat expressly exempting the mokarraridar from his statutory liability to pay cess. (Para 6)

(b) *Evidence Act (1872), S. 115 — Estoppel — Landlord and tenant — Person entitled to realise rent and cess recovering less amount than is legally due — When operates as estoppel.*

The right to realise cess, like the right to realise rent, accrues periodically and, if the person entitled to cess for any particular period chooses, either deliberately or through misapprehension of his right, to accept in satisfaction of his dues less than he is entitled to, his act will not estop him from claiming his full dues for a subsequent period. The realisation for a particular period of a lesser amount than is due will not, subject to the law of limitation, prevent the person entitled from realising by suit so much of his legal dues as have not been paid. (Para 7)

Anno.: Evi. Act, S. 115, N. 35.

(c) *Tenancy Laws — Bihar Tenancy Act (VIII) (8) of 1885), S. 3 and Sch. III, Art. 2 — Mokarrari lease for purpose of collection of rents — Suit for recovery of arrear of cess — Limitation —Limitation Act (1908), Arts. 110, 116 and 120.*

Whether a lease is governed by the Bihar Tenancy Act or the Transfer of Property Act is determined by the dominant purpose of the lease. AIR (31) 1944 Pat 87 FB, Rel. on. (Para 8)

The proprietors leased their entire interest in the four annas share in a village parting with practically all their proprietary rights for a small fixed rent inclusive of cess and put the mokarraridar in their own place. The dominant purpose for the lease was the Collection of agricultural rents and the bringing of land under cultivation either Khas or by settlement with tenants formed a minor part of the intention. The proprietors brought a suit for recovery of arrears of rent and cess due under the lease.

'Held' that (i) the lease was not one governed by the Bihar Tenancy Act. The cess claimed in the suit could not be deemed to form part of the rent of the land in suit under S. 3 of that Act and therefore the suit in respect of the cess was not governed by Sch. III, Art. 2, Bihar Tenancy Act. (Paras 8, 12)

(ii) The liability to pay cess being a statutory liability and not a contractual liability, the suit was not governed either by Art. 110 or Art. 116 but by the residuary Art. 120 of Limitation Act in the absence of any specific provision in the Limitation Act. (Paras 10, 13)

Anno.: Lim. Act, Art. 120, N 43; Art. 110, N 2.

(d) *(Bengal) Cess Act (IX (9) of 1880), S. 47 — 'Manner', meaning of.*

Though under S. 47, Bengal Cess Act arrears of cess are recoverable "in the same manner and under the same penalties as if the same were arrears of rent, the word 'manner' will not necessarily attract the rule of limitation in Art. 110, Limitation Act.

Rent may be recovered in various ways. Where the contract between the parties is governed by the Bihar Tenancy Act it can be recovered by a suit instituted, in some part of the State, in the ordinary Civil Courts and, in other parts of the State, in the Revenue Courts. In certain circumstances it can be recovered under the provisions of the Public Demands Recovery Act. Where the contract is governed by the Transfer of Property Act, the rent may be recovered by suit in the ordinary Civil Courts, and in certain circumstances in the Courts of Small Causes. The word "manner" may reasonably be understood to cover these possibilities according to the nature of the principal contract between the parties. AIR (4) 1917 Pat 485, explained. (Para 9)

Dinesh Chandra Varma, for Appellants; S. N. Banerji, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('93) 20 Cal 51 F B (Pr 10)
('08) 12 Cal W N 154:(8 Cal L J 525) (Pr 5)
('37) I L R (1937) Mad 498:(AIR (24) 1937 Mad 217 F B) (Pr 10)
('16) 1 Pat L J 214:(AIR (4) 1917 Pat 485) (Pr 9)
('35) AIR (22) 1935 Pat 305: (155 Ind Cas 96) (Pr 5)
('44) 23 Pat 185:(AIR (31) 1944 Pat 87 F B) (Pr 8)
('45) 24 Pat 307:(AIR (32) 1945 Pat 417) (Pr 5)

REUBEN, J.: This appeal by the defendants is directed against a decision of the Subordinate Judge, Monghyr, confirming a decision of the Munsif, Begusarai, decreeing a suit for recovery of arrears of rent for the period Chait 1354 to Asarh 1356 Fasli and of cess for the period from 1943 4th quarter to 1949 2nd quarter in respect of a mokarrari tenure held by the appellants under the plaintiffs respondents in seven villages lying in tauzi No. 1002/47. The tenure forms portion of a larger mokarrari tenure created by a registered lease on the 13th August, 1916 in respect of four annas share in twelve villages appertaining to taluka Mananpur. The defendants acquired the mokarrari interest in these seven villages on the 16th September, 1943 by transfer from the successors of the original mokarraridar. Under the deed of transfer, the mokarrari jama of the transferred interest was fixed at Rs. 829-4-6 including cess. Since the transfer, the plaintiffs have treated the transferred interest as a separate mokarrari tenure and have been recovering the jama accordingly. The Courts below have found that when the tenure was created in 1916 the cess payable in respect of these villages was Rs. 48-12-6 and that by increase at successive revisions of the cess valuation in the years 1921-22, 1944-45 and 1945-46 the cess has been gradually raised to Rs. 352-7-0. They have decreed rent on the basis that the fixed rent payable is Rs. 780-8-0, that is to say, the jama of Rs. 829-4-6 less the cess in 1916. They have decreed the arrears of cess according to the amounts assessed in the cess revaluation proceedings.

(2) Three points have been urged: 'Firstly', that under the terms of the mokarrari deed of 1916 the plaintiffs are entitled to realise only Rs. 829-4-6 inclusive of cess:

'Secondly', that having realised rent and cess at that rate for certain years in suit, the plaintiffs cannot realise arrear cess at a higher rate for those years; and

'Thirdly' that the period of limitation for recovery of arrears of cess is three years and arrears sued for and arising prior to that period are not recoverable.

(3) The relevant passages in the mokarrari kabuliyat relating to the jama are as follows:

"Therefore, I, the executant,.....got executed an istemrari patta.....after having fixed and got fixed an uniform annual jama of Rs. 1,693-1-4½ in the current royal coins..... including public road cess fixed from all sources.....I, the executant, in the capacity of a mokarraridar shall appropriate the entire profit of the above fixed rent of the shares in the aforesaid istemrari mokarrari mauzas which may accrue therefrom at present or in future. The said proprietors do not have and shall not have any ground for enhancement of rent etc. (wagairah) save and except getting the above fixed rent (jama mukarrar).....Be it also noted that Government revenue in respect of the mokarrari villages mentioned in this deed is payable at a time, together with the taluka Manunpur. The Government demand cannot be divided. Therefore the aforesaid proprietors have been made responsible for the payment of the Government demand. If per chance, I, the executant be compelled to pay any Government demand in respect of the said taluka Manunpur, with a view to safeguard the mokarrari right, then, I, the mokarridar shall be competent to realise the same by setting it off against the rent of the mokarrari or by instituting a suit in Court."

(4) Under the Cess Act, 1880 (Bengal Act IX of 1880) all immovable property is liable to pay a local cess assessed on its annual value at a rate which may be changed from year to year. The manner in which lands are to be valued for assessing the cess is prescribed in the Act, which contains also provisions for periodical revaluation. For the purpose of valuation interests in land are divided into three classes;

'Firstly'; Holders of estates, which would include proprietors paying revenue to Government;

'Secondly'; Cultivating raiyats, meaning thereby persons cultivating land and paying therefor rent not exceeding Rs. 100/- per annum; and

'Thirdly'; Tenure-holders, which class includes persons holding any other interest in land. As it would not be convenient for the State to collect the cess dues from all these persons, an arrangement is made whereby each proprietor will pay to Government the entire cess due in respect of the land in his estate & recover the cess paid by him from the tenure-holders and cultivating raiyats immediately holding under him. The tenure-holders similarly will recover from the persons holding immediately under them, and these persons in their turn will recover from their tenants, and so on till ultimately recovery has been made from all the persons directly holding the land. At each stage some deduction is made from the payment made to Government or to the superior landlord to meet the cost of collection. The particulars of the proportions in which the cess is to be realised and paid are contained in S. 41 of the Act.

(5) It appears from this that the liability to pay cess is a statutory one. It is now well settled that as between themselves a landlord and his tenant can contract themselves out of the provisions of S. 41. The question is whether they have done so in the present case. Two important principles to be observed in determining this question were enunciated in 'MOHANAND SAHAI v. MT. SAYEDUNNISSA BIBI', 12 Cal W N 154. Firstly, the contract under which exemption from the statutory liability is claimed must be strictly construed against the claimant and it must appear from its terms, beyond the possibility of any dispute, that the parties intended to vary the liability,

as imposed by the statute. In the second place, the construction to be placed on the deed ought to be such as will render it reasonable rather than unreasonable and will make it just to both the parties rather than unjust to one of them. Their Lordships pointed out that under the construction sought to be put on the contract the mokarridar would get the benefit of an increase in the value of the land while the proprietor would have to bear the burden of the extra cess assessed, and possibly the absurdity might be reached of the increase in cess payable by the proprietor absorbing the whole of the rent and cess recoverable by him. In the mokarrari lease which their Lordships were considering the clause fixing the rent ran as follows:

"At varying jamas, to wit, on an annual uniform jama of Rs. 1,580/- from 1289 to 1291 (Fasli) and at an annual uniform consolidated jama of Rs. 1,585/- of the current coin from 1292 (Fasli) together with abwab, such as, salami for Dusserah and Holi, Purkha, Sair, Road Cess, Public Works Cess, & etc., all of which are included in that very sum of Rs. 1,585/-."

Their Lordships pointed out that there was nothing in the lease, expressly or by necessary implication, exempting the lessee from liability for the increased burden in the event of an increase of the cess payable. In the absence of provision in the contract for such a contingency, they held that the rights of the parties must be regulated by the statute. These principles were applied and the decision in 'MOHANAND SAHAI', 12 Cal W N 154, was followed in 'GOURCHANDRA v. SARAT KUMARI DEBI', AIR (22) 1935 Pat, 305 and again in 'BALWANT v. BISWANATH', 24 Pat 307.

(6) The same considerations apply to the contract before us. There is nothing in the kabuliyat expressly exempting the mokarraridar from his statutory liability. The kabuliyat provides that "the profit of the above fixed rent of the shares in the aforesaid istimarari mokarrari mauzas" will go to the mokarraridar, and the proprietors will not be entitled, on account of such increase of "rent etc. (wagairah)", to anything above the "fixed rent (jama mukarrar)." It is evident that the 'profit' spoken of is the increasing amount by which the mukarraridar's income from the mokarrari villages is expected to exceed the fixed rent payable by him. The vague word "wagairah" refers to sources of income in the mokarrari villages other than rent. These expressions certainly do not exempt the mokarraridar from his statutory liability to pay cess. And the words "jama mukarrar" do not necessarily restrict the proprietor's statutory right to recover cess. In the subsequent passage, which I have reproduced above, it is noticeable that the provision made is confined to Government revenue. The mokarraridar's interest would not be affected by a sale for arrears of cess. Hence, a similar provision regarding cess was not required. In these circumstances, I have no doubt that the Courts below have rightly interpreted the contract as not excusing the mokarraridar from his statutory liability to pay cess.

(7) It has been faintly urged that, since up to 1943 the proprietors have been realising rent and cess at the rate of Rs. 829-4-6, they cannot now sue for cess at a higher amount. There is no force in this argument. The right to realise cess, like the right to realise rent, accrues periodically and, if the person entitled to cess for any particular period chooses, either deliberately or through misapprehension of his right, to accept in satisfaction of his dues less than he is entitled to, his act will not estop him from claiming his full dues for a subsequent period. This reply would cover also the second point urged on behalf of the appellants. The realisation for a particular period of a lesser amount than is due will not, subject to the law of limitation, prevent the person entitled from realising by suit so much of his legal dues as have not been paid.

(8) This brings me to the third point. Here the argument takes two alternative forms. Firstly, it is argued that the lease is governed by the Bihar Tenancy Act and, under the definition of "rent" in S. 3 of that Act, cess is rent for the purposes of Art. 2 of the Third Schedule to the Act. Whether a lease is governed by the Bihar Tenancy Act or the Transfer of Property Act is determined by the dominant purpose of the lease 'MAHESHWARI PRASAD v. MANRAJO KUER', 23 Pat 185 (F B). We find from the kabuliyat that the proprietors leased their entire interest in four annas share in the twelve villages, including

"malwajahat, sair wajahat, all habab, jalkar, bankar, ahar, pokhar, reservoir, pond, mud-built and brick-built wells, toddy palm trees, and date palm trees, orchard of mango, mahua and jack fruit trees, bail, barhal, sheesham, etc., fruit bearing and non-fruit bearing trees, khadhore, beswandh, mutaharfa, bardana, korauncha, keyani, dalali hat, bazars, sair, saltpetre, populated & unpopulated houses of the tenants, all zamindari rights appertaining thereto, excluding the excise mahal, the brahmotar, sheotar and faqirana lands etc., and those excluded by religion and items forbidden by Government, the lands of the road of the railway line Simria and Kathiar lying in the said mauzas."

The lease empowered the mokarridar to

"cultivate indigo etc., or construct houses or orchards in plant, fruit bearing and non-fruit bearing trees and the bamboo groves, make collection of rent in respect of the raiyati thika bhauli and sairat lands etc."

It is evident that the proprietors were practically parting with their proprietary rights for small fixed rent. They put the mokarraridar in their own place and the collection of agricultural rents and the bringing of land under cultivation either khas or by settlement of it with tenants, formed a minor part of the intention. The lease, therefore, is not one governed by the Bihar Tenancy Act.

(9) The alternative form of argument relies on S. 47 of the Cess Act, 1890. It points out that under this section arrears of cess are recoverable "in the same manner and under the same penalties as if the same were arrears of rent", and urges that the word "manner" covers limitation and attracts the application of Art. 110 of the Schedule to the Limitation Act, as there is no registered contract under which the mokarrari tenure of the seven villages was created. Reliance is placed in support of this argument on 'MAHANT KRISHNA DAYAL v. MT. SAKINA BIBI', 1 Pat L J 214, as an authority, that limitation is a matter of procedure It is noticeable that that decision is concerned with

a rule of limitation prescribed by the Civil P. C. and not with one prescribed by the Limitation Act. The question before their Lordships was whether the 12 years limitation in S. 48 of the Code of 1908 applies to the execution of a decree passed before the Code was enacted. In answering the question in the affirmative, Chamier C. J., accepted the view of the Judges of the Calcutta High Court that

"the decree-holder was entitled to execute the decree in accordance with the provisions of the Code of 1882 as long as it was in force, but had no vested right in the procedure prescribed by that Code."

Jwala Prasad, J., in agreeing with him observed

"the rule that no order for the execution of a decree shall be made after 12 years is a rule of procedure and is a part of the Procedure Code."

It is clear, therefore, that their Lordships did not intend to rule that limitation is always to be regarded as a matter of procedure. Rent may be recovered in various ways. Where the contract between the parties is governed by the Bihar Tenancy Act it can be recovered by a suit instituted, in some parts of the State, in the ordinary Civil Courts and, in other parts of the State, in the Revenue Courts. In certain circumstances it can be recovered under the provisions of the Public Demands Recovery Act. Where the contract is governed by the Transfer of Property Act, the rent may be recovered by suit in the ordinary Civil Courts, and in certain circumstances in the Courts of Small Causes. The word "manner" may reasonably be understood to cover these possibilities according to the nature of the principal contract between the parties.

(10) So far as limitation is concerned, however, in the absence of special provision relating to it, it must be determined under the provisions of the Indian Limitation Act, 1908. Article 110 and Art. 116 of the Schedule to the Act were referred to at the Bar, but neither of them is applicable. They relate to liabilities arising out of contract. I have held above that the liability for cess in this case is statutory. There being no specific provision in the Act for a suit for arrears of cess, it will be governed by the residuary Article, Art. 120 of the schedule to the Act. A case directly in point is 'RAJA OF VIZIANAGRAM v. DINDI CHINA THAMMANNA', I L R (1937) Mad, 498 Vide also 'SECRETARY OF STATE v. GURU PROSHAD', 20 Cal 51 (FB).

(11) For these reasons, I consider that there is no merit in the appeal and it must be dismissed with costs.

(12) LAKSHMIKANTA JHA, C. J.: I agree. The suit is for recovery of cess due from the defendants from the last quarter of 1943 to the second quarter of 1949. The plaintiffs' claim for a period in excess of three years would be barred if the amount claimed be deemed to be 'rent' either within the meaning of the Bihar Tenancy Act or within the meaning of the Limitation Act. On a construction of the deed, under which the leasehold was created and relevant portions of which have been quoted by my learned brother, there is no manner of doubt in my mind that a lease for the purpose of collecting rent was created and not an agricultural lease for purposes of cultivation. If there was no agricultural lease, the cess claimed in the suit cannot be deemed to form part of the rent of the land in suit and the contention of the defendants that the special rule of limitation under Art. 2 of the third schedule of the Bihar Tenancy Act applies must fail.

(13) The next question is whether cess can be deemed to be rent within the meaning of the Limitation Act. I may observe that the word 'rent' has not been defined in the Limitation Act although there is provision in Art. 110 providing for a period for the realization of rent. The Limitation Act provides different periods of limitation for different classes of cases and for different kinds of claims. Therefore, it is for the defendants to show under what specific provision of the Limitation Act the suit could be brought apart from Art. 120 which is the residuary Article applicable to all cases which cannot be brought under one or other of the different Articles of the Limitation Act. The learned Counsel for the appellants tried to bring 'cess' within the meaning of 'rent', but I am unable to accept this contention. 'Rent' always presupposes a contractual obligation to compensate the grantor for the loss of the use of the property of which he is deprived under a contract for the benefit of the grantee. 'Cess' cannot be said to be a liability incurred under any contractual obligation: it is a statutory liability imposed under the provisions of the Cess Act and may be enhanced from time to time under the provisions of the Act. The liability for payment of cess being a statutory obligation and there being no specific provision in the Limitation Act prescribing a period of Limitation for such cases, Art. 120 must apply and govern the present case. Therefore, in my opinion, no part of the claim is barred by Limitation.

K.S. *Appeal dismissed.*

A. I. R. 1952 Patna 242

RAMASWAMI, J.

Gulzar Chamar, Petitioner v. Uggam Chamar and others, Opposite Party.

Criminal Revision No. 892 of 1951, D/- 8-1-1952.

Criminal P. C. (1898), S. 439 — Revision by private party against acquittal — No discussion by lower Court of prosecution evidence or how it arrived at its finding of existence of right of private defence — No interference in revision.

An application in revision by a private party against an order of acquittal cannot be entertained except on some broad ground of exceptional requirement of public justice. The fact that the lower Court has not adequately discussed the prosecution evidence as to how the occurrence took place nor how he reached the finding that the accused acted in the right of private defence, is not such a ground for exceptional requirement of public justice. AIR (11) 1924 Pat 283; AIR (13) 1926 Pat 176; AIR (2) 1915 Cal. 388, Rel. on. (Para 3)

Anno: Criminal P. C., S. 439, N. 12.

Ganesh Sharma and Medni Prasad Singh, for Petitioner; S. Safar Imam; for Opposite Party.

Cases referred to:

('15) 42 Cal 612: (AIR (2) 1915 Cal 388: 16 Cri L J 122) (Pr 3)

('23) 2 Pat 708: (AIR (11) 1924 Pat 283: 25 Cri L J 446) (Pr 3)

('26) 5 Pat 25: (AIR (13) 1926 Pat 176: 27 Cri LJ 235) (Pr 3)

ORDER.: This rule is directed against the judgment of the Additional Sessions Judge of Saran acquitting the opposite party of certain criminal charges.

(2) According to the prosecution case there was a dispute between Gulzar and Doma Chamar over a nad alleged to have been fixed near the house of Gulzar. On the date in question Mt. Sonia tied an ox and a buffalo to the nad but Doma untied the cattle and drove them away. Mani Chamar again took the cattle and tied them to the nad whereupon Doma fetched a Kudali and attempted to take out the pegs of the nad. Mani Chamar objected and Doma thereupon assaulted him with Kudali on his head. For the prosecution it was said that Nagina and Ramjas assaulted Nathuni who sustained a fracture. The accused also was said to have assaulted Gulzar with lathi who sustained a fracture of the right arm. Chedi son of Gulzar was assaulted with Kudali and his nose and ear were cut.

First information report was lodged at the thana and the police after investigation submitted chargesheet. According to the defence Gulzar and Chedi had made an attempt to forcibly enter the house of Doma upon which there was an altercation and assault. The accused pleaded right of private defence. The trying Magistrate convicted the opposite party of the charges framed but in appeal the Sessions Judge acquitted the opposite party on the ground that right of private defence has been made out.

(3) In support of this rule, Mr. Ganesh Sharma contended in the main that the judgment of the appellate Court was not in accordance with law since there is no discussion of the evidence adduced on behalf of the parties nor does it contain reasons for holding that the right of private defence has been made out. The argument of the learned Counsel has considerable force since the Additional Sessions Judge has not adequately discussed the prosecution evidence as to how the occurrence took place nor how he reached to the finding that Doma was in possession of the house in dispute and the prosecution party had wanted to take forcible possession of the said house. Even though the complaint of the learned Counsel on behalf of the petitioner is justified I am not prepared to hold that this is a proper case in which High Court should interfere in its revisional jurisdiction. In the first place, it is important to notice that it was open to the petitioners to move the local Government to prefer an appeal under Section 417, Criminal P.C. No such appeal has been preferred by the local Government and there appears to be no reason why a private party should be encouraged to move High Court directly in revision against the order of Additional Sessions Judge. In the second place, an application in revision by a private party against an order of acquittal cannot be entertained except on some broad ground of exceptional requirement of public justice. See 'GULLI BHAGAT v. NARAIN SINGH', 2 Pat 708; 'SIBAN RAI v. BHAGWANT DASS', 5 Pat 25 and the observation of Jenkins, C. J., in 'FAUJDAR THAKUR v. KASI CHOWDHURY', 42 Cal 612. Mr. Ganesh Sharma frankly conceded in this case that he could not make out a case of exceptional requirement of public justice. In my opinion this application must be dismissed and the rule discharged.

R.G.D. *Rule discharged.*

A. I. R. 1952 Patna 243

DAS AND SARJOO PROSAD, JJ.

Kabindra Narain Singh, Appellant v. State.

Letters Patent Appeal No. 4 of 1946, D/- 6-12-1951.

Contempt of Courts Act (1926), S. 1 — False report by serving peon that summons on witness was served but he refused to take it — No contempt proceeding can be started against witness for not attending Court.

Where it was found that the summons was not served upon a witness but a false report that it was served but refused was made by the serving peon and relying upon the report, the witness was convicted for contempt, on his failure to attend the Court on the required date:

'Held' that considering the falsity of the report and also the fact that even if the summons was served, the witness could not attend the Court in a short time available to him, the conviction was set aside. (*Para 7*)

Anno: Contempt of Courts Act, S. 1, N. 3.

Lal Narain Sinha and Ashwani Kumar Rai, for Appellant.

SARJOO PROSAD, J.: The appellant, Kabindra Narain Singh, has presented this appeal against a judgment of Agarwala, J., a Judge of this Court, imposing a fine of Rs. 250/- on the appellant in a proceeding for contempt of Court.

(2) The facts giving rise to the proceeding are that the appellant was summoned to give evidence on behalf of the propounder of a will in a testamentary case pending before this Court. The genuineness of the will was questioned by the daughters of the alleged testator who had entered caveats. The said will purported to bear the signature of the appellant as an attesting witness; the date under the signature being the 25th of September, 1941, whereas the will purports to have been executed a couple of days earlier on the 23rd of September, in the presence of a number of other attesting witnesses. Evidently, therefore, the appellant was said to have attested on acknowledgment of execution of the document.

In that connection summons to the appellant was issued by this Court on the 24th of October 1945, the hearing having commenced on the 22nd, and the summons required the attendance of the appellant on the 29th. The summons, however, returned unserved with a note by the peon which was to the effect that the peon had gone to Rajipur and met the appellant there, and the appellant having taken the summons and having read the same refused to grant a receipt therefor; in consequence a copy of the summons was hung up on the north facing bungalow of the appellant. The date on which the summons appears to have been presented to the appellant is the 28th of October 1945, and the report appears to bear the signature of the local daffadar as an attesting witness. The alleged signature of the daffadar is in pencil and is now almost indistinct. The report does not expressly indicate who had accompanied the peon as an identifier at the time of the service; but the evidence is that the peon had gone to Rajipur in the company of Jagmohan Lall, the scribe of the questioned will.

In view of this report a notice was issued on the appellant to show cause why he should not be committed for contempt of the summons served on him on the 28th October 1945, to attend this Court as a witness on the 29th of October 1945, and for his failure to comply with the order of

the Court. The appellant showed cause in which he stated that no summons had been served on him to attend this Court in connection with the above testamentary case, and that the report of the peon to the contrary was entirely false. The appellant further stated that he was 58 years of age and was a chronic patient of sciatica and lumbago and had been operated upon twice, rendering his movements difficult. He further pointed out that Rajipur where the summons purports to have been served was in the district of Champaran 10 miles away from the nearest railway stations, namely, Motipur and Meshi, intercepted by a river; and even if the appellant had been served with the summons on the 28th of October, 1945, it would have been extremely difficult for him to appear in Court on the 29th of October. He accordingly prayed that the proceedings against him should be discharged as he had not committed any disobedience or contempt of the orders of this Court.

(3) The learned Judge, after having taken evidence in the case and after hearing the parties, came to the conclusion that the summons had been served on the appellant which he deliberately refused to obey. He accordingly passed the order under appeal.

(4) The proof of service depends entirely on the evidence of the peon, Prabhu Bhagat alias Rambrich, and one Jagmohan Lall said to be a gomasta and patwari of the Maksudpur Raj. The dafadar has also been examined in the case, but he denies having attested any such service or any such service having been made in his presence. I shall deal with the evidence in their order. (After reviewing their evidence his Lordship came to the conclusion that the evidence of the peon and Jagmohan could not be impliedly relied on.)

(5) It is suggested that there was no reason for Jagat Kishore or Jagmohan Lall to suppress the service of summons on the witness because it was to the interest of the propounder of the will to examine all the attesting witnesses to the document. Of course ordinarily it would be the duty of the propounder to produce all such witnesses in Court, but it may well be that where a witness is unwilling to depose, the propounder may seek to be absolved of his obligation to examine him by suppressing the summons on him and throwing the burden of non-appearance upon that witness. At any rate, it is quite clear from what transpired during the trial of the testamentary case itself that the propounder of the will was not seriously anxious to examine the appellant. The appellant was eventually produced before the Court under a warrant but the propounder of the document did not examine him. Agarwala, J., recognises that the propounder might have hesitated to put in the witness-box on his behalf a person who clearly demonstrated his reluctance to give evidence. That may equally have been the reason for the propounder of the will to suppress the service of summons on the appellant. These are, however, mere speculations. But on the evidence as it stands, it is difficult to hold that the peon actually presented the summons to the appellant or that the appellant refused to accept the same. The evidence, in my opinion, does not inspire sufficient confidence to enable me to hold otherwise, and at any rate I find no reason to disbelieve the evidence of the daffadar as against the evidence of the peon and the scribe.

(6) I am also satisfied that in any event it would not have been possible for the appellant to present himself before this Court on the 29th of October 1945, when the service is alleged to have been effected on the 28th of October 1945, only a day prior to the date fixed. The peon admits that there are two stations to go to Rajipur they being either Mehsi or Motipur, and that Rajipur would be about eight miles off from either of these stations, and having regard to the physical disabilities alleged in the show cause petition which have not been denied by any of the witnesses in evidence, I am inclined to think that the appellant had not sufficient time to enable him to present himself before this Court. Order XVI, Rule 9, Civil Procedure Code, enjoins that service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned to allow him a reasonable time for preparation and travelling to the place at which his attendance is required.

(7) For the reasons stated above, I would allow this appeal, set aside the decision of Agarwala, J., and give the benefit of doubt to the appellant. It appears that the fine imposed on him has been already deposited. This should now be refunded to him.

(8) DAS, J.: I agree.

R.G.D. *Order accordingly.*

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NARAYAN AND SINHA, JJ.

Md. Umar, Appellant v. Moti Chand and others, Respondents.

A. F. A. O. Nos. 87 and 88 of 1949, D/- 1-5-1951.

(a) Civil P. C. (1908), Order 21, Rule 90 — Fraud in publishing and conducting sale — Under-valuation.

If the properties have been sold at the auction sale at a gross under-valuation and have been purchased by the decree-holder himself, who is the only bidder at the sale, then it cannot be said that the sale was made in good faith. If, however, the value of which the property has been sold could be explained on grounds, other than the bad faith of the decree-holder, then it cannot be said that the low valuation at which the property was purchased by itself amounted to fraud by the decree-holder. Case law referred. *(para 5)*

Anno: C. P. C., O. 21, R. 90, N. 37.

(b) Civil P. C. (1908), O. 21, R. 90 — Material irregularity or fraud in publishing or conducting sales — Judgment-debtor remaining in possession even after sale and delivery of possession.

The fact that the judgment-debtor was in possession even after the auction-sale and the delivery of possession, will not be enough to hold that either there was material irregularity or fraud in publishing or conducting the sale. The question of possession has got little bearing so far as the setting aside of the sales is concerned under the provisions of Order 21, Rule 90. If there is some evidence of fraud ,then the question of possession might be relevant to enable the Court to consider that circumstance along with others to come to a proper finding of fraud. *(Para 6)*

Anno: C. P. C., O. 21, R. 90, N. 11, 37.

(c) Limitation Act (1908), Arts. 166, 181 — Applicability.

Where the sales are sought to be set aside only under the provisions of Order 21, Rule 90, the period of limitation will be 30 days from the date of sale under Article 166. If, however, the alle-

gations amount to a pleading that the sales were void, the party would be entitled to make an application within three years under Article 181. AIR (34) 1947 Pat 139, Rel. on. (*Para 6*)

Anno: Limitation Act, Art. 166, N. 2.

(d) Civil P. C. (1908), O. 21, Rr. 68, 69 — Non-compliance — Effect.

Non-compliance with the provisions contained in Order 21, Rules 68 and 69 amounts to a mere irregularity and the sale held in contravention of such provisions is not a nullity. Case law relied on. (*Para 8*)

Anno: C. P. C., O. 21, R. 69, N. 8.

(e) Civil P. C. (1908), O. 21, Rr. 64, 92 — Conditional sale — What amounts to.

The sale will remain a good sale in law even if at the time of the sale the decree-holder has given the Court to understand that he would return the property within six months, if he was paid the entire decretal amount. If the sale is otherwise good, then this undertaking given by the decree-holder cannot vitiate it. (*Para 12*)

Anno: C. P. C., O. 21, R. 92, N. 12-a.

Mahabir Prasad; D. L. Nandkeolyar and Shivanugrah Narain, for Appellant; P. R. Das; Rajkishore Prasad and Awadh Kishore Prasad, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('93) 20 Ind App 176: (21 Cal 66 PC) (Prs 8, 12)
('06) 34 Ind App 37: (29 All 196 PC) (Prs 8, 12)
('12) 39 Cal 26: (38 Ind App 200 (PC)) (Pr 8)
('41) AIR (28) 1941 P C 93: (1946 Rang L R 213 PC) (Pr 5)
('32) AIR (19) 1932 All 403: (141 Ind Cas 129) (Pr 8)
('89) 16 Cal 794 (Pr 8)
('22) 35 Cal L J 140: (AIR (8) 1921 Cal 597) (Pr 12)
('24) 51 Cal 224: (AIR (11) 1924 Cal 638) (Pr 8)
('24) 40 Cal L J 311: (AIR (12) 1925 Cal 201) (Pr 12)
('27) 54 Cal 624: (AIR (14) 1927 Cal 781) (Pr 8)
('29) AIR (16) 1929 Cal 736: (120 Ind Cas 451) (Pr 5)
('33) AIR (20) 1933 Cal 339: (143 Ind Cas 284) (Pr 5)
('33) 37 Cal W N 146: (AIR (20) 1933 Cal 486) (Pr 12)
('38) AIR (25) 1938 Cal 699: (178 Ind Cas 842) (Pr 12)
('41) 45 Cal W N 987: (AIR (29) 1942 Cal 275) (Pr 12)
('48) AIR (35) 1948 Cal 203: (ILR (1948) 2 Cal 278) (Pr 12)
('47) AIR (34) 1947 Pat 139: (225 Ind Cas 528) (Prs 5, 6)
('40) AIR (27) 1940 Pat 201: (185 Ind Cas 816) (Pr 5)

SINHA, J.: These are two miscellaneous second appeals arising out of applications made by the appellant under Order 21, Rule 90, Civil Procedure Code.

(2) The landlords-respondents filed two rent suits, being Rent Suits Nos. 1876 and 1886 of 1936, against the appellant and the other members of his family including the uncle and the brother of the appellant; the appellant was at that time a minor. The decrees in these two rent suits were executed in 1937, the execution cases being 1537 and 1535 of 1937. In one case the holding consisting of 11 bighas 3 kathas and in the other consisting of 2 bighas and 13 kathas were sold for Rs. 271/3/- and Rs. 159/12/- respectively on 14-7-1938 and were purchased by the landlords-decree-holders. Some of the lands purchased were settled by the landlords, respondents 1st party, with the respondents 2nd party, and respondents 3rd party are the uncle and brother of the appellant. These applications under Order 21, Rule 90 were filed by the appellant on the 24th January 1947, the date of knowledge of the sale having been given in the applications as the 21st January 1947. In the applications it was alleged that the summons in the rent suits were served fraudulently and surreptitiously in collusion with the peon of the Court and the same allegation was made in regard to the service of the notice in the execution proceedings as also in the proceeding for delivery of possession. In regard to the service of notice upon the guardian-ad-litem of the appellant, there is no specific denial in the applications. All that is mentioned in the applications is that

> "as it appears the opposite first party brought the petitioner's guardian also in their collusion and concert and did not allow him to take a proper legal action."

It is also alleged that the value put upon the properties in the sale proclamation was not fair and that the opposite first party fraudulently did not allow any fair valuation to be fixed out of ulterior motive. The appellant alleged in his petitions that he had "now attained age of majority", no specific date of attainment of majority is mentioned. There is no specific allegation in the petitions to bring the case within Section 18 of the Indian Limitation Act to the effect that the appellant by means of fraud had been kept out of knowledge of his right to make an application.

(3) The first Court held that the petitioner and members of his family had knowledge of the sale many years before the applications in question were filed and at page 14 of the brief there is a specific finding that the applicant got knowledge about the execution cases in question in the year 1938 and that the other members of the family of the appellant had also knowledge about the execution cases in the year 1938. It was also found that there was no evidence given by the appellant that there was any fraud by the decree-holders by which he was kept out of knowledge of his right to apply for setting aside the sale. In regard to the irregularities, the Court held that there was material irregularity in publishing and conducting the sale. As regards, the Court held that the price fetched at the sale was shocking to the conscience of the Court and that the appellant had suffered substantial injury. Although the properties in each of the two execution cases were valued in the applications at Rs. 2,000/- each, the Court found that the value of all the properties covered by the two sales could not be less than Rs. 20,000/-. It appears from the judgment of the 1st Court that on some of the lands sold there were big houses, but these houses were mostly in delapidated condition, and, in view of the prices of lands having gone up very high at about the time when the Court was considering the value of these properties, it appears the Court put the valuation at Rs. 20,000/-. The question whether the decrees for rent were rent decrees or money decrees and whether or not the appellant was in possession even after the delivery of possession was not considered by the Court because in its view these questions were outside the scope of a

proceeding under Order 21, Rule 90, Civil Procedure Code. In view of the finding that the applications were barred by time, the sales were not set aside and the applications were dismissed. The appellant went up in appeal against the order rejecting his applications, and the appeals were finally heard by Mr. P. K. Nag, the learned Additional District Judge of Muzaffarpur. It appears from his judgment that only two questions were pressed before him in appeal — the one being whether the applications were barred by limitation on the date they were presented, and the other, whether the sales were vitiated by fraud and irregularities which resulted in substantial loss to the applicant. The learned Judge has found that since three or four years before the applications in question were made, the appellant was looking after his affairs and that, before that period, his brother Saddique used to look after the affairs and that the lands were in joint management of his brother Saddique and his uncle Rahmu. It has been found that Rahmu did appear in the execution cases on the 7th of April 1938, and by his petition of that date prayed that the sale be kept on hammer till the 20th April 1938, which application, however, was rejected. It has been found that Saddique and Rahmu had full knowledge of the execution and sales many years before the present applications were filed. It has further been found that the appellant attained majority some time in the year 1939 and that:

> "Umar, the applicant, had full knowledge that the disputed properties had been sold in execution of rent decrees many years before he had filed the present applications."

This finding is based upon a consideration of the evidence to the effect that in 1938 there was one execution case, No. 47 of 1938, filed by one Mahabir Lall, the decree-holder, against Md. Saddique and other judgment-debtors including the appellant and that claim cases had been filed by several members of the family of the appellant and one was filed on behalf of the appellant himself, being Miscellaneous Case No. 69 of 1938. In Miscellaneous Cases 24 and 25 of 1938 filed by some of the ladies of the family of the appellant, copies of the petitions by Rahmu filed on the 7th of April 1938, had been filed. Then again in the year 1941 one Sheoprasad Chaudhury, a creditor of Saddique and the appellant Umar, had attached the disputed lands which had been sold in Execution Case No. 882 of 1941. Jagesher Lall, respondent 2nd party, the settlement-holder from the landlords-decree-holders had filed a claim case alleging that some of the properties sold in Execution Case No. 882 of 1941 belonged to him on the strength of the patta executed in his favour by the landlords who had purchased these holdings comprising the lands, the subject-matter of the claim case, in rent execution sales in Execution Cases Nos. 1537 and 1535 of 1937. There was other evidence to show that the appellant had also direct knowledge of the sales in June 1946 and, upon these findings, the learned Judge held that the applications were barred by time on the date when they were made. In regard to the service of notices, it was held that these notices in the execution cases were duly served on Rahmu and Saddique and the attachment and the sale proclamations were also proved. In regard to the service of notice on the guardian, it was held that no attempt was made to produce in Court the said guardian-ad-litem who was still then practising as a Pleader in the Hajipur Courts. The Court observed that, even conceding that there was no service of notices on the said guardian-ad-litem, it was a mere technical irregularity inasmuch as it was an admitted fact that the uncle and brother of the appellant were adult members of the family who had been looking after and managing the property on behalf of the applicant as well. In view of these observations, the Court held that there was no fraud or material irregularity in publishing or conducting the sales. It is to be noted, as I have said, that there is no allegation in the two petitions under Order 21, Rule 90, C. P. C., that the guardian-ad-litem of the appellant had not been duly served with the necessary notices in the execution cases. The allegations in the applications, on the contrary are that the guardian had been in collusion with the decree-holders, which impliedly showed that service of notice had been effected upon the guardian. In regard to the valuation of the properties, the learned Judge appears to think that the prices for which these lands were sold were not grossly inadequate because, in his view, at the time when these sales had taken place, there used to be no purchasers of holdings in rent sales and that fact had brought down the prices and that it had become the habit of the landlords, while executing rent decrees, to value the holdings according to the value of their decrees and that was what was done in the present cases. It was held that because, Rahmu, the seniormost raiyat of the holding, had appeared in both the cases and wanted time to pay the amount of the decree, it was impossible to hold that, if there was any undervaluation, it was the result of any fraud on the part of the decree-holders. In view of these findings, the lower appellate Court dismissed the appeals.

(4) Mr. Mahabir Prasad, the learned Advocate-General, on behalf of the appellant, has argued the case with his usual vehemence from all possible points of view. He contended that there is no specific finding to the effect that the value of the lands, at which they were sold, was adequate and that the finding of the first Court to the effect that the price fetched at the sales was shocking to the conscience of the Court was not set aside by the appellate Court; that, if the valuation of the property is grossly inadequate so as to shock the conscience of the Court, that by itself is evidence of fraud; that, if there was fraud, the burden of proving definite knowledge of the sales to the appellant was entirely upon the decree-holders-respondents and that burden of proving it not having been discharged in the present case, it must be held that there was fraud practised upon the appellant and, in that view of the matter, the applications for setting aside the sales could not be said to be barred by limitation especially when the possession of the properties, which were sold and of which delivery of possession was supposed to have been taken by the decree-holders was with the appellant. Lastly, it was contended that the sale was a nullity because of the non-compliance by the Court with the provisions of Order 21, Rule 69, C.P.C., inasmuch as the sales were held not on the date fixed and, in that view of the matter, the holding of the sales not on the dates fixed for them and the issue of a sale certificates for the same amounted in law to an abuse of the process of the Court and, therefore, the Court, under the provisions of Section 151 of the Civil Procedure Code, should recall that order. It was also contended on the same ground that they were not sales under the Code of Civil Procedure and, therefore, there was no limit of time under the Limitation Act for setting aside such sales.

(5) As I have indicated there is no finding by the appellate Court that the price fetched at the

sale was grossly inadequate; rather the findings arrived at by the Court on this point indicate that the properties were sold not at an under-value, taking into consideration the conditions prevailing in the year of the sales, and, in my opinion, the finding on this point arrived at by the first Court has been impliedly displaced by the findings referred to above of the lower appellate Court. It is no doubt true that, if the properties had been sold at the auction-sale at a gross under-valuation and had been purchased by the decree-holder himself, who was the only bidder at the sale, then it cannot be said that the sale was made in good faith; 'CHANDRA BHUKHAN v. RAMDUTT MAHTO', AIR (34) 1947 Pat 139. Cases have laid down that, if the discrepancy between the value stated in the sale proclamation and the real value is so great as to shock the conscience of the Court, that by itself is a valuable evidence of fraud on the part of the decree-holder 'BHAIRAB CHANDRA v. KALIDHAN ROY', AIR (16) 1929 Cal 736 and RAMIADDIN BASAR v. NIMADDI BASAR'. AIR (20) 1933. Cal 339. In my opinion, however, the authority of these cases has got no application to the facts of the present case. If the value at which the property had been sold could be explained, as has been done in this case by the Court below, on grounds other than the bad faith of the decree-holder, then it cannot be said that the low valuation at which the property was purchased by itself amounted to fraud by the decree-holder:

> "Fraud, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond all reasonable doubt." 'NARAYANAN CHETTYAR v. OFFICIAL ASSIGNEE, HIGH COURT OF RANGOON', AIR (28) 1941 PC 93."

and it is well established that:

> "where fraud is to be inferred from the circumstances and is not directly proved these circumstances must be such as to exclude any other reasonable possibility." 'RAJA SINGH v. CHAICHOO SINGH', AIR (27) 1940 Pat 201.

and in another case the Judicial Committee has said that:

> "unless the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith that cannot be accepted as affording sufficient proof of fraud."

These are well settled rules and I do not see in this case that the findings arrived at by the Court below and the circumstances disclosed in the case lead to the inference that fraud was practised either upon the Court or upon the party by the decree-holder. As I have already mentioned, the Court of first instance did not find what was the value of the properties sold in the year 1938 when the sales had taken place. The lower appellate Court has definitely held that in these days, due to economic depression and abnormally low selling rate of foodgrains, the prices of lands had gone down to a great extent and that there used to be no purchasers of holdings in rent sales. In view of these findings, I am unable to accept the contention that the property was sold at a gross under-valuation and, in that view of the matter. I find no substance in the ground taken by the learned Advocate-General. If fraud cannot be inferred from the low valuation at which the properties were sold, there are no other circumstances from which fraud could be inferred. In the applications for setting aside the sales there is no averment of facts so as to attract the provisions of Section 18 of the Limitation Act and no evidence has been led to show that the decree-holder contrived to conceal the knowledge of the sales from the appellant or other members of his family, and that by means of any fraud the appellant was "kept from knowledge" of his right to make an application. I, therefore, hold that the appellant failed to prove that fraud was practised upon him or upon the Court.

(6) It has been definitely found that the appellant attained his majority in the year 1939 and that many years before he made the applications in 1947 he had knowledge of the sales. The learned Advocate-General has laid stress upon the fact that even after the so-called delivery of possession the appellant was in possession of the lands in question. There is no finding that the appellant is in possession of the properties sold. But, even if it were conceded that the appellant was in possession even after the sale and the delivery of possession, that, in my judgment, will not be enough to hold that either there was material irregularity or fraud in publishing or conducting the sales. The question of possession has got little bearing so far as the setting aside of the sales is concerned under the provisions of Order 21, Rule 90, Civil Procedure Code. If there were some evidence of fraud, then the question of possession might have been relevant to enable the Court to consider that circumstance along with others to come to a proper finding of fraud, but in this case, as there are no other materials upon which a finding of fraud could be founded, the mere fact that the appellant has remained in possession will not be sufficient to support a finding of fraud. The question as to whether Article 166 or Article 181 of the Limitation Act will apply to the facts of the present case will depend upon the allegations made in the applications for setting aside the sales. Reading the two petitions as a whole, it appears the sales were sought to be set aside only under the provisions of Order 21, Rule 90, Civil Procedure Code, and, if that be so, the period of limitation will be 30 days from the date of sale under Article 166 of the Limitation Act. If, however, the allegations in the two petitions had amounted to a pleading that the sales were void, the appellant woud be entitled to make an application within three years under Article 181 of the Limitation Act: AIR (34) 1947 Pat 139. Taking the most favourable view in favour of the appellant, he might have been entitled to file a petition within three years of the sales and, as he was a minor at the time, the period of limitation would be extended to three years after he had attained majority. Considering these applications even from that point of view, the applications are definitely barred by time, no fraud having been established. The evidence given in the case, and which has been elaborately discussed by the two Courts below, leads to the only inference that fraud was not practised upon the appellant or the other members of his family who were the judgment-debtors in the rent suits and that the appellant had knowledge of the sale at least in 1941 long before three years of the date when the applications for setting aside the sales were filed.

(7) It has been contended on behalf of the appellant that the sales were nulities because they were held on a date not specified in the sale proclamation. In both the execution cases the sale proclamation fixed the 7th of April 1938, at 9 a.m., for the sale of the properties, and on the 7th of April, 1938, the order-sheet records the following order in both the cases: "Attachment, sale proclamation served. Judgment-debtor 1 files a petition praying that the sale be kept on hammer till 20-4-1948. Petition rejected." The judgment-debtor No. 1 in each case was Rahmu Mian. Then

on the 14th of April 1938, the following order was recorded:

"Sale held today 'on account of other sales'.... on decree-holder's undertaking to have the sale set aside if the decree money is paid within six months."

The important words have been underlined (here in single inverted commas) by me. The argument is founded upon the order-sheet of these two dates that the sales were not held on the date advertised for sale and, therefore, the sales were nullities. It has to be remembered that the sales, although fixed for the 7th of April, were actually held on the 14th, that is to say, within 15 days of the date of sale. Order 21, Rule 69, as amended by this Court, says that where a sale is adjourned under Sub-rule (1) of Rule 69, for a period longer than 15 days, a fresh proclamation under Rule 67 shall be made unless the judgment-debtor consents to waive it. It has been argued upon the language of this Sub-rule (2) of Order 21, Rule 69, that there was no adjournment of sale and, therefore, this Sub-rule had no application and, on that ground, it is argued that the sale was without jurisdiction. I agree that no express order is recorded in the order-sheet adjourning the sales but it was not necessary to do so in the circumstances to be presently noticed. The order-sheet of the 14th of April shows quite clearly that these sales could not be held earlier "on account of other sales", which can only mean that on the 7th of April 1938, a large number of sales had to be held in several other execution cases and that the sales must have begun on the 7th of April 1938, but the sales in the present case could not be held until the 14th of April 1938 as the Court was engaged in holding other sales. From the language of the order-sheet it must be inferred that the sales had started on the 7th of April and were going on from day to day until the turn for the sales under these execution cases was reached on the 14th of April, 1938. As the question about the sales having been held without jurisdiction or that the sales were nullities had not been raised in the two applications for setting aside the sales, it appears definite materials were not brought on record to show that sales did actually begin on the 7th of April 1938, and the sales went on from day to day until these properties were sold on the 14th of April 1938, Rule 13 of Chapter VI of Part I at page 34 of the General Rules and Circular Orders of this Court (Volume I, Civil) runs as follows:

"Subject to the proviso in Order XXI, Rule 43, sales of property in execution of decrees in the several Courts of each district (not being Courts of Small Causes) shall be held and commenced at a certain day each month to be fixed by the District Judge."

(8) Rule 14 lays down that all properties to be sold shall be entered in a list and it shall be so prepared as to contain in regular order each item of property. Rule 15 provides that at the stated hour upon each fixed date the sale shall commence and shall be carried on in the order stated in the list and that sales shall be held from day to day until the list is finished. If we read the order-sheet of the two dates mentioned above along with these rules, it becomes crystal clear that a large number of sales must have been fixed for the 7th of April 1938, according to the rules and that sales must have commenced on that date and, according to the lists, the turn for the sale of these properties came on the 14th of April, 1938, when the sales were actually held. On the facts of this case I am, therefore, unable to hold that the sales so held were nullities without jurisdiction or that there was any material irregularity in publishing or conducting the sales. In my judgment, there was no lack of jurisdiction in the Court which held the sales. This view is amply supported by the decision of the Judicial Committee reported in 'RANG LAL SINGH v. RAVANESHWAR PERSHAD SINGH', 39 Cal 26 P C. In this case the sale was fixed for the 11th May and ultimately on the 16th the property was put up for sale, but as there were insufficient bidders, the sale was postponed and a fresh proclamation was issued fixing the 13th of July for the sale. The presiding officer was absent from the 13th to the 16th of July. On the 17th an application was made for postponement which was rejected and the property was sold on the 20th and on these facts their Lordships held that

"It is evident that on the 16th of May the sale was postponed to the 13th of July, the date on which the monthly sales were to commence; these sales did not actually begin until the 17th owing to the absence from the station of the presiding officer, and the sale was held on the 20th, in the course of the monthly sales. On the facts appearing on the record their Lordships think the Subordinate Judge did not act in contravention of the provisions of the Civil P. C. in holding the sale on the 20th of July."

The case of 'BASHARUTULLA v. UMACHURN DUTT AND OTHERS', 16 Cal 794 was cited before their Lordships but obviously it was not followed. The view of the Judicial Committee as expressed in 'TASADDUK RASUL KHAN v. AHMAD HUSSAIN', 20 Ind App 176 (PC) & 'GAJRAJ NATH TEORAIN v. AKBAR HUSAIN', 34 Ind App 37 (P C) shows that non-compliance with the provisions now contained in O. 21, Rr. 68 and 69 amounts to a mere irregularity and that the sale held in contravention of such provisions is not a nullity but in the present cases it cannot be held that there was any breach of these rules. In the view I have taken, the other point, namely, the holding of the sales on the 14th of April, 1938, and the issuing of sale certificate for these sales, could not by any stretch of imagination amount in law to an abuse of the process of the Court under the provisions of S. 151 of the Code of Civil Procedure. A large number of authorities were cited at the Bar, but it is not at all necessary to consider these authorities. There are some decisions of the Calcutta High Court 'UMAMOYEE DASYA v. JATAN BEWA', 54 Cal, 624; 'JOGESWAR MAHATA v. JHAPAL SANTAL', 51 Cal 224, which lay down that when a sale is a nullity, no question of limitation arises for setting aside such a sale. On the other hand, the Allahabad High Court in 'PANDIT SRIDAT v. MOHAR SINGH', AIR (19) 1932 All 403, a judgment of Sir Muhammad Sulaiman, has held that there is no inherent jurisdiction in a Court to set aside a sale outside the provisions of O. 21. But, as I have already mentioned, those matters do not arise for decision in this case.

(9) It was also argued that the sales which were held on the 14th April, 1938, being conditional sales, were no sales at all. As I read the order-sheet, it does not appear that the sales were conditional ones. It may be that in good faith the decree-holder had said that if the decretal amount was paid to him within six months from the date of the sales, he would have no objection if the sales were set aside — the Court may have used a bad language, but could never have meant to sell the properties subject to certain conditions.

(10) In my judgment, upon a consideration of the material facts and circumstances and the law bearing upon them, I am definitely of the view that the sales were good sales under the provisions of the Code of Civil Procedure, that there was

no fraud practised upon the Court or upon the judgment-debtors including the appellant and that as the applications for setting aside the sales have not been made within the time prescribed by law the applications were rightly dismissed by the Courts below.

(11) I would accordingly dismiss these appeals with costs. As these Appeals were heard together, there will be one set of hearing fee.

(12) NARAYAN, J.: I generally agree with my learned brother. On the findings arrived at by the lower appellate Court the application for setting aside the sale cannot be deemed to be in time if the sale is not regarded as a nullity. It is only when the sale is regarded as nullity that the petitioner can contend that the question of limitation does not arise, inasmuch as there was nothing which he could seek to set aside. As such, the most important question in these appeals is whether the sale in question can be regarded as a nullity. As has been indicated in the judgment of my learned brother the sale proclamation had been issued fixing 7-4-1938 as the date for sale. On 7-4-1938, the judgment-debtor No. 1 filed a petition praying that the sale be kept on hammer till 20-4-1938, and this petition was rejected. On 14-4-1938 the sales were held and in one of the two cases the property was sold for Rs. 271/-/3 and in the other for Rs. 159/12/-. The order in both cases shows that the sale was held on 14-4-1938, because there were other sales to be held, and it is further indicated in the orders of both the cases that the decree-holder had given an "undertaking to have the sale set aside if the decree money is paid within six months". The learned Advocate General has contended that such a conditional sale is unwarranted in law and that the sale is a nullity because it was held on a date for which it was not advertised. I have no hesitation in repelling the contention that the sale is vitiated because of the undertaking recorded in the order. The sale will remain a good sale in law even if at the time of the sale the decree-holder had given the Court to understand that he would return the property within six months if he was paid the entire decretal amount. If the sale is otherwise good, then this undertaking given by the decree-holder cannot vitiate it. In my opinion, this undertaking would not have created any other complication except this that if the judgment-debtor had really come forward to pay the decretal amount within six months from the date of sale, the question would have arisen whether the decree-holder was bound on account of this undertaking to return the property on taking from the judgment-debtor the decree money. The event contemplated never happened and the question never arose as to whether this was an undertaking enforceable in law. It is a pure surplusage and has remained as such. We know of compromises between judgment-debtors and decree-holder-auction-purchasers to the effect that in case the decretal amount is paid before a certain date, the property will be returned, and in case it is not paid the sale will become absolute and remain binding on the judgment-debtor. Because of such a compromise a sale is never regarded as ineffective and inoperative. The first contention of the learned Advocate General must therefore be overruled. I am not also able to accept the other contention of the learned Advocate General that the sale should be regarded as a nullity, because it was held on a date for which it was not advertised. The decisions of the Judicial Committee in 'TASSADUK RASUL KHAN v. AHMAD HUSAIN', 20 Ind App 176 (P C) and 'GAJRAJ NATH TEORAIN v. AKBAR HUSAIN', 34 Ind App 37 (P C), appear to me to settle the question raised by the learned Advocate General. In the former case there was a clear violation of S. 290 of the Code of Civil Procedure which corresponds to R. 68 of O. XXI. According to R. 68 no sale can, without the consent in writing of the judgment-debtor, be held until after the expiration of at least thirty days in the case of immoveable property from the date on which the copy of the proclamation has been affixed on the Court-house of the judge ordering the sale. Their Lordships held that the decree-holder had failed to comply with the requirement of S. 290, but still their Lordships were of the opinion that this would be regarded as merely a case of material irregularity to be redressed pursuant to the provisions of S. 311, and in the application of that section it being incumbent on the judgment-debtor to prove that he had sustained substantial injury by reason of the irregularity. As was pointed out by Edgley J. in 'JOGENDRA NATH BHATTACHARYYA v. NABI NEWAJ', AIR (25) 1938 Cal 699, the provisions in Rr. 67, 68 and 69 have been designed for the protection of judgment-debtors and for the purposes of ensuring that properties of such persons shall not be put to sale unless the publicity is given to the fact that the sale is to be held and a proper opportunity is afforded to bidders to attend the sale after proper notice has been given. The provisions of S. 68 are certainly mandatory but still their Lordships of the Judicial Committee were of the opinion that non-compliance with these provisions amounts only to material irregularity. In the other case '34 Ind App 37 (P C) it was assumed on the facts that the issue of a fresh sale proclamation was necessary, but still their Lordships held that the omission could be regarded only as an irregularity and that no regular suit would lie for the purpose of setting aside the sale which had been held in violation of the terms of the old S. 291 of the Code. In some Calcutta cases, no doubt, and especially in 'MOTAHAR HOSSAIN v. MOHAMMAD YAKUB', 40 Cal L J 311 a contrary view has been taken. But in view of the several other decisions of the Calcutta High Court it may be taken that the preponderance of authority even in that Court is in favour of the view that a sale which is held without strictly complying with the provisions of Rr. 67, 68 and 69 of O. XXI cannot be regarded as a nullity. (See 'GOBARDHAN BEHARI v. SARAT CHANDRA', 37 Cal W N 146; 'HARI SADHUN ROY v. SHIB GOPAL MITRA', 35 Cal L J 140; 'JATINDRA MOHAN v. MAHIPAL NAYEK', AIR (35) 1948 Cal 203 and 'SM. ASALATA BOSE v. MANINDRA NATH', 45 Cal W N 987. It was held in 'JATINDRA MOHAN SARKAR'S Case', AIR (35) 1948 Cal 203, that non-issue of a sale proclamation when the law requires the publication of a fresh sale proclamation stands on the same footing as the non-service or suppression of service of a sale proclamation in the matter of the reversal of a sale, and that they would be material irregularities and would not affect the jurisdiction of the executing Court to hold the sale. In 'SM. ASALATA BOSE'S Case', 45 Cal W N 987 it was pointed out that if violation of one part of O. XXI, R. 69, Civil P. C., as was held by their Lordships in 'GAJRAJ NATH TEORANI'S Case', 34 Ind App 37 (P C) amounts only to material irregularity, it can certainly be argued that the violation of the other part could not produce a different result. I therefore agree in the conclusion arrived at by my learned brother that the sale cannot be regarded as a nullity, and if it is not a nullity, then on the facts found it cannot be set aside.

D.H. *Appeals dismissed.*

A. I. R. 1952 Patna 250

JAMUAR AND RAI, JJ.

Basdeo Singh and others, Appellants v. Sm. Subhadra Kuer and another, Respondents.

A. F. A. O. No. 104 of 1948, D/- 22-11-1951.

Civil P. C. (1908), S. 11 — Co-defendants.

Where in a title suit there had been a conflict of interest between the defendants and the party defendant and the conflict formed the main basis of the plaintiff's claim and it was necessary to decide the conflict to give the plaintiff the necessary relief, and the conflict was decided in favour of the plaintiff and against the interest of the party defendant, if the party defendant instead of appealing against the decision file a suit against the plaintiff claiming the same interest which was decided against her, the suit will be barred by res judicata, if in the meanwhile the decision of the first suit is confirmed in appeal to which also the party defendant was a party. AIR (18) 1931 P. C. 114; AIR (30) 1943 P. C. 115 Foll; AIR (30) 1943 Cal 76, Explained and Dist. (Para 5)

Anno: Civil P. C., S. 11, N. 46.

K. K. Sinha and Umesh Chandra Sharma, for Appellants.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('31) AIR (18) 1931 P C 114: (53 All 103) (Pr 5)

('43) AIR (30) 1943 PC 115: (ILR (1943) Kar PC 123) (Pr 5)

('43) AIR (30) 1943 Cal 76: (ILR 1942) 2 Cal 299) (Pr 5)

RAI, J.: This is an appeal by defendant No. 1 against the judgment and order of the Additional Subordinate Judge, Third Court, Patna, who set aside the judgment and decree of the fourth Additional Munsiff Barh and remanded the case for trial of the remaining issues.

(2) The facts relevant to the present appeal may shortly be stated as follows. One Jhuman Singh had two sons, Kamlapat Singh and Kuldip Singh. Mt. Lalwati Kuer, widow of Kamlapat Singh died on the 13th of January 1943, leaving behind her daughter, the present plaintiff. The other son of Jhuman Singh, namely Kuldip Singh, had a son Tilakdhari Singh who is defendant No. 2 to the present action. On the 29th of September 1931, Tilakdhari Singh defendant No. 2 sold to Basdeo Singh defendant No. 1, appellant, certain lands including the lands in dispute. On the 13th of January 1941, Mt. Lalwati Kuer executed a registered sale-deed in favour of one Gulab Singh in respect of some lands included in the sale-deed of the present appellant, Basdeo Singh. In 1943, Gulab Singh filed Title Suit No. 134 of 1943 for a declaration of his title, and for confirmation or, in the alternative, for recovery, of possession of the lands purchased by him on the ground that Kamlapat Singh had died separate from the branch of Kuldip Singh and his properties including the properties purchased by him had been inherited by Mt. Lalwati Kuer who had every right to execute the sale-deed in his favour. In that suit he had impleaded Srimati Subhadra Kuer, the present plaintiff, also as a party-defendant along with Tilakdhari Singh and Basdeo Singh. The case of Tilakdhari Singh and the present appellant in Title Suit 134 of 1943 was that Kamlapat Singh had died joint with Tilakdhari Singh who had come in possession of the entire properties left by Jhuman Singh by survivorship and as such Gulab Singh had derived no title by his purchase from Mt. Lalwati Kuer. The suit filed by Gulab Singh was dismissed on the 13th of December 1946. It was held in that suit, in the presence of the present plaintiff, that Kamlapat Singh had died as a member of the joint family with Tilakdhari Singh. The judgment and decree of the trial Court was upheld up to this Court in S. A. No. 2603 of 1947. The Title Suit No. 135 of 1943 out of which the present appeal arises was instituted by Srimati Subhadra Kuer on the 20th of August 1943 for a declaration of her title and confirmation or, in the alternative for recovery, of possession of about 3.19 acres of land which had been purchased by the present appellant along with other lands by the registered sale-deed, dated the 20th of September 1931. The case of the plaintiff was that her father, Kamlapat Singh, had separated from Tilakdhari Singh and the latter had no right to execute any sale-deed in respect of the lands in dispute which belonged to the former and as such Basdeo Singh had derived no title to it by the said sale-deed, dated the 29th of March 1931. In this Title Suit, Tilakdhari Singh also was impleaded as defendant No. 2 to the action. The suit was contested by defendant No.1 who pleaded that the present plaintiff was the daughter of Bajrangi Singh, another brother of Kamlapat Singh. According to him, Kamlapat Singh had died in a state of jointness with Tilakdhari Singh who had every right to execute the sale-deed in his favour. Defendant No. 1 had further pleaded that the present suit was barred by limitation.

(3) Before the trial Court various issues issues were framed including Issues No. 2 and 6 which ran as follows:

"Issue No. 2: Is the suit barred by res judicata?
Issue No. 6: Has the plaintiff her alleged title in the suit land?"

(4) During the pendency of the present suit, Title Suit No. 134 of 1943 filed by Gulab Singh was decided on the 13th of December 1946. Defendant No. 1 of the present suit, therefore, filed an application on contending that the judgment in Title Suit No. 134 of 1943 operated as res judicata so far as the present suit was concerned. He pressed that the issue on res judicata be heard first. The trial Court acceded to his prayer and took up Issues Nos. 2 and 6 for decision. It came to the conclusion that the claim of the plaintiff was barred by res judicata in view of the judgment given in Title Suit No. 134 of 1943 in presence of the present plaintiff where it was held that Kamlapat Singh died as a member of the joint family with Tilakdhari. On this finding the suit was dismissed by the trial Court. The plaintiff thereafter went in appeal. The lower appellate Court came to the conclusion that the judgment in Title Suit No. 134 of 1943 was not res judicata and, accordingly, it set aside the judgment and decree of the trial Court and remanded the case for disposal in accordance with law; hence the present appeal by defendant No. 1.

(5) Mr. K. K. Sinha, the learned Advocate for the appellants contended that the present case was fully covered by the decision of the Judicial Committee in the case of 'MOHAMMAD SAADAT ALI KHAN v. MIZRA WIQUAR ALI BEG', AIR (30) 1943 P. C. 115. According to him, it was essential for the decision of Title Suit No. 134 of 1943 to determine whether Kamlapat Singh had died joint with Tilakdhari Singh or not, and that there was a conflict of interest on this point between the present plaintiff and the other two de-

fendants impleaded in that action. This being the position, the judgment in Title Suit No. 134 of 1934 was res judicata, according to him, on the question whether Kamlapat died joint with Tilakdhari or not. Mr. K. K. Sinha, further relied upon the decision in the case of 'MT. MUNNI BIBI v. TIRLOKI NATH', AIR (18) 1931 P C 114. In that case while dealing with the question of res judicata between co-defendants their Lordships of the Judicial Committee held:

"It is, in their Lordships' opinion, in accord with the provisions of S. 11, Civil P.C., and they adopt it as the correct criterion, in cases where it is sought to apply the rule of res judicata as between co-defendants. In such a case therefore three conditions are requisite: (1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided." -

* * * *

It is true that the appellant did not enter an appearance in the suit, and it is also said that she was not a necessary party to it; but their Lordships do not regard either of these two factors as really material. The appellant was at all events a proper party to the suit and had the right to be heard if she so desired. If she chose to stand by and let the plaintiff fight her battle, it could not affect her legal position."

Mr. Sinha further contended that the Court of appeal below had erred in thinking that the facts and circumstances of the present case are similar to those of the case of 'CHANDU LAL v. BIBI KHATEMONNESSA', AIR (30) 1943 Cal 76. He directed our attention specially to the following passage in that judgment:

"In the present case the decision which is set up as res judicata is the decision in the Rent Suit No. 1 of 1922. This suit was originally instituted against Safiquiddin himself by his landlord Prasanna Deo Raikat. Safiquiddin died durring the pendency of the suit, and, as far as can be gathered from the materials on record the present plaintiffs, the present defendants 1 to 3 and Safiquddin's daughter by his first wife were substituted in his place as his heirs. Defendants 1 to 3 appeared and filed a written statement denying that the present plaintiffs were also the heirs of Safiquiddin. But from the evidence on the record it appears to us that Khatemanessa was designedly kept from the knowledge of this conflict. Mr. Gupta contends that as the present plaintiffs were parties co-defendants in that suit and as admittedly the present defendant 1 Tanjina denied that the present plaintiffs were the heirs of Safiquiddin (1) there was a conflict of interest between the then two sets of defendants (2) it was necessary to decide this conflict in order to give the then plaintiff the relief he claimed, and (3) the question was decided in that suit, no matter on what materials that decision might have been based. Consequently, that decision, so long as it is allowed to stand, shall operate as res judicata, between the plaintiffs and defendants 1 to 3 or persons claiming under them."

In our opinion, this will be a dangerous extension of the rule laid down by the Judicial Committee. 'The present plaintiffs were made parties as the heirs of Safiquddin. There was nothing on the record till then to give them any notice of any possible conflict.' If they had no defence to put forward, and the result of that suit shows that they had none, they were not bound to put in useless appearance. If, therefore behind their back anything was pleaded assailing their interest and if the then plaintiff thereupon chose to accept the relief as modified by such pleading, it is difficult to see how the matter can be said to have been heard and decided. The absentee, co-defendants having no notice of the conflict and thus having no occasion for exercising their right of appearance and contest, the matter, so far as they are concerned, was not heard and decided by the Court. In our opinion, the decision is not res judicata and the plaintiffs are not debarred from agitating the matter in the present suit."

Mr. Sinha, thereafter rightly contended that in Title Suit No. 134 of 1943, the claim put forward by Gulab Singh in respect of the properties sold to him by Mt. Lalwati Kuer was mainly based on the allegation that Kamlapat Singh had separated from Tilakdhari Singh before his death. The conflict of interest between Subhadra Kuer on the one hand and Basdeo Singh and Tilakdhari Singh on the other was the main basis of the Title Suit No. 134 of 1943. It had to be decided to give relief to the plaintiff of that suit and it was actually decided. The decision in that suit was brought to the notice of the present plaintiff on the very next day of the judgment, i.e., on the 14th of Dec. 1946 when defendant No. 1, filed an application in the present suit to take up the issue of res judicata first. It was open to the present plaintiff to get the judgment and decree passed in Title Suit No. 134 of 1943 reversed in appeal which was in fact upheld by this Court in S. A. No. 2605 of 1947 to which also the present plaintiff was a party. In my opinion the present case is covered by decisions of the Judicial Committee in the cases of 'MT. MUNNI BIBI v. TIRLOKI NATH', AIR (18) 1931 PC 114 and 'MOHAMMAD SAADAT ALI KHAN v. MIRZA QIQUAR ALI BEG', AIR (30) 1943 PC 115 and is not hit by the above quoted observations, made in the case of 'CHANDU LAL v. BIBI KHATEMONNESSA', AIR (30) 1943 Cal 76.

(6) The result is that the judgment and order of the Court of appeal below are set aside, the judgment and decree of the trial Court are restored and this appeal is allowed. There will be no order for costs of this Court and of the Court of appeal below.

(7) JAMUAR, J.: I agree.

R.G.D. *Appeal allowed.*

A. I. R. 1952 Patna 251

SHEARER, J.

Hitlal Mahton, Petitioner v. Bhikhari Mahton and others, Opposite Party.

Criminal Ref. No. 68 of 1951, D/- 6-12-1951.

Criminal P. C. (1898), Ss. 147 and 145 — Nature of proceeding under S. 147.

A proceeding under S. 147 is a quasi civil proceeding. If, therefore, the question at issue between the parties has already been the subject-matter of a suit in the Civil Court, the trying Magistrate has no jurisdiction to institute the proceeding: AIR (14) 1927 Bom 654, Foll. (Para 1)

Anno: Criminal P. C., S. 145, N. 3.

Shambhu Saran Singh, for Reference; Kanhaiyaji, Against the Reference.

Case referred to:

('27) 28 Cri L J 578: (AIR (14) 1927 Bom 654) (Pr 1)

ORDER.: A proceeding under Section 147 of the Code of Criminal Procedure is a quasi civil proceeding. If, therefore, the question at issue between the parties has already been the subject-matter of a suit in the civil Court, the learned trying Magistrate had no jurisdiction to institute this proceeding; and the course which he took was the correct one. ('Vide' In Re: 'ANYA SHIDHYA PATIL, 28 Cri L J 578 (Bom.)) The plaint and written statement in the suit are not on the record, and it may be, as has been contended by the learned Advocate for the opposite party, that in the plaint it was asserted in the alternative that the plaintiff had a right of way across the defendant's land, and that this plea was not taken at the trial and was by implication, negatived. The reference will be accepted, the order of the trial Court will be set aside, and the case will be remanded. It will be for the learned trying Magistrate to decide whether the decision of the civil Court operates as 'res judicata.' If it does he will not proceed further. If, on the other hand, it does not so operate, he will continue the proceeding and dispose of it according to law.

V.B.B. *Reference allowed.*

A. I. R. 1952 Patna 252

SHEARER, J.

Babulal Kandu, Petitioner v. Kanti Dutta Misra Opposite Party.

Criminal Revision No. 619 of 1951, D/- 5-12-1951.

Evidence Act (1872), S. 114 — Criminal trial — Benefit of doubt — Accused found in enclosed premises at night — Inference — Criminal P. C. (1898), S. 367.

If on the evidence adduced by the prosecution, a reasonable doubt arises as to the guilt of the accused, he must have the benefit of it: 1935 A C 462 Foll. (*Para 1*)

Ordinarily, when a man is found in enclosed premises at night, and when the explanation which he gives for being there is palpably untrue, the inference which may be drawn is that he was on the premises for some criminal purpose. Nevertheless, such an inference ought not to be drawn if there are circumstances in the case which go to show that in fact he may have had some innocent purpose in view, although not the purpose which he himself said he had. (*Para 1*)

Anno: Evidence Act, S. 114, N. 7; Criminal P.C., S. 367, N. 6.

Lakshmi Narayan Sinha, for Petitioner, Devendra Prasad, for Opposite Party.

Case referred to:

(1935) A C 462: (104 L J K B 433) (Pr 1)

ORDER.: This case presents some difficulty, and the difficulty arises from the conduct of the petitioner in having put forward at his trial a defence which was wholly untrue. The petitioner was discovered in the middle of the night in a house belonging to one Damodar and was apprehended by Damodar, who is a young man of about twenty. and his relation Kishun Ram, who is not much older. Two constables, who were on patrol in the village, came up immediately after the petitioner was apprehended and took him in charge. The defence set up by the petitioner was that he had advanced a sum of Rs. 500/- to Mt. Rajwanti, the mother of Damodar, in connection with the latter's marriage, and had been asked by Damodar and Kishun Ram to come to the house and try to come to some arrangement as to how Mt. Rajwanti should pay the money due by her. This defence, which, in short, was that the petitioner had been enticed into the house and then falsely and maliciously denounced as a burglar, was quite rightly disbelieved by the Courts below. Ordinarily, when a man is found in enclosed premises at night, and when the explanation which he gives for being there is palpably untrue, the inference which may be drawn is that he was on the premises for some criminal purpose. Nevertheless, such an inference ought not to be drawn if there are circumstances in the case which go to show that in fact the petitioner may have had some innocent purpose in view, although not the purpose which he himself said he had.

In this particular case there are several circumstances which, in my opinion, create a reasonable doubt as to the petitioner having been invited into the house by Mt. Rajwanti in pursuance of an intrigue, and not having broken into it in order to commit theft. The most important of these circumstances is that the petitioner was apparently found in the room occupied by Mt. Rajwanti and that he had no house-breaking implements or the like on his person. Now, admittedly, the petitioner had been in the employ of Mt. Rajwanti's husband, and was quite well-known to her. In fact, at the trial a number of letters were produced which were said to have been written by Mt. Rajwanti to the petitioner. According to the prosecution, the petitioner was not admitted into the house by Mt. Rajwanti but got into it by means of a rope which, in some way or other, he contrived to throw up and fasten on to an upper window or balcony. This part of the evidence was, in my opinion, most unconvincing.

The learned Advocate who appears in support of the conviction, lays stress on the fact that the petitioner was taken into custody forthwith by two constables, and argues with some cogency that these constables must have been led to believe that he was a burglar. The constables were not, however, called to give evidence, as they should have been at the trial. Moreover, the Assistant Sub-Inspector who conducted the investigation was of opinion that the petitioner was not a burglar and did not submit a charge-sheet. If the petitioner had been an ordinary burglar, one would expect Damodar and Kishun Ram to have gone with him and the two constables to the police station and to have lodged an information immediately. Instead, nothing was apparently done until the next morning, and an information was lodged then, not by Damodar or Kishun Ram, but by Kanti Dutt Misra, who was not himself in the house and personally knew nothing of what had taken place.

It appears that the learned Additional Sessions Judge would not have convicted the petitioner if he had specially taken the defence that he had entered the house in pursuance of an intrigue with Mt. Rajwanti. The lower appellate Court appears to have thought that it was incumbent on the petitioner to take this defence specifically and also to adduce evidence to prove that the letters which he produced were in the handwriting of Mt. Rajwanti. The learned Additional Sessions Judge, in my opinion, misdirected himself. On the principle laid down in 'WOOLMINGTON v. DIRECTOR OF PUBLIC PROSECUTIONS', (1935) A C 462 at 481, if on the evidence adduced by the prosecution, a reasonable doubt arises as to the guilt of a prisoner, the prisoner must have the benefit of it. In my opinion, there is more than a reasonable doubt as to the petitioner having entered these premises in order to commit theft. That being so, the application will

be allowed, the conviction and sentence are set aside, and the petitioner is discharged from his bail.

V.B.B. *Application allowed.*

A. I. R. 1952 Patna 253

REUBEN J.

Behari Rai, Petitioner v. The State.

Criminal Miscellaneous Case No. 383 of 1951 with Criminal Revision No. 1063 of 1951. D/- 23-11-1951.

(a) *Criminal P. C. (1898), S. 197 — Test of applicability.*

In deciding whether S. 197 has any application, the test is the prosecution story and not the defence of the accused. AIR (26) 1939 F C 43, Relied on. (Para 2)

Anno: Criminal P. C., S. 197, N. 1.

(b) *Criminal P. C. (1898), S. 197 — "Acting in discharge of official duty" — Act held did not lie within scope of authority.*

A public servant can only be said to act or purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. AIR (35) 1948 P. C. 128, Relied on.

Where the complaint against the Deputy Superintendent of Police was that when he and other police officers had come to the place of a dacoity to investigate the dacoity the complainant who along with them was also making a search for the dacoits was called by the Deputy Superintendent of Police and on his arrival abused and slapped and upon his protest beaten by a lathi:

'Held' that taking the complaint as it stood there was nothing to indicate that the accused was acting or purporting to act in the discharge of his official duty. At the utmost, the act complained of was committed during the investigation of a cognizable offence. (Para 2)

Anno: Criminal P. C., S. 197, N. 6.

Murtaza Fazl Ali, for Petitioner; S. C. Chakravarti, for Opposite Party.

Cases referred to:

('48) AIR (35) 1948 P C 128: (49 Cri L J 503) (Pr 2)

('39) AIR (26) 1939 F C 43: (40 Cri L J 468) (Pr 2)

ORDER.: Criminal Revision No. 1063 of 1951 arises out of an order of the Sub-divisional Magistrate of Dinapore "dropping" a complaint of assault filed by the petitioner against a Deputy Superintendent of Police on the ground that sanction under Section 197 (1) of the Code of Criminal Procedure is necessary and has not been obtained. The facts are that, in the night of the 8th of August 1951, at about 11 O'clock, a dacoity was committed in the house of one Pati Lall Sahu of village Manpura. Soon after the dacoity, the Deputy Superintendent of Police with some other police officers arrived. A first information report of dacoity was lodged before the Sub-Inspector, who was in the police party, and, among other persons, the petitioner was named as one of the dacoits. The case of the petitioner is that, after the arrival of the police party, the petitioner along with other villagers, on the request of the police, searched for the dacoits unsuccessfully and that later the petitioner from his house in village Tarachak was called to the Deputy Superintendent of Police; that on his arrival there he was abused and slapped by the Deputy Superintendent of Police and on his protest was beaten by the Deputy Superintendent of Police with a 'lathi.' A complaint to this effect was filed by the petitioner before the Sub-divisional Magistrate on the 10th of August 1951. The Sub-divisional Magistrate postponed passing orders thereon for the purpose of holding a preliminary enquiry. In the meantime, an objection was filed on behalf of the accused regarding the maintainability of the petition of complaint. This objection was taken up on the 3rd of September 1951 with the result which I have noted above.

(2) The provisions of Section 197 (1) are very clear and have been explained in several reported rulings. Under this section, protection is given, among others, to a public servant not removable from his office save by or with the sanction of a State Government or some higher authority, who is 'accused' of any offence alleged' to have been committed by him 'while acting or purporting to act in the discharge of his official duty." I find it difficult to understand how it can be said in the present case that this provision has any application. My attention has been drawn to Sections 54 (1) and 46 (2) of the Code of Criminal Procedure, and it has been urged that the Deputy Superintendent of Police, by virtue of his being a police officer, was entitled to arrest the petitioner and, if necessary, to use force for the purpose, there being against him a credible information of his being concerned in the offence of dacoity. This, however, is taking an incorrect view of the effect of Section 197. The words "accused" and "alleged" which I have placed in italics (here in inverted commas) above make it clear that, in deciding whether Section 197 has any application, the test is the prosecution story and not the defence of the accused. This has been authoritatively laid down by the Federal Court in the case of 'HORI RAM SINGH v. EMPEROR', AIR (26) 1939 FC 43, with reference to Section 270 (1) of the Government of India Act which was identical with the terms of Section 197. Taking the complaint as it stands, there is nothing to indicate that the accused was acting or purporting to act in the discharge of his official duty. At the utmost, the act complained of was committed (I am for the purpose of the argument accepting the story as alleged), during the investigation of a cognizable offence. The words ' 'while acting etc." cannot, however, be read in a temporal sense 'H. H. B. GILL v. THE KING', AIR (35) 1948 P C 128. A public servant can only be said to act or purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty.

(3) For these reasons the order of the Sub-divisional Magistrate cannot be supported. It is set aside and the Magistrate is directed to proceed according to law. In order to avoid any misapprehension in the matter, I make it clear that the proper action to be taken on the complaint is a matter within the powers of the Sub-divisional Magistrate and my present order must not be understood as giving him any direction as to how that power should be exercised by him.

(4) Criminal Miscellaneous No. 383 of 1951, in which the petitioner is the same person, is a petition for bail in the dacoity case. I have examined the first information report and the case diary. While there is some evidence against the petitioner, I do not think the circumstances are such as to justify the refusal of bail. Let the petitioner be released on bail to the satisfaction of the District Magistrate.

R.G.D. *Orders accordingly.*

A. I. R. 1952 Patna 254

CHATTERJI, J.

Ramchandra Ram, Appellant v. Ram Ratan Prasad and others, Respondents.

A. F. A. D. No. 1783 of 1950, D/- 20-7-1951.

Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control Act (III (3) of 1947), S. 18(3)) — Jurisdiction of Civil Court to question decision of Rent Controller — Civil P. C. (1908), S. 9.

Where the Rent Controller orders eviction of a tenant on the finding that there was non-payment of rent, his decision cannot be questioned in the Civil Court, even if the Controller may be assumed to have wrongly decided the question of non-payment of rent. AIR (38) 1951 S C 115, Foll;. AIR (27) 1940 P C 105, Referred. (*Para 9*)

Anno: C. P. C., S. 9 N. 50, 53.

Rameshwar Misra, for Appellant; Ganesh Sharma and Medni Prasad Sinha, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('40) 67 Ind App 222: (AIR (27) 1940 P C 105) (Pr 8)

('51) AIR (33) 1951 S C 115: (1951 S C R 145) (Pr 7)

('49) AIR (36) 1949 Pat 474: (30 Pat L T 183) (Prs 7, 8)

JUDGMENT: This is an appeal by the defendant in a suit brought by the plaintiffs for a declaration that the order passed by the learned Additional Commissioner of Patna & Trihut for ejectment of the defendant (sic) from a house was without jurisdiction and not binding on the plaintiffs.

(2) The plaintiffs are monthly tenants of a house of which the defendant is the landlord. The plaintiffs had taken lease of the house from the previous owner from whom the defendant purchased the proprietary interest in March, 1944. After some previous unsuccessful attempts to eject the plaintiffs, the defendant filed an application under the provisions of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, before the Subdivisional Officer for eviction of the plaintiffs on the ground of non-payment of rent. After enquiry, the learned Sub-divisional Officer, by his order dated the 19th May 1949, rejected the defendant's application and allowed the plaintiffs to deposit the rent of the house in Court. Against that order the defendant preferred an appeal to the Commissioner. This appeal was heard by the learned Additional Commissioner who by his order dated the 26th July, 1949 directed the plaintiffs to vacate the house by 27h October 1949. He found that there was non-payment of rent and, therefore, the plaintiffs were liable to be evicted.

(3) On 17th September 1949, the plaintiffs brought the present suit for a declaration that the said order dated the 26th July 1949 of the learned Additional Commissioner was without jurisdiction and not binding on them. It was alleged that the plaintiffs never defaulted in payment of rent and in fact there was no non-payment of rent for which they could be evicted under the provisions of Bihar Buildings Control Act.

(4) The defence was that there was in fact non-payment of rent, as found by the learned Additional Commissioner, and that his order could not be questioned by the civil Court.

(5) The learned Munsif who tried the suit held that in fact the plaintiffs did not pay some arrears of rent and that the learned Additional Commissioner was justified in passing the order for eviction. He further held that under Section 18 (3) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, the order of the learned Additional Commissioner could not be questioned by the civil Court. He accordingly dismissed the suit.

(6) Against his decision the plaintiffs preferred an appeal to the district Court. The learned Subordinate Judge, who heard the appeal, upon a consideration of the evidence, came to the finding that the plaintiffs never defaulted in payment of rent and they were never in arrears and that, therefore, the order dated the 26th July 1949 passed by the learned Additional Commissioner was without jurisdiction and as such not binding on the plaintiffs. Hence this second appeal by the defendant.

(7) The learned Subordinate Judge, in deciding that the order of the learned Additional Commissioner dated the 26th July 1949 was without jurisdiction, relied on the decision of this Court in 'S. K. SHAW AND BROS. v. BRIJ RAJ', AIR (36) 1949 Pat 474. In that **case it was held:**

> "Reading S. 18(3) of the Act, in this context, it is clear what it excludes is the jurisdiction of the civil Court to question the order of the Controller, provided the fact for which the order is made is not non-existent. It certainly does not exclude the jurisdiction of the civil Court to examine into cases where the order is made in the absence of the fact, on the existence of which alone depends the jurisdiction of the Controller."

But this decision was reversed on appeal, by the Supreme Court in 'BRIJ RAJ KRISHNA v. S. K. SHAW AND BROS.', AIR (38) 1951 S C 115. Their Lordships of the Supreme Court after referring to the relevant provisions of the Bihar Buildings (Lease Rent & Eviction) Control Act of 1947, said:

> ".....the Act has entrusted the Controller with a jurisdiction, which includes the jurisdiction to determine whether there is non-payment of rent or not, as well as the jurisdiction, on finding that there is non-payment of rent, to order eviction of a tenant. Therefore even if the Controller may be assumed to have wrongly decided the question of non-payment of rent, which by no means is clear his order cannot be questioned in a civil Court."

(8) Mr. Ganesh Sharma on behalf of the respondent relies on Privy Council decision in 'SECRETARY OF STATE v. MASK AND CO.', 67 Ind App 222 (PC), in which it was laid down:

> "It is settled law that the exclusion of the jurisdiction of the civil Court is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where

the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

But this very passage from the Privy Council decision was referred to and relied upon by this Court in the aforesaid case 'S. K. SHAW AND BROS v. BRIJ RAJ', AIR (36) 1949 Pat 474.

(9) The said decision of the Supreme Court is exactly in point and it is binding on this Court. In the face of this decision of the Supreme Court, it is impossible to hold that where the Rent Controller orders eviction of a tenant on the finding that there was non-payment of rent, his decision can be questioned in the civil Court. It, therefore, follows that the order of the learned Additional Commissioner dated the 26th July 1949 was passed with full jurisdiction and it cannot be questioned in the civil Court.

(10) The appeal is accordingly allowed, the decision of the learned Subordinate Judge is set aside and that of the trial Court restored. The appellant will be entitled to his costs in this Court as well as in the lower appellate Court.

D.H. *Appeal allowed.*

A. I. R. 1952 Patna 255

SINHA AND RAMASWAMI, JJ.

Bhagwan Das, Plaintiff-Appellant v. Janak Lal Thakur and others, Defendants-Respondents.

A. F. A. D. No. 1433 of 1948, D/- 1-9-48.

Houses and Rents — Bihar Buildings (Lease Rent and Eviction) Control Act (III (3) of 1947), S. 11(1)(a) and (3)(a), Proviso — Application for eviction of tenant before expiry of term of lease — House required by landlord for his own use — Order of eviction after expiry of lease — Order if ultra vires — Civil P. C. (1908), S. 9.

A landlord applied for eviction of his tenant on two grounds: (i) failure to pay arrears of rent (ii) the house was required for his personal use. The controller passed an order of eviction on the first ground. In appeal the commissioner held that the first ground was not proved but that the tenancy was for a fixed term and the tenant should be ejected because of the expiry of that term. The tenant thereupon brought a suit for declaration that the order of eviction passed by the commissioner was without jurisdiction:

Held that as the Commissioner had jurisdiction to decide whether the plaintiff was a tenant from month to month or only a tenant for prescribed term, even if he decided the question wrongly that was not a matter affecting his jurisdiction. (Distinction between an absolute want of jurisdiction and an irregular assumption of jurisdiction pointed out). (Para 3)

Held further that the order of eviction could not be said to be without jurisdiction merely because the application for eviction was filed before the expiry of the term of the lease in contravention of proviso to Section 11(3)(a) which was merely a directory provision involving no invalidating consequence in its disregard. Moreover, the proviso was inserted by the legislature simply for the security or benefit of the tenants and the party concerned may waive the condition without affecting the jurisdiction of the Court. (Paras 4, 7)

Anno: C. P. C., S. 9 N. 4.

G. P. Sahi and Sreenath Singh, for Appellant; Nandlal Untwalia, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('98) 27 Ind App 216: (25 Bom 337 PC) (Pr 3)
('87) 11 Bom 488 (Pr 3)
('47) L P A No. 15 of 1946: (AIR 1949 Pat 139 F B) (Pr 5)
(1894) A C 129: (63 L J P C 49) (Pr 4)
(1938) 4 All E R 32: (159 L T 508) (Pr 6)
(1758) 1 Burr 445: (97 E R 394) (Pr 4)

RAMASWAMI, J.: The question in issue in this appeal is whether the order of the Commissioner of Muzaffarpur evicting the appellant from occupation of a house is beyond jurisdiction and 'ultra vires.' The plaintiff alleged that he had taken lease of the house from the defendants on a rent of Rs. 18/- per mouth. In the year 1942-43 a portion of the house was acquired by the Government and demolished for a road widening scheme. The plaintiff advanced a sum of Rs. 1,500/- to the defendants who agreed to make some additional construction. The plaintiff agreed to pay rent at Rs. 65/- per month. A sum of Rs. 40/- per month was to be deducted monthly so that the loan would be liquidated in December, 1946. A written statement to this effect was signed by both the parties. The plaintiff asserted that as the defendants did not complete the house, he was not liable to pay enhanced rent of Rs. 65/- per month. The plaintiff sent a registered notice to the defendants, who thereupon applied to the Controller for eviction of the plaintiff from the house. The Controller, by his order dated the 26th August 1947, ordered that the plaintiff should be evicted. The plaintiff appealed before the Commissioner who affirmed the order of eviction.

(2) Both the Munsiff and the Subordinate Judge have held that the Commissioner's order was not 'ultra vires', and cannot be challenged in this collateral proceeding.

(3) The plaintiff has preferred this appeal. On his behalf, learned Advocate presented two arguments. In the first place, learned Advocate pointed out that, in their application the respondents asked for eviction on the grounds (1) that the plaintiff had failed to pay arrears of rent, and (2) that the house was required for their personal use. The Controller held that the respondents failed to establish ground No. 2; but, since the plaintiff had failed to pay the arrears of rent, the Controller ordered that he should be evicted. In appeal, the Commissioner held that there was no proof that the plaintiff failed to pay the arrears of rent. The Commissioner, however, decided that the plaintiff was a tenant for a term, and that he should be evicted because the term of the lease had expired. It was contended for the appellant that the Commissioner was erroneous to hold that the plaintiff was a tenant for a specific period; and that he was liable to eviction on the expiry of the lease under Section 11 (1) (b) of Act III of 1947. Assuming that this argument is correct and the Commissioner committed a mistake of law, it cannot still be contended that the Commissioner acted without jurisdiction in ordering eviction of

the plaintiff. In my opinion, the Commissioner had jurisdiction to decide whether the plaintiff was a month to month tenant or if he was a tenant for a term. If he decided the question wrongly against the plaintiff, that was not a matter affecting his jurisdiction. In examining this question, it is necessary to keep in mind the distinction between 'an absolute want of jurisdiction and an irregular assumption of jurisdiction.' By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. As pointed out by West, J., in 'AMRITRAV KRISHNA v. BALKRISHNA GANESH', 11 Bom 488:

"Jurisdiction consists in taking cognizance of a case involving the determination of some jural relation, in ascertaining the essential points of it, and in pronouncing upon them."

Objections affecing jurisdiction must relate either to the person, the place or the character of the suit. If a Court has competence in these respects, it may exercise jurisdiction and does exercise it whether correctly or erroneously in dealing judicially with a cause placed before it. In 'MALKARIJUN v. NARHARI', 27 Ind App 216 (PC), it was held that an execution sale could not 'be treated as nullity if the Court which sold has jurisdiction to do so', even though it erroneously decided that a person who in fact did not represent the estate of the deceased judgment-debtor was such a representative. Lord Hobhouse observed:

"He contended that he was not the right person, but the Court, having received his protest, decided that he was the right person, and so proceeded with the execution. 'In so doing the Court was exercising its jurisdiction.' It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right."

In my opinion the Commissioner had jurisdiction in the present case to decide wh her the plaintiff was a tenant from month to month or only a tenant for a prescribed term.

(4) In the second place, learned Advocate pointed out that, even if the plaintiff was a tenant for a term, the defendants were not entitled to apply for eviction before the expiry of the lease. Section 11 (3) (a) of Act III of 1947 reads:

"A landlord may apply to the Controller for an order directing the tenant to put the landlord in possession of a building if he requires it reasonably and in good faith for his own occupation or for the occupation of any person for whose benefit the building is held by him:

Provided that where the tenancy is for a specified period agreed upon between the landlord and the tenant, the landlord shall not be entitled to apply under this Sub-section before the expiry of such period."

In the present case the respondents admittedly applied for eviction before the expiry of the period of the lease. But the order of the Commissioner cannot be held 'ultra vires' for this reason. For it is well established that violation of an imperative provision of a statute does not necessarily affect the jurisdiction of a Court. Where an enabling statute prescribes the way in which something is to be done, the enactment may be absolute or directory. If an absolute enactment is neglected or contravened, a Court of law will treat the thing which is being done as altogether void, but if an enactment is merely directory, it is immaterial so far as it relates to the validity of thing which is being done, whether it is complied with or not. For

"there is a known distinction" as Lord Mansfield said in 'REX v. LOXDALE', (1758) 1 Burr 445, between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory."

In the present case the proviso to Section 11 (3) (a), that the landlord "shall not be entitled to apply before the expiry of such period", though expressed as a command, should be considered as a mere direction or instruction involving no invalidating consequence in its disregard. Moreover, there is another important reason. The Act purports to regulate the letting of buildings and to prevent unreasonable eviction of tenants. Now, if the object of a statute is not one of general policy or if the thing which is being done will benefit only a particular class of persons, then the conditions prescribed by the statute are not considered as being indispensable. In 'WILSON v. McINTOSH', (1894) A C 129, an application was made to bring lands under Real Property Act (26 Vict. No. 9), of New South Wales. A caveat was lodged under Section 23, and more than three months thereafter the applicant lodged his case under Section 21, and obtained an order that the caveator should file his case. The Judicial Committee said:

"Their Lordships are of opinion that the maxim 'Quilibet protest renunciare juri pro se introducto applies to this case, that it was competent for the applicant to waive the limit of the three months and the lapse of the caveat by Section 23."

In the present case I consider that the statutory provision (that is the proviso to S. 11 (3) (a)) was inserted by the legislature simply for the security or benefit of the tenants, that the provision is not indispensable and the party concerned may waive the condition without affecting the jurisdiction of the Court.

(5) In the Full Bench decision, 'RAM RANBIJAYA PRASAD SINGH v. RAM KAWAL UPADHYA', AIR (36) 1949 Pat 139, the Revenue Officer admittedly violated Section 113 of the Bihar Tenancy Act when he granted a second reduction of rent within the prescribed period of fifteen years. Even so, the Full Bench held that that Revenue Officer's order cannot be impeached as being 'ultra vires.'

(6) The principle has been emphatically stated by Greer, L. J., in 'R. v. MINISTER OF HEALTH, EX PARTE GLAMORGAN COUNTY MENTAL HOSPITAL', (1938) 4 All E R 32 at p. 36:

"Where the proceedings are regular upon their face, and the Magistrate had jurisdiction, the superior Court will not grant the writ of certiorari on the ground that the Court below has misconceived a point of law. When the Court below has jurisdiction to decide a matter, it cannot be deemed to exceed or abuse its jurisdiction, merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence."

(7) In the present case, I hold that the Revenue Commissioner did not act without jurisdiction merely because he failed to comply with the proviso to Section 11 (3) (a) of the Act.

(8) In my opinion, this appeal must be dismissed with costs.

(9) SINHA, J.: I agree.

K.S. *Appeal dismissed.*

A. I. R. 1952 Patna 257

JHA C. J. AND NARAYAN J.

Jugal Singh, Appellant v. Tripureshwari Prasad and others, Respondents.

A. F. A. D. No. 839 of 1948, D/- 18-7-51.

Tenancy Laws — Bihar Tenancy Act (VIII (8) of 1885), Sch. III, Art. 3 — Applicability — Dispossession must be by landlord.

The operation of the special law of limitation as provided by Art. 3, Sch. III of the Bihar Tenancy Act would be attracted only when the landlord as such dispossesses a person in possession either by his own act or by the act of his agents or servants, or if a third person as settlee or transferee dispossesses the person in possession by the active co-operation and aid of the landlord. Where, therefore, the dispossession of a tenant is not proved to be by the landlord, his agent or his transferee, the special rule of limitation in Art. 3 does not apply and the case is governed by the general law of limitation. AIR (22) 1935 Pat 372 Expl; AIR (4) 1917 Pat 404; AIR (34) 1947 Pat 392; 20 Ind Cas 350 (P C) and unreported decision in S. A. No. 983 of 1947, D/- 11-8-1949 (Pat) Relied on. (Paras 2, 4)

Padmanand Jha, for Appellant; G. P. Das and S. C. Mukherji, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('13) 17 Cal W N 1149: (20 Ind Cas 350) (Pr 3)

('17) 2 Pat L J 567: (AIR (4) 1917 Pat 404) (Pr 2)

('35) AIR (22) 1935 Pat 372: (158 Ind Cas 21) (Pr 2)

('46) 25 Pat 695: (AIR (34) 1947 Pat 392) (Pr 3)

('49) Second Appeal No. 983 of 1947, D/- 11-8-1949 (Pat) (Pr 3)

NARAYAN, J.: This is a defendant's appeal arising out of a suit for declaration of title and recovery of possession with regard to 6 bighas 1 Katha of raiyati land. This land was the property of the plaintiff, and in execution of a money decree against him an area of 7 bighas and odd, including the disputed land, was purchased by the proprietor of a concern known as Bhikhanpur and Jhapaha Concern. This sale took place on the 19th November, 1931 and it was followed by a symbolical delivery of possession which was effected sometime in the year 1932. On the 7th June, 1933, the said concern reconveyed this disputed 6 bighas 1 katha to the plaintiff by a registered sale-deed. The plaintiff's case was that in Sawan, 1349 Fasli, the defendant dispossessed him from the land on the strength of a sale-deed which had been executed in his favour by one Mr. Richardson, the managing proprietor of the Jhapaha concern, and hence he filed this present suit on the 5th April, 1945, with the prayer that his title on the strength of the sale-deed, dated the 7th June, 1933, be declared and a decree for khas possession with mesne profits be granted to him.

(2) The claim was resisted by the defendant 1st party who pleaded 'inter alia' that the suit was barred under the special limitation provided by Article 3, Schedule III of the Bihar Tenancy Act. This contention found favour with the Court of first instance which dismissed the plaintiff's claim as time-barred. On appeal by the plaintiff the decision was reversed and the learned Subordinate Judge held that, on the facts alleged, the special limitation provided by the Bihar Tenancy Act could not be applied to this case. One of the defendants 1st party then came up in second appeal and the only point that has been pressed before us is that the Court below was wrong in holding that the special limitation of the Bihar Tenancy Act, could not apply to this case. The appellant's learned counsel has relied on a decision of a Single Judge of this Court in 'HAR DAYAL v. NATHUNI BHAGWAT', AIR (22) 1935 Pat 372 and has strenuously contended that this must be taken to be a case in which the landlord had a hand in the dispossession of the raiyat and that as such the claim of the plaintiff should be rejected as time-barred. But it would appear from a perusal of the judgment of the lower appellate Court that it was never alleged in this case that the defendants had dispossessed the plaintiff at the instigation of or in collusion and concert with the landlord The learned Subordinate Judge says that there is absolutely no suggestion in the plaint that the dispossession was caused with the collusion of the landlord and that in the evidence there is no case that the landlord helped the defendants in dispossessing the plaintiff. In my opinion this finding is conclusive of the case, and conclusive of it against this present appellant. The appellant's learned counsel could not contend that there is any mis-statement of fact in the judgment of the lower appellate Court, and the irresistible conclusion, therefore, is that the landlord had no hand in the ouster. The decision relied on by the appellant's learned Counsel, apart from being a decision of a Single Judge, is really to the effect that Art. 3, Schedule III, applies only to cases of actual dispossession by the landlord, and it further says that if the possession of the tenant ceases on account of the land being submerged under water, and if after re-appearance of the land there is no actual taking of possession by the raiyats and no dispossession by the landlord, then Art. 3, Schedule III, would not apply. There is no doubt an observation that if a landlord authorizes a third person by making settlement of the land with him to dispossess a raiyat and that person armed with the settlement dispossesses him, the dispossession is by the landlord. In this particular case it cannot be urged that there was a settlement by the landlord and the person armed with the settlement dispossessed the plaintiff. As was pointed out by Chamier, C. J. in 'JAIMANGLABATI v. JHARU LAL', 2 Pat L J 567, there are several decisions of the Calcutta High Court to the effect that where a landlord buys a raiyat's holding and as purchaser of the raiyati interest dispossesses that raiyat, Article 3 does not apply to the suit by the dispossessed raiyat to recover his holding.

(3) There is a recent decision of a Division Bench of this Court, 'KAPIL SINGH v. FEDA ALI', 25 Pat 695, in which the principles connected with Art. 3, Schedule III, have been clearly explained. As was pointed out by His Lordship Ray, J., this Article will never apply

to a case in which the plaintiff cannot say to the defendant that "I am your raiyat", and if it was otherwise, then it will amount to changing the general law of limitation in the case of suits for recovery of raiyati lands as against any body who comes and squats upon the land and claims it adversely simply because the latter has some sort of sympathy, however remote, from the landlord. In this particular case it cannot even be argued that the landlord was remotely concerned with the dispossession of the plaintiff. There is also an unreported decision of this Court on this point, TOOKA SINGH v. DWARKA SINGH', Second Appeal No. 983 of 1947, D/- 11-8-1949, to which I was a party. In this case the following well-known observation of His Lordship Sir Lawrence Jenkins, C. J., in 'SMT. BASANTA KUMARI v. NANDA RAM', 17 Cal W N 1149, was quoted with approval:

> "As between the plaintiff and the principal defendants there was no relationship of landlord and tenant, so that as between them the article would not apply and it is only by importing the landlord and saying that he had a hand in the ouster that any suggestion can be made that this rule of special limitation governs this case."

His Lordship the Chief Justice further observed in this case:

> "This theory of constructive dispossession by landlords has been carried too far, and we are not disposed to encourage the idea that, because it can be said that the landlord has favoured the dispossession by others, there has been a dispossession by him."

I need not repeat that, on the facts found in this particular case, it cannot even be urged that the landlord had favoured the dispossession. The learned Subordinate Judge seems to have accepted the evidence of P.W. 3 to the effect that after the purchase by the defendant he went to Mr. Richardson and complained to him as to why a sale-deed had been executed in favour of the defendants in respect of the disputed land and the answer of Mr. Richardson was that the settlement was made on account of the mistake of the 'amlas'. This evidence having been accepted, it follows that the landlord never sanctioned or favoured this dispossession. In this view of the matter I do not find any merit in this appeal and I would dismiss it with costs.

(4) LAKSHMIKANTA JHA, C. J.: I agree. The law, in my view, is that the operation of the special law of limitation as provided by the Bihar Tenancy Act would be attracted only when the landlord as such dispossesses a person in possession either by his own act or by the act of his agents or servants, or if a third person as settlee or transferee dispossesses the person in possession by the active co-operation and aid of the landlord. In any other case the special law of limitation cannot be held to be applicable. If the landlord being an auction-purchaser dispossesses a person who has got a right to hold as against him as purchaser, and the dispossession is through the instrumentality of the Court, then it cannot be said to be a case of dispossession by the landlord, and the general law of limitation would apply. In the present case, on the findings, the appellant has failed to prove that he was dispossessed either by the landlord or by his agent or by his transferee with his active co-operation.

D.R.R. *Order accordingly.*

A I. R. 1952 Patna 258

JHA, C. J. AND AHMAD, J.

Raghunandan Rai and others, Appellants v. Sukhlal Rai, Respondent.

A. F. A. O. No. 158 of 1949, D/- 14-5-1951.

(a) Civil P. C. (1908), S. 115, O. 23, R. 3, O. 43, R. 1 — Submission to award — Defendant not consenting — Effect — Arbitration Act (1940), S. 47, Proviso.

Where the leave of the Court before which the suit was pending was not taken to make any reference to arbitrators for the decision of the dispute which was the subject-matter of the suit and at the time when the Court was asked to dispose of the suit in terms of the award the defendants did not consent to the compromise or adjustment of the suit being recorded according to the award, even if the parties consented to the dispute being settled by arbitration without obtaining the sanction of the Court it has no jurisdiction under the proviso to S. 47 of the Arbitration Act, to dispose of the suit in terms of the award under O. 23, R. 3, unless all the parties to the suit consented to the same. When the lower appellate Court without expressing any view as to whether the Court has at all any jurisdiction to record the arbitration award as compromise under O. 23, R. 3 of the Code of Civil Procedure, when the same is objected to by one or the other party, remands the case to the Court below with a direction that the parties be given opportunity to prove whether in fact consent was given by the defendants at the time when the reference was made, no second appeal is maintainable but revision lies as the Court commits an error of law in the exercise of its jurisdiction. AIR (22) 1935 Pat 243 Foll.; AIR (32) 1945 Mad. 294 not Foll. *(Paras 2, 3, 4, 6)*

Anno: C. P. C., S. 115 N. 12, 13; O. 23, R. 3 N. 9; O. 43, R. 1 N. 12, Arbitration Act, S. 47, N. 1.

(b) Civil P. C. (1908), S. 115 — Error of law or fact.

The High Court has no power to interfere with an order of a Court subordinate to it if it acts with jurisdiction even though its conclusions of law or fact may be wrong. 25 Bom 337 P C; AIR (36) 1949 P C 239; AIR (36) 1949 P C 156, Foll. *(Para 5)*

Anno: C. P. C., S. 115 N. 12, 13.

Prem Lall, for Appellants; B. N. Mitter and Umesh Chandra Prasad Sinha, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

(1900) 27 Ind App 216: (25 Bom 337 (P C)) (Pr 5)

('49) 76 Ind App 131: (AIR (36) 1949 P C 239) (Pr 5)

('49) 76 Ind App 67: (AIR (36) 1949 P C 156) (Pr 5)

('45) AIR (32) 1945 Mad 294: (ILR (1946) Mad 39) (Pr 4)

('35) 16 Pat L T 280 : (AIR (22) 1935 Pat 243) (Pr 4)

JUDGMENT: This appeal is directed against an appellate order of Mr. Naqui Imam, District Judge, Muzaffarpur, dated the 20th May, 1949, remanding the case to the Court of first instance for disposal after taking evidence in the case.

(2) The plaintiff filed a suit on the 5th of December, 1947, for certain reliefs, and on the 7th of January, 1949, he filed a petition that the dispute had been settled out of Court by arbitrators with the consent of both parties and prayed that a decree be passed in terms of the award under O. 23, R. 3, Code of Civil Procedure. The defendants denied the allegation of the plaintiff and contended that the award is illegal and fraudulent and that the Court had no jurisdiction to order the suit to be disposed of in terms of the award without their consent. The trial Court, without taking any evidence on the merits of the allegations of the parties, held that, as there was objection by the defendants to the recording of the compromise, it could not be given effect to in law. There was an appeal by the plaintiff, and the learned District Judge, without expressing any view as to the legality of the order and as to whether the Court had at all any jurisdiction to record the arbitration award as compromise under O. 23, R. 3 of the Code of Civil Procedure when the same is objected to by one or the other party, sent the case back to the Court below with a direction that the parties be given opportunity to prove whether in fact consent was given by the defendants at the time when the reference was made. He held:

> "These are facts that have to be determined on evidence. It is only when it knows what the facts are that the Court can go into the legal points that have been raised and see whether they have any substance in the light of the facts of the case as brought out through evidence. It will thus be clear that the evidence must be taken in this case."

Being dissatisfied with this order the defendants have come up in second appeal.

(3) This second appeal is from an order of remand. It is, therefore, not maintainable, and it has been conceded on behalf of the appellants that no appeal lies and we have been asked to treat it as a civil revision. The contention of Mr. Prem Lall, for the defendants, is that the order of the learned District Judge is bad in that he has acted illegally and with material irregularity in remanding the case without recording his view on the question of law, and that he has failed to exercise the jurisdiction vested in him in law. There is much substance in the contention of Mr. Prem Lall, and, in our opinion, the order of the learned District Judge cannot be supported.

(4) On the plaintiff's own allegation, the leave of the Court before which the suit was pending was not taken to make any reference to punches for the decision of the dispute which was the subject-matter of the suit. At the time when the Court was asked to dispose of the suit in terms of the award the defendants did not consent to the compromise or adjustment of the suit being recorded according to the award. Therefore even if the parties consented to the dispute being settled by arbitration without obtaining the sanction of the Court it had no jurisdiction under the proviso to S. 47 of the Indian Arbitration Act, 1940 to dispose of the suit in terms of the award under O. 23, R. 3, Code of Civil Procedure unless all the parties to the suit consented to the same. The proviso to S. 47 reads:

> "Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending."

Therefore, apart from any authority, it is clear that under this proviso it is not open to the Court to record any arbitration award under O. 23, R. 3, Civil Procedure Code if objection to the recording of it is made by any party. It was held in 'BHIMRAJ KANAI LAL FIRM v. MUNIA SETHANI', 16 Pat L T 280 at p. 288:

> "If parties come to the Court with a cut and dry statement that the matters in dispute between them have been adjusted, then O. 23, R. 3 applies; but if they come to the Court stating that it is true that they have referred their dispute to arbitration but that they do not agree actually to accept the decision which has been arrived at by another person, then the matter is no longer governed by O. 23, R. 3."

A contrary view was taken in 'ARUMUGA MUDALIAR v. BALASUBRAMANIA MUDALIAR', AIR (32) 1945 Mad 294, but in view of the clear provision of the proviso to S. 47 and the decision in 'BHIMRAJ KANAI LAL FIRM v. MUNIA SETHANI', 16 Pat L T 280, we do not think the learned District Judge was justified in making the order that he did.

(5) The question, however, for our consideration is whether we can interfere with the order of the learned District Judge under S. 115, Code of Civil Procedure. This Court has no power to interfere with an order of a Court subordinate to it if it acts with jurisdiction even though its conclusions of law or fact may be wrong, because as pointed out in 'MALKARJUN BIN SHIDRAMAPPA v. NARHARI BIN SHIVAPPA', 27 Ind App 216 at p. 225 (PC):

> "A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision, however wrong, cannot be disturbed."

Again, in 'JOY CHAND LAL v. KAMALAKSHA CHAUDHURY', 76 Ind App 131 at p. 141, the Privy Council reiterated the law thus:

> "a subordinate Court does not act illegally or with material irregularity because it decides wrongly a matter within its competence. A Court has jurisdiction to decide a case wrongly as well as rightly."

Thus it is evident that S. 115 of the Code of Civil Procedure applies to jurisdiction alone and it empowers this Court, as a Court of revision, to interfere with the final order of a Court subordinate to it if no appeal lies, (a) when the subordinate Court invests itself with a jurisdiction which in law it does not possess; (b) or having jurisdiction when it fails to act in the excercise of such jurisdiction; (c) or when it assumes or declines to assume jurisdiction on wrong interpretation of law or on refusal to interpret law; (d) or when in the exercise of its jurisdiction it

follows a wrong procedure of law, which vitiates its ultimate decision. In 'JOY CHAND LAL BABU'S CASE', 76 Ind App 131 at p. 142, already referred to, the Privy Council observed:

"Although error in decision of a Subordinate Court does not by itself involve that the Subordinate Court has acted illegally or with material irregularity so as to justify interference in revision under sub-section (c), nevertheless, if the erroneous decision results in the subordinate Court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (a) or sub-section (b), and sub-section (c) can be ignored."

In 'VENKATAGIRI AYYANGAR v. HINDU RELIGIOUS ENDOWMENTS BOARD, MADRAS', 76 I A 67 at p. 73 (P C) the Privy Council, on a review of the decisions relevant to the point, interpreted the scope of S. 115, Code of Civil Procedure, and laid down the law thus:

"Section 115 applies only to cases in which no appeal lies, and where the Legislature has provided no right of appeal, the manifest intention is that the order of trial Court, right or wrong, shall be final. The section empowers the High Court to satisfy itself upon three matters; (a) That the order of the subordinate Court is within its jurisdiction; (b) That the case is one in which the Court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision."

Their Lordships further said:

"the section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

(6) We are satisfied that the learned District Judge committed an error of law in the exercise of his jurisdiction in making an order of remand without recording his views to the effect of the proviso of S. 47 of the Indian Arbitration Act. No useful purpose would be served by remanding the case to his Court for disposal according to law. Had he taken into consideration the effect of the proviso to S. 47 of the Indian Arbitration Act, he was bound to dismiss the application on the admitted fact alone that the award had not been filed with the consent of all the parties interested. His order is, therefore, set aside and the order of the trial Court restored. The Court will now proceed to hear the suit. The petitioner is entitled to his costs in this Court; hearing fee two gold mohurs.

D.H. *Order accordingly.*

A. I. R. 1952 Patna 260

JAMUAR AND RAI, JJ.

Jainandan Singh, Petitioner v. Krishnandan Singh and others, Opposite-Party.

Civil Revn. No. 457 of 1950, D/- 10-8-1951.

Civil P. C. (1908), Ss. 115, 151 — Failure to exercise inherent jurisdiction — Revision.

The petitioner was required to file non-judicial stamp for the preparation of the final decree in the partition suit. Instead of purchasing non-judicial stamp his agent purchased judicial stamp by mistake and it was this stamp which was filed in Court:

'Held' that the Court below should have exercised its inherent jurisdiction under S. 151 and granted a certificate for refund of the stamp filed by him by mistake. It having failed to exercise that jurisdiction, it was a fit case in which the High Court should interfere in its revisional jurisdiction. 7 Ind Cas 94 (Cal), Disting. (Para 4)

Anno: C. P. C., S. 115, N. 11; S. 151, N. 10.

Baidynath Jha, for Petitioner; Chatrapati Kumar, for Opposite Party; Government Pleader, for the State.

Cases referred to:

('29) 56 Ind App 379: (AIR (16) 1929 P C 279) (Pr 3)

('01) 23 All 213: (1901 All W N 54) (Pr 3)

('10) 14 Cal W N 1101 : (7 Ind Cas 94) (Pr 3)

JAMUAR, J.: The petitioner had filed a title suit for partition of certain joint family properties, being partition Suit No. 162 of 1949, in the Court of the Subordinate Judge of Darbhanga. The suit was decreed on compromise. Thereafter the petitioner was required to file non-judicial stamp worth Rs. 660 for the preparation of the final decree in the suit.

(2) The petitioner's case is that he sent Rs. 660 to his karpardaz for purchasing the non-judicial stamp from the Collectorate, but the karpardaz instead of purchasing non-judicial stamp of the value of Rs. 660 purchased judicial stamp by mistake and it was this stamp which was filed by him in Court. The petitioner alleges that when he detected the mistake he filed an application in the Court of the Subordinate Judge for the grant of a certificate for refund of the stamp filed by him by mistake, but the application was rejected by the Subordinate Judge on the 16th of March, 1950. It is against this order of rejection that the present application is directed and it is prayed that the Subordinate Judge may be directed to issue a certificate in the particular circumstances of the case for the refund of Rs. 660.

(3) The learned Subordinate Judge based his order of rejection on a case reported in 'RAFIUDDIN v. LATIF AHMAD', 14 Cal W N 1101. In my opinion, that case has no application to the facts of the present case. In the first place, the decision in that case was based upon a decision in a case reported in 'Ref. under S. 57 of Act 2 of 1899' 23 All 213, which decision was disapproved by their Lordships of the Judicial Committee in 'MA PWA MAY v. S.R.M.M.A. CHETTYAR FIRM', 56 Ind App 379 (P C). Secondly, in the Calcutta case the stamp filed had been used up, whereas in the present case before us the stamp is still lying unused.

(4) In the circumstances, I am of opinion that the Court below should have exercised its inherent jurisdiction under S. 151 of the Code of Civil Procedure. It having failed to exercise that jurisdiction, it is a fit case in which we should interfere in our revisional jurisdiction. I would accordingly set aside the

order of the Court below and allow the application for the refund. The learned Subordinate Judge is accordingly directed to issue the necessary certificate to enable the petitioner to get the refund.

(5) The result is that this application is allowed, but without costs.

(6) RAI, J.: I agree.

D.H. *Application allowed.*

A. I. R. 1952 Patna 261

AHMAD, J.

Parhan Mahto, Petitioner v. Divisional Forest Officer, Hazaribagh, Opposite-Party.

Criminal Revn. No. 418 of 1951, D/- 18-7-1951.

(a) Bihar Private Forests Act (IX (9) of 1948), Ss. 49 and 30 — Offence under S. 49— Private protected forest — Proof of — Absence of notification under S. 30 — Effect.

Under the Bihar Private Forests Act it is ultimately the publication of a notification in the official gazette as contemplated by S. 30 specifying definitely, according to the boundary marks erected or otherwise, the limits of the forest which converts a private forest into a private protected forest.

In a prosecution under S. 49 of the Act unless the prosecution established that the forest in question is a private protected forest none of the provisions imposing penalty on persons for contravening the provisions of the Act can come into play. Hence where the prosecution fails to produce the notification under S. 30 of the Act in respect of the forest in question and there are no materials on the record to show that the forest has been constituted as private protected forest, the conviction of the accused cannot be sustained under S. 49 of the Act. Cr. R. No. 374 of 1951 (Pat) and AIR (38) 1951 Pat 380, Rel. on. (Para 6)

(b) *Criminal P. C. (1898), S. 439 — Power to allow additional evidence.*

Where in a prosecution under S. 49, Bihar Private Forests Act the prosecution fails to produce a copy of the gazette notification in proof of the fact that the forest in question was a private protected forest, the High Court in revision against conviction of the accused will not allow the prosecution to bring on record the gazette notification when the accused is adversely prejudiced thereby. (Para 9)

Anno.: Cri. P. C., S 439, N 25.

L. K. Chaudhury, for Petitioner; S. C. Chakravarty, for Opposite-Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('25) AIR (12) 1925 Lah 298: (26 Cri L J 302) (Pr 9)

('25) AIR (12) 1925 Lah 299: (26 Cri L J 1078) (Pr 9)

('31) AIR (18) 1931 Lah 273: (32 Cri L J 1227) (Pr 9)

('46) 27 Pat L T 112: (AIR (33) 1946 Pat 1: 47 Cri L J 497 F B) (Pr 7)

('51) Cri. Revn. No. 374 of 1951, D/- 2-7-1951 (Pat) (Prs 6, 8)

('51) AIR (38) 1951 Pat 380: (31 Pat L T 128) (Pr 6)

ORDER: This application in revision is directed against an order convicting the petitioner for having committed an offence under S. 49, Bihar Private Forests Act. The petitioner has been sentenced to undergo simple imprisonment for a period of fifteen deys.

(2) The case for the prosecution, briefly stated, is that the private forest of Pokharia has been constituted a private protected forest under the provisions of the Bihar Private Forests Act, 1947 (IX of 1948). On 22nd September, 1949, the petitioner, along with seven others, was detected by one Jugeshwar Singh, who was patrolling in the jungle, cutting wood. Babu Radha Krishna Ram, Beat Officer, on information came to the spot, and asked the petitioner to show his permit, but he could not show it. The Beat Officer tried to seize the wood; but he was resisted. He, therefore, sent information to the police station through the forest guard, and he himself remained with the petitioner there. The forest guard returned with two constables. The wood was seized in a village called Dhabia, and kept in the custody of one Dhanuki Singh. The Beat Officer wrote down a seizure report (exhibit 2). He also wrote a report about the offence (exhibit 4). The necessary sanction having been obtained, the petitioner was prosecuted under S. 49 of the said Act.

(3) The petitioner has denied the charge. His case is that he has been maliciously implicated in the case, as he refused to pay bribe to the prosecution witness No. 1 which he wanted to extort from the petitioner.

(4) The prosecution has examined four witnesses. P.W. 1, Radha Krishna Ram, is the Beat Officer who acted on the information of the forest guard, Jugeshwar Singh. P.W. 2 is Gaya Singh constable who was requisitioned from the police station Ichak by P. W. 1 to help him in seizing the wood. P.W. 3, Murlidhar Prasad, is the forest guard who has proved the publication of notice under Ss. 14, 21 and 29 of the Bihar Private Forests Act, 1947. P.W. 4, Jugeshwar Singh, is the forest guard who detected the petitioner cutting wood in the jungle. The petitioner examined two witnesses in support of his defence.

(5) The Court of appeal has accepted the prosecution evidence and rejected the defence version.

(6) Mr. L. K. Chaudhury, learned advocate for the petitioner, has contended that there is no evidence on the record in support of the fact that Pokharia forest is a private protected forest and as such the conviction passed against the petitioner is not maintainable in law. Section 3, Clause (10) of the Bihar Private Forests Act reads:

"'Private protected forest' means a forest specified in a notification issued under S. 30 or the proviso thereto;."

Section 30 of the Act provides that, when certain events have occurred which need not be mentioned here:

"the Provincial Government shall publish a notification in the official Gazette specifying definitely according to boundary marks erected or otherwise, the limits of the forest which is to be constituted a private protected

forest, and declaring the same to be a private protected forest from a date fixed by the notification, and from the date so fixed such forest shall be deemed to be a private protected forest."

So under the Act it is ultimately the publication of a notification in the official gazette specifying definitely, according to the boundary marks erected or otherwise, the limits of the forest, which converts a private forest into a private protected forest. In the absence of the publication of the notification in the official gazette as contemplated by S. 30 with regard to any particular private forest, it cannot be deemed to be a private protected forest. The only evidence on the point of publication of the notification required under the provisions of the Act is the oral evidence of P.W. 3, Murlidhar Prasad. He deposed in examination-in-chief:

"I know Pokharia Reserve Jungle. I had served notices there under Ss. 14, 21 and 29 of Bihar Private Forests Act on 23rd December 1947 by beat of drums. Myself and Beat Officer Bhagwat Prasad were there. The notices were pasted in village Sijhua in the house-wall of Budhnath Mahto as village Pokharia contains no inhabitants. Nobody—villager — agreed to put any signature on the notices."

In support of the evidence of this witness, the service report has been exhibited in this case, and that is exhibit 5. No copy of the notification published in the gazette or the gazette itself has been placed on the record. Therefore, in the absence of the notification itself specifying therein definitely the limits of the forest and the publication of the same in the official gazette, it cannot be held on the basis of the materials on the record of this case that Pokharia forest has been constituted a private protected forest; and, unless it is established that Pokharia forest has been constituted a private protected forest, none of the provisions imposing penalty on persons for contravening the provisions of the Private Forests Act can come into play, and the conviction, therefore, passed on the petitioner under S. 49 of the Act must be held to be bad in law. Mr. Choudhury has relied on two cases. One is an unreported decision of this Court in 'LALA BALARAM LAL v. THE STATE', Cri Revn No. 374 of 1951 disposed of on the 2nd July 1951. The other is 'MANSID ORAON v. THE KING', AIR (38) 1951 Pat 380. In the earlier case, Rai, J. has observed:

"What the prosecution had to prove was that the forest in question was a 'private protected forest' as defined in the Act which could be done by bringing on record the notification published in accordance with S. 30 of the Act

As in the present case there is nothing on the record from which it can be ascertained that the forest in question was a private protected forest on the relevant date, the conviction of the petitioner cannot stand."

The second case is in connection with an offence under clauses (f) and (h) of S. 26 (1) of the Forest Act, 1927. Under that Act a reserved forest is constituted by the operation of the S. 20. That section provides that, when certain events have occurred, the Provincial Government "shall publish a notification in the official gazette specifying definitely, according to boundary marks erected or otherwise, the limits of the forest which is to be reserved, and declare the same to be reserved from a date fixed by the notification". Sub-section (2) of that section says that "from the date so fixed shall be deemed to be a reserved forest". For all practical purposes, the words used in S. 20 of the Forest Act, 1927, are the same as in the proviso to S. 30 of the Bihar Private Forests Act, 1947. In that case also the prosecution had not produced the notification, if any, issued under S. 20 specifying definitely the limits of the forest. Agarwala, C. J. observed:

"The prosecution has, by oral evidence, endeavoured to prove that the land in question falls within certain boundary pillars. Presumably it was intended to imply that these were the boundary marks referred to in sub-section (1) of S. 20. It may be that they are so; but for the purpose of proving the guilt of the petitioners it is necessary to shew not only that they did the acts mentioned in clauses (f) and (h) of S. 26 (1), but also that they were not entitled to do those acts because there had been a notification issued under S. 20 (1) specifying the limits of the forest and that the land in question fell within those limits."

(7) Mr. Chakravarty, appearing for the State, has laid down three propositions. His first contention is that whether or not Pokharia forest was a private protected forest is a question of fact and cannot be agitated for the first time in revision. In support of this contention he has cited a case reported in 'MAHADEO PRASAD v. EMPEROR', 27 Pat L T 112 at p. 137. The passage relied upon is the observation made by Shearer J:

"The existence of a law, or of a rule or order having the force of law, may in the last resort be a fact: but is it a fact which stands on precisely the same footing?"

After some discussion, Shearer J. has observed:

"This is an aspect of the matter which as yet does not appear to have been considered and which, I think myself, ought to be considered at some future date."

So this is 'obiter' 'dictum'. This rule, however, can in no case apply to the present case, as the presumption of existence of a rule of law cannot apply to the publication of a certain fact according to the procedure laid down in a statute.

(8) Next Mr. Chakravarty argued that, as the petitioner knew that Pokharia forest was a private protected forest, the conviction cannot be set aside in revision even if the notification has not been brought on the record. I think that the case referred to above decided by Rai J. in 'Cri Revn. No. 374 of 1951, D/-2-7-1951 (Pat) is a complete answer to this proposition. I hold that this point also has got no substance.

(9) The third contention was that, even if in the trial Court or in the Court of appeal, the necessary copy of the publication in the gazette has not been placed on record, that may be taken in this Court during the hearing of the revision petition. He has cited two decisions, one reported in 'RAM SARAN v. EMPEROR', AIR (12) 1925 Lah 298 and the other

reported in 'NANAK CHAND v. EMPEROR', AIR (18) 1931 Lah 273 in support of his contention. In the first case, Campbell, J. observed:

"The net result to be extracted from them is that knowledge by a printer of the nature of the matter printed is a question to be determined on the particular facts of a particular case."

And in that case he, on the basis of the circumstance disclosed on the record, came to the conclusion that the printer had the knowledge of the nature of the matter printed in a certain pamphlet which was on the record. I am afraid this proposition does not in the least apply to the facts of the present case, and perhaps this case has been cited in a desperate attempt to support the conviction. In the second case Abdul Qadir, J. has referred to the case of 'BAWA SARUP SINGH v. EMPEROR', AIR (12) 1925 Lah 299 where a copy of a Gazette Notification was produced before the High Court in a revision and the Court presumed the genuineness of the Gazette under S. 81, Evidence Act, and held the production of it in the High Court sufficient even if it had not been tendered in evidence before. Under S. 81 no doubt the High Court can presume the genuineness of the gazette; but the matter is not free from limitation. Even if the document is taken in evidence, the question will arise whether it can be used against the accused at that stage without giving him opportunity to meet it. If he is prejudiced as a result of the filing of the evidence at that stage. I think the document cannot be used against the accused, and it will be too hard against the accused to admit a document at a very late stage. In this case one of the necessary elements that has to be notified is the limit of the forest constituted as a protected forest. It has nowhere been proved by the prosecution that the tree cut falls within defined specified limits and that those limits are covered by the boundary given in the copy of the gazette proposed to be filed now in this Court during the hearing of this criminal revision. I hold that by accepting this gazette at this stage the petitioner will be adversely prejudiced. Therefore, I do not accede to the prayer of Mr. Chakravarty that the copy of the gazette should be taken in evidence at this stage.

(10) Accordingly I hold that the prosecution has failed to proved the charge framed against the petitioner. The conviction and sentence passed against him are set aside.

K.S. *Conviction and sentence set aside.*

A. I. R 1952 Patna 263

LAKSHMIKANTA JHA, C. J. AND CHATTERJI, J.

Panchoo Sahu, Appellant v. Janki Mandar and others, Respondents.

A. F. A.. D. No. 1961 of 1948, D/- 26-9-1951.

(a) Transfer of Property Act (1882), S. 54 — Sale deed — Question whether title passes on execution and registration of deed or on payment of consideration, depends upon intention of parties to be gathered from deed.

Whether title passed on the mere execution and registration of the sale-deed or whether the intention of the parties was that title would not pass until the full consideration was paid, is to be gathered from the sale-deed itself. The sale-deed in question recited: "Having received payment of the whole and entire consideration money in cash from the aforesaid vendee, I put him (the vendee) in possession and occupation of the vended property." It again recited lower down: "On receipt of ths fair consideration money I, the executant, sell the vended land":

'Held' that these recitals clearly indicated that the title would pass and possession would be delivered on payment "of the whole and entire consideration money"; that the bulk of consideration was paid was immaterial and would not pass the title. *(Paras 6, 7 and 9)*

Anno: T. P. Act, S. 54, N. 14.

(b) Evidence Act (1872), S. 92 — Sale-deed reciting payment of consideration — Vendor can show that it was not paid.

Though the sale-deed may recite that the consideration has been paid, there is nothing to prevent the parties from adducing evidence to show that the recital is untrue and that in fact the consideration was not paid. AIR (25) 1938 Pat 505, AIR (36) 1949 Pat 364, Rel. on. *(Paras 6 and 9)*

Anno: Evidence Act, S. 92, N. 19.

S. C. Misra and B. K. N. Singh, for Appellant; Rajkishore Prosad; B. K. Saran Sinha and R. K. Verma, for Respondents.

Cases referred to:

('35) 1 Cut L T 1 (Prs 6, 7)

('38) 17 Pat 318: (AIR (25) 1938 Pat 505) (Prs 6, 9)

('49) 27 Pat 122: (AIR (36) 1949 Pat 364) (Prs 6, 7, 9)

('50) AIR (37) 1950 Pat 236 (Pr 6)

CHATTERJI, J.: This is an appeal by the plaintiff in a suit for declaration of title and recovery of possession in respect of 1 katha of land out of Survey Plot No. 1169 in village Sultangunj.

(2) The plaintiff claims title to the disputed 1 katha of land under a registered sale-deed, dated the 5th October 1942, executed in his favour by defendant No. 1 for Rs. 100/- in respect of the entire Plot No. 1169 measuring .05 acre equivalent to 1 katha 14½ dhurs. The plaintiff's case is that he paid the entire consideration money to defendant No. 1, but the latter never made over the registered sale-deed to him in spite of demands. The plaintiff, however, it is said, came into possession of the entire plot and amalgamated 15 dhurs out of it with his house. The remaining 1 katha which is in dispute was used by him as his bari, but the defendants dispossessed him from it on 1st Asarh 1353 Fs. (June 1946). The suit was instituted on 6th July 1946.

(3) The defendants belong to the same family of which the defendant No. 1 is the head. Their defence is that the real consideration of the sale-deed in favour of the plaintiff, executed by defendant No. 1, was Rs. 170/- though only Rs. 100/- was mentioned in the deed, and that the plaintiff paid only Rs. 70/- out of the consideration and did not pay the balance and, therefore, the sale-deed remained with the defendants. There was a difference between the parties which was referred to Panches and, according to the decision of the panches, defendant No. 1 was to execute a fresh sale-deed in favour of the plaintiff in respect of 14 dhurs out of the Plot No. 1169. The plaintiff accordingly amalgamated 14 dhurs with his house and the disputed 1 katha remained in possession of the defendants as before. The defendant No. 1 also executed a fresh sale-deed for Rs. 50/- in

favour of the plaintiff's son in respect of this 14 dhurs. This sale-deed, however, was not registered. According to the defendants, the registered sale-deed, dated the 5th October 1942, is inoperative and the plaintiff is not entitled to any relief on the basis of that deed.

(4) The learned Munsiff who tried the suit held that the defendants were precluded by Section 92 of the Evidence Act from proving that the consideration money of the sale-deed in question was not Rs. 100/- but Rs. 170/-. He also held that the plaintiff paid the entire consideration money Rs. 100/- and came into possession of the entire plot, but was subsequently dispossessed by the defendant from the disputed land. He did not accept the story of the panchayati set up by the defendants. He accordingly decreed the suit.

(5) On appeal, the learned Subordinate Judge agreed with the learned Munsiff that oral evidence was not admissible to prove that the consideration of the sale-deed in question was Rs. 170/- and not Rs. 100/-. But he held that out of the consideration of Rs. 100/- the plaintiff paid Rs. 70/- only to defendant No. 1. He also held that the intention of the parties was that title to the land would pass on payment of the entire consideration and as the entire consideration was not paid, the plaintiff did not acquire any title to the disputed land. He further held that the plaintiff never came into possession of any portion of Plot No. 1169 by virtue of the sale-deed, but came into possession of only 14½ dhurs out of it, sometime later as a result of the panchyati alleged by the defendants. He, however, did not accept the defendants' case about the execution of the subsequent sale-deed in respect of the 14½ dhurs. In the result he allowed the appeal and dismissed the suit. Hence this second appeal.

(6) The main question for determination in this appeal is whether title passed on the mere execution and registration of the sale-deed in question, or, the intention of the parties was that title would not pass until the full consideration was paid. This question has been considered by this Court in various cases and it is now well-settled that the intention is to be gathered from the sale-deed itself; 'RASIKANANDA MALLICK v. GANGADHAR PANDA', 1 Cut L T 1; 'RADHAMOHAN THAKUR v. BIPIN BEHARI MITRA', 17 Pat 318; 'MD. MURTAZA v. ABDUL RAHMAN', 27 Pat 122 and 'MOTILAL SAHU v. UGRAH NARAIN SAHU', AIR (37) 1950 Pat 288. It has also been laid down in the second case ILR 17 Pat 318 and in the third 27 Pat 122, that though the sale-deed may recite that the consideration has been paid, there is nothing to prevent the parties from adducing evidence to show that the recital is untrue and that in fact the consideration was not paid.

(7) The sale-deed in question, Exhibit A/2, recites:

"Having received payment of the whole and entire consideration money in cash from the aforesaid vendee, I put him (the vendee) in possession and occupation of the vended property."

It again recites, lower down:

"On receipt of the fair consideration money I the executant sell the vended land."

These recitals clearly indicate that title would pass and possession would be delivered on payment "of the whole and entire consideration money." In the cases in 'RASIKANANDA v. GANGADHAR', 1 Cut L T 1; 'MD. MURTAZA v. ABDUL RAHMAN', 27 Pat 122 and 'MOTILAL SAHU v. UGRAH NARAIN SAHU', AIR (37) 1950 Pat 288, already cited, the sale-deeds were similarly worded and it was held that the intention of the parties was that the passing of title should depend on the passing of consideration. In the last two cases it was also held that if the terms of the sale-deed were ambiguous, the Court might also take into consideration the facts that the vendor retained the sale deed and never made it over to the vendee and that possession was not delivered in pursuance of the sale deed. In the present case, it has been found by the learned Subordinate Judge that the entire consideration money was not paid, that the defendant No. 1 did not make over the sale deed to the plaintiff and that the plaintiff never came in possession of any portion of the vended plot consequent on the registration of the sale deed. Upon these findings, taken with the recitals in the sale deed, I think, the learned Judge was quite right in coming to the conclusion that "the intention of the parties was that title would pass to the vendor only on payment of the entire consideration money and not otherwise".

(8) Mr. S. C. Misra on behalf of the appellant seeks to distinguish the present case from the aforesaid decisions on the ground that here the bulk of the consideration money, that is, Rs. 70/- out of Rs. 100/- was paid. But if the intention of the parties, as gathered from the sale deed itself, was that title would pass only on payment "of the whole and entire consideration money", it is immaterial that the bulk of the consideration was actually paid.

(9) Mr. Misra also lays great stress on the following recital in the sale deed which comes immediately after the first of the two above-quoted passages:

"Should in future, at any time I, the executant or my heirs and representative put forward any claim in respect of the consideration money of the sale deed of the vended property it will be illegal and null and void in Court."

But this recital obviously means that the vendor would not put forward any claim for the consideration money; in other words, it would not be open to him to dispute the correctness of the recital that he received the consideration money. As pointed out in 'RADHAMOHAN v. BIPIN BEHARI', 17 Pat 318 and in 'MD. MURTAZA v. ABDUL RAHMAN', 27 Pat 122 that in spite of such recital, it would be open to the parties to show that it was incorrect.

(10) Mr. Misra then relies on the following recital in the sale deed:

"Should, on account of any act done by me the executant there be found any kind of defect on the vendee viz. the claimant be put to any trouble and loss in the matter of the purchase of the vended property and in consequence thereof he (vendee) be dispossessed (from the vended property) or I, the executant or my heirs and representative dispossess him (vendee) or get him dispossessed (from the vended property), the said vendee shall be competent to realise the entire costs, damages and the entire consideration money paid with interest at the rate of Rs. 1/- per cent per month from the date of dispossession to the date of realization from the person and properties of me the executant and my heirs and representatives."

It is said that this shows that the intention was that the title would at once vest in the vendee. But this passage must be considered along with the earlier recital which clearly shows that the vendee would be put in possession of the vended property on receipt of the "whole and entire consideration money". If the entire consideration money was not paid, possession would not be delivered and, therefore, no question of dispossession of the vendee could arise. The words "the said vendee

shall be competent to realise the entire costs, damages and the entire consideration money paid with interest" in the passage relied upon are pertinent and they obviously mean that the vendee would be liable to refund the entire consideration money with costs, damages etc. This implies that the entire consideration money must have been paid.

(11) Mr. Misra next contends that the plaintiff having paid the bulk of the consideration of the sale deed, the defendants ought to have performed their part of the contract. But this is not a suit for specific performance and the plaintiff never suggested in his plaint that he was ready and willing to pay the balance of the consideration money. On the contrary, his case was that he paid the entire consideration and came into possession of the entire vended property. It is important to notice that the suit was instituted more than three years after registration of the sale deed.

(12) Mr. Misra further contends that the learned Subordinate Judge in view of the provisions of the Indian Arbitration Act, 1940, should not have at all taken into consideration the award of the panches by reason of which the plaintiff is said to have been given possession of the 14½ dhurs out of the vended plot. But that area is not in dispute and, therefore, the question of panchyati is not relevant. Besides, the decision of the learned Judge means no more than that the plaintiff came into possession of the 14½ dhurs by some subsequent amicable arrangement.

(13) In my opinion, the decision of the learned Subordinate Judge is right and the appeal must be dismissed with costs.

(14) LAKSHMIKANTA JHA, C. J.: I agree.

R.G.D. *Appeal dismissed.*

A. I. R. 1952 Patna 265

RAMASWAMI AND RAI, JJ.

Hirday Narayan Singh, Appellant v. Jang Bahadur Singh and others, Respondents.

A. F. A. D. No. 1941 of 1948, D/- 18-1-51.

(a) Interpretation of Statutes — Statute imposing public duty to be performed in certain manner — Rule of construction.

If a statute imposes a public duty and requires that it should be performed in a certain manner or within certain time or on certain conditions such cases will be regarded as intended to be directory, otherwise injustice or inconvenience will result to persons who have no control over those exercising their duty without promoting the essential aim of the legislature. (1830) 1 B and Ad. 328; (1863) 32 L J Q B 366, Rel. on. (Para 5)

(b) Tenancy Laws — Bihar Tenancy Act (8 of 1885), Ss. 26A and 12 — Sale of occupancy tenure — Sale deed registered without payment of landlord's registration fee — Transferee gets valid title — Subsequent rent sale in execution of decree against original tenant — Effect.

Where a person purchases an occupancy tenure under a registered kabala without paying the landlord's registration fee as required by S. 26A(2) of the Bihar Tenancy Act, he obtains a valid title to the land as soon as the registration is effected. The reason is that the condition as regards payment of the landlord's fee enacted in S. 12(2) of the Bihar Tenancy Act is merely directory and not absolute and in consequence the failure to deposit landlord's fee at the time of registration of the kabala does not affect the title of the transferee. (Para 6)

If in such a case the landlord obtains a rent decree against the original tenant without impleading the transferee and purchases the holding in execution and obtains possession, the transferee is entitled to get a declaration that the rent sale did not affect his title and to claim possession of the holding as against the landlord. AIR 1944 Pat 252; AIR 1945 Pat 313, Rel. on. (Para 8)

K. K. Sinha and U. C. Sharma, for Appellant; J. M. Ghosh, for Respondents.

Cases referred to:

('44) 23 Pat 356: (AIR 1944 Pat 252) (Pr 7)
('45) 24 Pat 148: (AIR 1945 Pat 313) (Pr 7)
(1830) 1 B and Ad 328: (109 E R 809) (Pr 5)
(1863) 32 L J Q B 366: (11 W R 800) (Pr 5)

RAMASWAMI, J.: The question to be examined in this appeal is whether the plaintiff obtained a valid title to the property in dispute as soon as the husband of defendant 2nd party executed a registered kebala in his favour, though the fee prescribed to the landlord was not paid to the registering officer at the time.

(2) The leading facts of the case are as follows. The plaintiff brought the suit alleging that on 19th December 1938 the husband of defendant 2nd party executed a registered kebala with respect to 9 Kathas and 13 dhurs of Plot No. 244, Khata No. 115, village Madhepura. The plaintiff asserted that he paid landlord's fee but defendants first party did not accept rent since salami was not paid by the plaintiff. In 1941 defendants first party instituted a rent suit against the original tenant and having obtained an ex parte decree purchased the holding in execution case and obtained delivery of possession in due course. The plaintiff claimed that the decree in the rent suit had only the effect of a money decree since the holding was not properly represented. The plaintiff hence brought the suit for a declaration of title and recovery of possession of the land. Defendants first party contested the suit on the ground that the landlord's fee was not paid at the time when the kebala was registered and in consequence the plaintiff acquired no title and was not a necessary party in the rent suit. Defendants first party maintained that the decree obtained in the rent suit had the effect of a rent decree and the plaintiff was not entitled to any relief. After examining the evidence the learned Munsiff held that the landlord's fee had not been paid, but the plaintiff was nevertheless entitled to a decree. His decision has been reversed by the Additional District Judge of Monghyr in appeal.

(3) In support of this appeal, Mr. K. K. Sinha addressed the argument that the lower appellate Court was erroneous to hold that the decree obtained in the rent suit had the effect of a rent decree and that the defendants first party obtained a valid title to the land by sale in execution case. Learned Counsel did not properly impeach the finding of the lower appellate Court that the landlord's fee was not paid since this finding was upon a question of fact. But the learned Counsel maintained that upon proper construction of Section 26-A, Sub-section (2) read with Sections 11 and 12 of the Bihar Tenancy Act the lower appellate Court ought to have held that though the landlord's fee was not paid the plaintiff acquired a valid title to the land as soon as the sale-deed was registered. In my opinion the argument addressed

by the learned Counsel is well-founded and must succeed. The new Section 26-A of the Bihar Tenancy Act was substituted in place of the former Section 26-A by Bihar Act II of 1938 which came in force on the 10th December 1938. The amended Section 26-A, Clause (2) is to the following effect:

"Every transfer of an occupancy holding or a portion thereof, together with the right of occupancy therein, by sale, exchange or gift and every bequest of such holding or portion, together with the right of occupancy therein, shall be made in the same manner and subject to the same conditions as a permanent tenure in respect of registration and the payment of landlord's registration fee."

(4) The material sections with respect to transfer of a permanent tenure are Sections 11 and 12 of the Bihar Tenancy Act. Section 11 enacts:

"Every permanent tenure shall, subject to the provisions of this Act, be capable of being transferred and bequeathed in the same manner, and to the same extent as other immovable property."

Section 12 (1) states:

"A transfer of a permanent tenure by sale, gift, exchange or mortgage (other than a transfer by a sale in execution of a decree or by summary sale under any law relating to patni or other tenures) can be made only by a registered instrument."

Section 12 (2) is to the following effect:

"A registering officer shall not register any instrument purporting or operate to transfer by sale, gift, exchange or usufructuary mortgage a permanent tenure unless there is paid to him, in addition to any fee payable under the law for the time being in force for the registration of documents, a process-fee of the prescribed amount and a fee (hereinafter called the landlord's registration fee) together with the costs necessary for the transmission of the landlord's registration fee to the landlord."

(5) On behalf of the respondents, Mr. J. M. Ghosh argued that the payment of the landlord's fee was a condition precedent to the registration of the kebala and since it has been found in fact that the landlord's fee has not been paid it ought to be held that the plaintiff acquired no title upon registration of the kebala. In my opinion this argument is untenable and cannot succeed. For it is an established rule that if a statute imposes a public duty and requires that it should be performed in a certain manner or within certain time or on certain conditions such cases will be regarded as intended to be directory otherwise injustice or inconvenience will result to persons who have no control over those exercising their duty without promoting the essential aim of the legislature. It has been held, for instance, when an Act ordered a thing to be done by a public body or public officers and pointed out the specific time when it was to be done, that the Act was directory only and might be complied with after the prescribed time 'SMITH v. JONES', (1830) 1 B & Ad 323 at p. 334. In another case 'BELLAMY v. SAULL', (1863) 32 L J Q B 366, the Queen's Bench had to construe Section 34 of the Revenue Act, 1861, which enacted that no copy of a bill of sale should be filed in any Court unless the original was produced to the officer duly stamped and it was held that the section did not invalidate the registration if the bill was not duly stamped when so produced since the object of the enactment was to protect the revenue, and this was thought sufficiently attained if the deed was afterwards duly stamped, without going to the extreme of holding the registration void.

(6) In the present case I think that the condition as regards payment of the landlord's fee enacted in Section 12 (2) of the Bihar Tenancy Act is merely directory and not absolute and in consequence the failure to deposit landlord's fee at the time of registration of the kebala, did not affect the title of the plaintiff. It follows that the plaintiff obtained valid title to the land as soon registration was effected irrespective of the question whether the landord's fee was paid or not.

(7) This opinion is supported by 'RANI PRABHABATI v. LALJI MAHTO', 23 Pat 356, in which a Division Bench of this Court held that under Section 13, Bihar Tenancy Act, when a permanent tenure was sold in execution of a mortgage-decree, the title of the auction-purchaser became complete on the sale being confirmed, even though the landlord's fee may not have been deposited and that the landlord, therefore, could not proceed to sell the tenure in execution of a decree for rent obtained by him against the original tenure-holder in a suit instituted after the confirmation of the sale. The same principle was enunciated in 'CHANDRASEKHAR v. JAGARNATH', 24 Pat 148, in which a transferee of a portion of a permanent tenure was not impleaded in the rent suit subsequently brought by the landlord and it was held that the decree for rent obtained by the landlord against the recorded tenant will not affect the transferee and the plea that the landlord had no notice of the transfer was of no avail. Mr. J. M. Ghosh who appeared for the respondents pointed out that this case ought to be distinguished on the ground that under Section 1 of the Bengal Act I of 1903 no transfer of a tenure made under Section 12 or Section 13 "shall be deemed to be invalid merely on the ground that the landlord's fee prescribed by the said Sections 12 and 13 has not been paid." But it is important to notice that the transferee had not paid the fee for service of notice on the landlord and on this point Fazl Ali, C. J., states at page 151 of the report:

"It is true that these cases were cases relating to Section 12 of the Bengal Tenancy Act, but it seems to me that on principle no distinction can be drawn between cases which come under Section 13. Section 11 of the Bihar Tenancy Act, which has already been quoted, provides that a permanent tenure is capable of being transferred in the same manner as other immovable property. There is nothing in the Act to suggest that the title of the transferee is not complete until the landlord receives notice of the transfer. It is true that provisions are made for the payment of the landlord's registration fee and also for the service of notice upon the landlord, but it is nowhere suggested that non-compliance with the provisions will affect the title of the transferee. Where the sale takes place under Section 12, notice is to be issued by the officer who registers the instrument of transfer, and where the sale takes place under Section 13, the notice is to be issued by the Court confirming the sale. The mere fact that the Registrar or the Court does not carry out the directions contained in Sections 12 and 13 cannot affect the title of the transferee, and if the failure of the payment of the landlord's fee by the transferee cannot affect his title as provided by Section 1 of Act I of the Bengal Act (No. I of 1903), I do not see why his failure to deposit the fee for serving notice on the landlord should have any other effect."

It is of importance to observe that in '24 Pat 148', the plaintiff had failed to pay not merely the landlord's fee but also the fee prescribed for the service of notice and it was held by the Bench

that neither failure to deposit the landlord's fee nor failure to deposit the fee to serve notice can affect the title of the transferee. In other words the decision was that the provision as regards payment of process-fee and costs of transmission was merely directory and not imperative and cannot affect the title of the vendee under the registered kebala. I see no reason in principle why the provision with respect to the payment of the landlord's fee in Section 12 (2) should be construed in a different manner even assuming that Section 1 of the Bengal Act I of 1903 is non-existent.

(8) Upon these grounds, I would set aside the decree of the lower appellate Court and order that the plaintiff should be granted a decree for declaration of title and recovery of possession of the land in dispute. There will be no decree as regards mesne profits in the circumstances proved in the case. The appeal is accordingly allowed with costs throughout.

(9) RAI, J.: I agree.

K.S. *Appeal allowed.*

A. I. R. 1952 Patna 267

LAKSHMIKANTA JHA, C. J. AND CHATTERJI, J.

Ram Saran Ahir and others, Appellants v. Prithvi Nath Singh and another, Respondents.

Letters Patent Appeal No. 17 of 1950, D/- 13-4-1951.

Civil P. C. (1908), O. 22, Rr. 4 and 11 — Death of one of two respondents — Abatement — Decree passed in ignorance of death — Second appeal — Application to set aside abatement — Proper procedure.

One of the respondents to an appeal died and the appellate Court in ignorance of such death passed a decree without the heirs of the deceased respondent being brought on record within time. The surviving respondent filed a second appeal on the ground that the appeal in the lower appellate Court could not proceed after it had abated on the death of the deceased respondent. The other side filed an application to set aside the abatement on the ground that they were ignorant of the death till the filing of the second appeal. The Court set aside the decree of the appellate Court and restored that of the trial Court. On Letters Patent appeal:

Held that the proper course in the circumstances would be to set aside the decision of the second appellate Court and send the application for setting aside the abatement to the first appellate Court for disposal according to law. AIR 1925 Bom 290, Rel. on.; 51 Cal W N 654, Not foll. (Para 8)

Anno: C. P. C., O. 22, R. 4 N. 25.

M. N. Pal, for Appellants; K. Rai and B. K. Sharma, for Respondents.

Cases referred to:

('25) AIR 1925 Bom 290: (86 Ind Cas 31) (Pr 5)

('47) 51 Cal W N 654 (Pr 7)

CHATTERJI, J.: Two plaintiffs, Ramdeo Singh and Prithwi Nath Singh, who were cousins and members of a joint Mitakshara family, instituted a suit for declaration of title and recovery of possession in respect of certain plots of land with a house standing thereon. The suit was decreed in full by the trial Court. The contesting defendants then preferred an appeal to the District Court in which Ramdeo and Prithwi Nath were impleaded as respondents 1 and 2. Notices were served on them and both of them appeared, as the order-sheet shows, by a vaklatnama on the 30th January, 1948. Ramdeo Singh, however, died near about that time. But the fact of his death was not brought to the notice of the Court and it proceeded to decide the appeal in ignorance of his death. Eventually, on 15th September 1948, it allowed the appeal in part and modified the decree of the trial Court.

(2) From the appellate decree Prithwi Nath alone preferred a second appeal to this Court. Along with the memorandum of appeal he filed an affidavit sworn by himself in which he stated that Ramedeo Singh had died on the 1st of January 1948. In support of his affidavit he also filed a certified copy of the death register. At the hearing of the second appeal, the point argued on behalf of the appellant there was that the appeal in the lower appellate Court could not proceed after it had abated as against the respondent Ramdeo Singh, who was a member of the joint family with the surviving respondent Prithwi Nath Singh. Sinha, J., who heard the appeal gave effect to this contention, and he disposed of the appeal in these terms:

> "This appeal is, therefore, allowed, the judgment and decree passed by the lower appellate Court are set aside and the decree passed by the trial Court restored with costs throughout."

From his decision the defendants have preferred this Letters Patent Appeal.

(3) It is necessary to mention here that in the second appeal a counter-affidavit was filed on behalf of the respondent, which was in substance an application for setting aside the abatement of the appeal in the lower appellate Court. With regard to this counter-affidavit, Sinha, J stated:

> "A counter-affidavit is filed in this Court to the effect that the appellants in the lower appellate Court were not aware of the death of Ramdeo. That question has not been investigated and need not be investigated at this stage because this Court cannot set aside the abatement which occurred in the Court below."

(4) The question for consideration in the present appeal is whether, in the circumstances, Sinha, J., was justified, not only in setting aside the decree of the lower appellate Court, but in restoring the decree of the trial Court. The position is that after the death of Ramdeo, without his legal representatives being brought on the record within the prescribed time, the appeal abated as against him. As he was a member of a joint family with the surviving respondent Prithwi Nath Singh, the appeal could not proceed, because the result would be that in case the appeal was allowed there would be two inconsistent decrees. In fact, that is the view on which Sinha, J., set aside the decree of the lower appellate Court. The result of the abatement of the appeal as against Ramdeo Singh was that the appeal could not proceed. The defendants' case is that they were never aware of the death of Ramdeo and they came to know of it only after the institution of the second appeal. If that was so, they could not certainly file an application for setting aside the abatement in the Court of appeal below. By the time they came to know of the death of Ramdeo, the second appeal had already been filed in this Court, and they presented an application in this Court in the second appeal for setting aside the abatement. But the proper Court to deal with the application for setting aside the abatement was the Court of Appeal below.

(5) In 'AMARSANGJI INDRASANGJI v. DESAI UMED', AIR (12) 1925 Bom 290, the appellant in the lower appellate Court died, but that Court proceeded to dispose of the appeal in ignorance of his death. In second appeal an application for setting aside the abatement was filed. The High Court held that the decree was a nullity and remanded the case to the lower appellate Court to deal with the application for setting aside the abatement.

(6) In 'NABA KUMAR v. PRAFULLA CHANDRA', 51 Cal W N 654, a Single Judge of the Calcutta High Court held in similar circumstances that the High Court itself was competent to deal with the application for setting aside the abatement. As at present advised, I am not prepared to go so far. In my opinion, the view taken by the Bombay High Court in the above case was correct.

(7) Mr. Kailash Rai, on behalf of the respondent, wanted to argue that the appellants had knowledge of the death of Ramdeo. But this is a matter to be dealt with by the Court of Appeal below, while considering the application for setting aside the abatement. It is, however, to be observed that from the records it appears that different dates of death of Ramdeo were given in different affidavits. In the affidavit filed by the appellants in the Second Appeal the date of death was given as 1st of January 1938, although from the order-sheet of the lower appellate Court it appears that Ramdeo and Prithwi Nath appeared by a vaklatnama on the 30th January 1948. In some other affidavit, it appears, the date of death was given as 29th January 1948. It is stated that that affidavit was sworn by the widow of Ramdeo.

(8) If, in fact, the defendants were not aware of the death of Ramdeo until after the filing of the Second Appeal, it will be, in my opinion, most unjust if investigation in the matter is shut out. If the decision of Sinha, J., were to stand, such investigation would be completely shut out. The proper course, therefore, would be to allow the appeal and set aside the decision of Sinha, J., and send the application filed before him for setting aside the abatement to the Court of appeal below for disposal according to law.

(9) I would, therefore, allow the appeal and set aside the decision of Sinha, J., and remand the case to the lower appellate Court for disposal according to law in the light of the observations made above. Costs will abide the result.

(10) LAKSHMIKANTA JHA, C. J.: I agree.

K.S. *Case remanded.*

A. I. R. 1952 Patna 268

NARAYAN J.

Sarbeswar Mahata and others, Appellants v. Chota Lakhiram Mahato and others, Respondents.

A. F. A. D. No. 1504 of 1949, D/- 7-1-1952.

Co-sharers — Joint possession — Tank in joint possession of plaintiffs and defendants — Plaintiff's title not disputed — Decree for joint possession — Limitation Act (1908), Arts. 142 and 144.

Where in a suit for removal of certain encroachments alleged to have been made by the defendants over a tank which was said to be the joint property of the plaintiffs and the defendants, the nature of the encroachments being the preparation of paddy fields in a portion of the tank, the defendants averred that the disputed paddy fields did not form part of the tank, but this allegation was not found to be true, and in the alternative contended that, even if the fields be regarded as included within the tank, they by preparing the fields had not exceeded their right and this contention was found to be correct.

Held that the defendants could not be said to have disputed the plaintiff's title to the tank and therefore a decree for joint possession in favour of the plaintiffs could not be passed. AIR 1941 Pat 90 and AIR 1951 Pat 481, Foll; AIR 1936 Pat 231, Disting. (Para 4)

Anno: Lim. Act, Arts. 142 and 144 N. 35.

S. C. Mazumdar, for Appellants; R. S. Chatterji, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('91) 18 Cal 10: (17 Ind App 110 PC) (Pr 5)
('92) 19 Cal 253: (19 Ind App 48 PC) (Pr 5)
('28) 55 Cal 396: (AIR 1928 Cal 216) (Pr 5)
('35) 16 Pat L T 484: (AIR 1936 Pat 231) (Pr 7)
('41) 20 Pat 162: (AIR 1941 Pat 90) (Pr 5)
('51) AIR 1951 Pat 481: (30 Pat 304) (Pr 5)

JUDGMENT: This is an appeal by the plaintiffs, and it arises out of a suit in which the prayer was for the removal of certain encroachments alleged to have been made by the principal defendant No. 2 over a tank which is said to be the joint property of the plaintiffs and the defendants and which has been recorded in the Survey as plot No. 1534. The plaintiffs also sought a permanent injunction restraining the principal defendants from filling up the tank and from further changing its character. This tank originally belonged to the common ancestors of the plaintiffs and the defendants, and though the other properties were partitioned between the plaintiffs and the defendants, this tank was left joint or 'ijmal'.

According to the plaintiffs' allegation they and the defendants had been in joint possession of the tank, but the principal defendants filled up a portion of the tank and converted about 3 bighas out of it into paddy fields. The disputed portion of the tank has been shown in the plaint as schedules 2 ka and 2 kha. After the plaint had been filed a commissioner was appointed for inspecting the locality and after the commissioner had submitted his report the plaintiffs made a further prayer in the plaint, for removal of a dam constructed by the principal defendants by the side of the tank.

(2) The suit was resisted by the principal defendant No. 2, and his contention was that the disputed paddy fields were outside the bed of the tank and had been prepared by him long ago. According to him these paddy fields were prepared more than 12 years prior to the institution of the suit and to the knowledge of the plaintiffs. Alternatively, the defendant contended that even if the fields were found to be within the tank, the defendant by converting a portion of it into paddy fields, had not exceeded his right. Regarding the dam, the allegation of the defendant was that because a streamlet to the east of the tank was causing considerable damage to the tank, he, with the consent of his co-sharers, constructed the dam.

(3) The Courts below have concurrently found that the dam was constructed by the defendants 15 or 16 years prior to the institution of the suit and that it had been constructed for protecting the tank from being spoilt by the flow of the water of the streamlet which is to the east of the tank, and that consequently the defendant, by construct-

ing the dam, had not acted to the prejudice of the right of the plaintiffs in the tank. They have further found that the disputed portion, namely, Sch. 2 ka and 2 kha of the plaint, had silted up long ago and that the defendants, after it had silted up, prepared paddy 'khets' in it. The contention of the defendant that the disputed land was outside the tank has been negatived by both the Courts below.

(4) Mr. Mazumdar who has appeared for the plaintiffs-appellants before me has contended that the Courts below should have passed a decree for joint possession in favour of the plaintiffs in view of the fact that the plaintiffs' title had been disputed by the defendant. I am, however, not able to agree with the learned Counsel that this should be treated as a case in which the defendant had disputed the plaintiffs' title to the tank. What the defendant had averred was that the disputed paddy fields did not form part of the tank, and this allegation of the defendant has not been found to be true by the Courts below. As already pointed out, the alternative contention of the defendant was that even if the disputed fields be regarded as included within the tank, the defendant by preparing paddy fields in this portion of the tank had not exceeded his right.

It will not to my mind be correct to say that the defendant disputed the plaintiffs' title to the tank. It is one thing to say that the disputed land was outside the tank and it is another thing to say that the plaintiffs had no right to the tank. It was open to the defendants to contend that the land was outside the tank and it was also open to them to take up the alternative plea that if the disputed land was found to be a portion of the tank, in that event also the plaintiffs are not entitled to a decree in this suit. It is important to note that according to the findings of both the Courts the defendants have not prepared paddy fields in an area which can be regarded as exceeding his share in the tank or in the bed of the tank. And Mr. Mazumdar did not seriously press the claim of the plaintiffs-appellants for the removal of the dam.

It has been definitely found by the Courts below that the streamlet was causing great damage, and that but for the construction of this dam further damage would have been caused to the tank by that streamlet. This was undoubtedly a very prudent act on the part of the defendant, and as the learned Additional District Judge has pointed out, when the plaint was filed there was no allegation made by the plaintiffs therein as to the construction of this dam and no relief was sought on account of the defendants having constructed it. The prayer for the removal of the dam was made after the commissioner had submitted his report, though in the written statement the defendants had specifically stated about the construction of the dam. This conduct of the plaintiffs also lends substantial support to the view of the Courts below that this dam was really constructed for the benefit of all the co-sharers who have interest in this tank.

(5) The case would, in my opinion, be governed by the two Division Bench decisions of this Court reported in 'RAJ RANJAN PRASAD v. KHOBARI LAL', 20 Pat 162 and 'DIP NARAIN v. BIHARI MAHTON', AIR 1951 Pat 481. In the former case several previous decisions having bearing on the question were discussed and his Lordship Dhavle J. who delivered the judgment of the Court agreed with the view which had been taken by a Division Bench of the Calcutta High Court in 'CHANDRA KISHORE v. BISESWAR PAL', 55 Cal 396. In the Calcutta case it was held that where co-sharers were entitled to joint possession of immoveable property as tenants in common each of such co-sharers was entitled to be in possession of each and every part of the common land, and that for the purpose of the profitable occupation of the joint property some of them could be in occupation of some of the portions of the land and other co-sharers of other portions and that where one co-sharer was in separate possession of the common land without objection from, or ouster or exclusion of, the other co-sharers, he was under no obligation either to account or to pay compensation to such co-sharers in respect of the profits which had accrued to him by reason of the skill or industry which he had employed in making good use of the property while he was in possession.

The Judicial Committee has in 'LACHMESHWAR SINGH v. MONOWAR HOSSEIN', 19 Cal 253 (PC), laid down that when the defendant as a co-owner has made use of the joint property in a way quite consistent with the continuance of the joint ownership and joint possession he has not excluded any co-sharer and that it is a proper use and the question of exclusive right in the defendant does not arise. Their Lordships, in this case, quoted the well-known observation of the Board in 'WATSON AND CO. v. RAMCHAND DUTT', 18 Cal 10 (PC) and I should like to quote the following passage from that observation:

> "In India a large proportion of the lands, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husbandlike manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the share-holders can agree upon a mode of cultivation to be adopted or until a partition by metes and bounds can be effected, a work which, in ordinary course in large estate, would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the Courts of justice, in cases where no specific rule exists, are to act according to justice, equity, and good conscience, and if in a case of share-holders holding lands in common, it should be found that one share-holder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other share-holder to appropriate to himself the fruits of the other's labour or capital."

(6) In the latter Patna case also referred to above the relevant decisions were reviewed and the same view was taken. In this present case, before me there is no claim for compensation or mesne profits, and it has been distinctly found that the defendant has not prepared paddy fields in any portion of the tank which may exceed his share. There is a further important finding to the effect that a portion of the tank which has been converted into paddy fields "silted up long ago and in the ordinary course of nature." In such circumstances, a co-sharer would be justified in converting the silted portion into paddy field in order to make proper use of it. I have already said that it was not the defence of the defendants that the plaintiffs had no right in the tank, and the contention of the defendant No. 2 to the effect that the land was outside the tank cannot amount to a contention that the plaintiffs had no interest in the tank. There was thus no exclusion or ouster of the plain-

tiffs pleaded and the Courts below have come to the conclusion that the tank continues to be the joint property of the plaintiffs and the defendants.

(7) The learned Counsel for the appellants referred to a decision of this Court in 'MATHURA SINGH v. RAMA RUDRA PRASAD', 16 Pat L T 484, but the facts of that case are clearly distinguishable from the facts of this present case. In that case the plaintiffs and the defendants were co-sharer landlords of a certain village and the plaintiff's share was in 'zarpeshgi' lease or usufructuary mortgage with the defendants who did not give up possession of the plaintiffs' share of the 'bakasht' lands and asserted 'raiyati' rights therein, and in such circumstances the plaintiffs had to sue for joint possession with mesne profits. These facts certainly bear no resemblance to the facts of this present case, in which the disputed portion of the tank has been filled up with earth in natural course, and one of the co-sharers, the defendant No. 2, has by his own expense and skill converted the portion filled up with earth into paddy fields.

(8) This appeal, therefore, appears to me to be without any merit, and I would dismiss it with costs.

V.R.B. *Appeal dismissed.*

A. I. R. 1952 Patna 270

DAS J.

Purnendu Narayan, Petitioner v. Akhouri Jagannath Prasad and others, Opposite Party.

Criminal Revn No. 526 of 1951, D/- 2-1-1952.

Criminal P. C. (1898), S. 145 — "Parties concerned in such dispute" — Addition of parties during proceedings.

An enquiry under S. 145 is restricted to an enquiry as to actual physical possession irrespective of the question of right to possession.

(Para 4)

Where the enquiry under S. 145 had reached the stage when the evidence of the witnesses of one party had already been taken and some of the witnesses of the second party had also been examined, in these circumstances a third party cannot, as a matter of right, claim to be added as a party to the enquiry, particularly when such third party or his predecessor-in-interest do not claim to have been in possession at the relevant date. 30 Cal 155 (FB), Rel. on.

(Para 4)

Anno: Criminal P. C., S. 145 N. 20.

T. Nath and Thakur Gurusevak Singh, for Petitioner; Ramakant Verma, for Opposite Party.

Cases referred to:

('03) 30 Cal 155: (6 Cal W N 737 FB) (Pr 3)

('46) 27 Pat L T 484: (AIR 1946 Pat 389: 47 Cri L J 1013) (Pr 3)

ORDER: This is an application in revision against an order of the learned Sub-divisional Magistrate, Arrah, Sadr, dated the 24th of February, 1951, refusing an application of the petitioner to be added as a party to a proceeding under S. 145 of the Code of Criminal Procedure. The short facts are these. On the 7th of June, 1950, there was a police report about an apprehension of a breach of the peace regarding a piece of land in Arrah town between Akhori Jagannath Prasad on one side and Bhubeneshwar Prasad on the other. On this police report a proceeding under S. 144, Criminal P. C., was drawn up on the 8th of June, 1950. This proceeding was ultimately converted into a proceeding under S. 145, Code of Criminal Procedure, on the 20th of July, 1950. In the original proceeding the parties were Akhouri Jagannath Prasad, first party and Bhubneshwar Prasad, second party. I may state here that Srimati Radhika Devi, opposite party No. 3 before me, is the wife of Babu Bhubneshwar Prasad, second party before the learned Magistrate. It appears that on some petition filed on behalf of Akhouri Jagannath Prasad near about August 1950 some more persons were added as parties, namely, Saheb Roza Mian and Mt. Jaitunnissa. Srimati Radhika Devi, wife of Bhubneshwar Prasad, was also added as a party.

(2) I may indicate here very briefly the nature of the claims of the two principal parties to the dispute. Akhouri Jagannath Prasad claimed to be in possession on the basis of a settlement alleged to have been made by Mt. Sahidanand Saheb Roza. Mt. Sahidan, it may be stated here, was the mother-in-law of Mt. Jaitunnissa. Bhubneshwar Prasad and his wife Radhika Devi claimed to have purchased the property from Saheb Roza and claimed to be in possession on the strength of that purchase. The proceedings were amended by adding the parties, and then on the 1st of February, 1951, the enquiry began. Some witnesses were examined on that date: some more witnesses were examined on the 6th February, 1951, and again on the 12th of February, 1951. On the 22nd of February 1951, the present petitioner made an application to be added as a party. The petitioner claimed to be added as a party on the strength of a sale deed alleged to have been executed by Mt. Jaitunnissa on the 13th of July, 1950. It was stated that the consideration for the sale deed was paid as late as the 8th of February 1951; that is, after the enquiry had already proceeded for a considerable time. The application which the petitioner made to be added as a party, after the enquiry had begun, was rejected by the learned Magistrate by his order dated the 22nd of February, 1951. On the 24th of February, 1951, the petitioner again applied to be substituted in place of Jaitunnissa. That petition was again rejected. The petitioner then moved the learned Sessions Judge without any success. Then he moved this Court on which the present rule was issued.

(3) Learned Counsel for the petitioner has contended before me that the expression "parties concerned" occurring in sub-s. (1) of S. 145, Criminal P. C., should not be construed narrowly and should be so construed as to include persons who claim to be in possession after a notice of the order has been served as required by sub-s. (3) of S. 145 of the Code of Criminal Procedure. Learned Counsel has placed reliance on the decision in 'LEELA SINGH v. B. P. SINGH', 27 Pat L T 484. The question before me is not really about the meaning of the words "parties concerned" occurring in sub-s. (1) of S. 145. The question before me is whether any person who claims to be interested in the dispute can as a matter of right, claim to be added as a party after the enquiry has commenced. The legal position with regard to that question has been clearly stated in the Full Bench decision of the Calcutta High Court in 'KRISHNA KAMINI v. ABDUL JUBBAR', 30 Cal. 155. Hill, J., with whom the majority of Judges concurred, stated as follows:

"It would lead to much inconvenience and delay, if it were held that any one claiming to be concerned in the dispute was entitled to come in and join in the proceedings after the commencement of the enquiry. It would probably be necessary in such a case to start the inquiry afresh

as the party added would have a right to have the evidence taken in his presence, and, if several claimants successively were to come in, in this way, it is evident that the proceedings might be indefinitely prolonged. I do not say that, if the Magistrate for sufficient reasons thought proper after the commencement of the inquiry to bring in an additional party, that his proceedings would therefore be bad, but I think that he would in doing so be acting in contravention of the intention of the Legislature."

If I may say so with respect, the legal position is correctly stated in the aforesaid observations.

(4) In the case before me, it is clear that the real parties, who were claiming to be in possession at the relevant date, are Akhouri Jagannath Prasad on one side and Bhubneshwar Prasad and his wife on the other. Mt. Jaitunnissa, from whom the petitioner is stated to have purchased the property in dispute, never claimed to be in possession at the relevant date. Even the petitioner does not himself claim anywhere that he was in possession at relevant date or came to be in possession thereafter. All that the petitioner is stating is that he has made a purchase from Mt. Jaitunnissa.

It is to be observed that an enquiry under S. 145 of the Code of Criminal Procedure is restricted to an enquiry as to actual physical possession irrespective of the question of right to possession. It is not necessary for me to make any pronouncement as to the validity or otherwise of the sale deed of the petitioner. All that need be stated is that the enquiry had already commenced and the learned Magistrate was justified in refusing to add the petitioner as a party at that late stage of the enquiry. As a matter of fact, the enquiry has now reached a stage when the evidence of the witnesses of the first party has already been taken, and some of the witnesses of the second party have also been examined. In these circumstances I do not think that the petitioner can, as a matter of right, claim to be added as a party to the enquiry, particularly when the petitioner or his predecessor-in-interest did not claim to have been in possession at the relevant date.

(5) For the reasons given above, I see no merit in the application and the rule is accordingly discharged.

V.B.B. *Rule discharged.*

A. I. R. 1952 Patna 271

LAKSHMIKANTA JHA, C. J. AND REUBEN J.

Sasanka Sekhar Pal and others, Appellants v. Dinanath Gorain and others, Respondents.

A. F. O. D. No. 120 of 1946, D/- 17-1-1952.

(a) Civil P. C. (1908), O. 26, R. 9 — Commission — When should not issue — Delegation of judicial function to commissioner.

Under Order 26, R. 9 or under any other provision of the Code of Civil Procedure, a Court cannot appoint a commissioner to discharge a judicial function. Where in a suit for recovery of royalty, income-tax and other public demands in respect of a lease-hold, the Judge left it to the Commissioner to determine the prevailing rate and decide whether the plaintiffs were entitled to claim commission at the reduced or increased rate in accordance with terms of the lease, the Judge has delegated a judicial function to the commissioner and the order is wrong. He must determine the liability of the defendants himself on such evidence as may be adduced in this connection. He may, however, for the sake of convenience, appoint a commissioner to examine witnesses, hold local investigations or examine accounts and ask him to submit a report, but the decision on the point must be given by him and not by the commissioner. AIR 1930 Pat 557; AIR 1931 PC 136, Rel. on. (Para 7)

Anno: C. P. C., O. 26 R. 9 N. 2.

(b) Contract Act (1872), S. 74 — Obligation to pay interest for non-performance of obligation primarily incurred under contract — Stipulation to pay interest is penalty.

If rights are created and obligations incurred under a contract to do or forbear from doing an act, and a further obligation is incurred under a stipulation for non-performance of the obligation primarily incurred under the contract, the stipulation giving rise to the second obligation is auxiliary or subsidiary to the primary contract and not independent of it. (Para 8)

The primary contract between the parties to a mining lease was that the lessees must pay the royalty or commission in the first week of the English calendar month following the mouth of accounting. In default of such payment, it was contracted that the lessee would be liable to pay interest at the rate of 2 per cent. per month from the beginning of the month till the date of payment.

Held that the stipulation for payment of interest is 'in terrorem' intended to secure regular payment of the royalty, and was not independent of the primary contract. The stipulation to pay interest at 2 per cent. per mensem was in the nature of a penalty, and relief could therefore, be given by the Court under S. 74. 36 Mad 229; AIR 1938 Mad 304; AIR 1920 Pat 97; AIR 1915 Cal 796, Rel. on; AIR 1927 Mad 620; AIR 1918 PC 48, Disting; AIR 1929 PC 179; 34 Cal 150 (PC), Ref. (Para 8)

(Interest reduced from 24 p.c. p.a. to 9 p.c. p.a., in view of the charge on the lease-hold).

Anno: Contract Act, S. 74 N. 5.

(c) Usury Laws Repeal Act (1855), S. 2 — Section 2 does not destroy jurisdiction of Court to give relief against penal clause.

The law laid down in S. 2 applies only to a primary contract. It does not destroy the equitable jurisdiction of the Court to give relief against a penal clause for which an express provision is made in S. 74 of the Contract Act. (Para 8)

B. C. De, S. C. Mazumdar and S. K. Mazumdar, for Appellants; Mahabir Prasad, N. N. Sen and Lala Atul Chandra, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('07) 34 Ind App 9: (34 Cal 150) (PC) (Pr 9)
('19) 23 Cal W N 130: (AIR 1918 PC 48) (Pr 9)
('29) AIR 1929 PC 179: (117 Ind Cas 485) (Pr 9)
('31) 58 Ind App 173: (AIR 1931 PC 136) (Pr 7)
('15) 42 Cal 652: (AIR 1915 Cal 796) (Pr 8)
('13) 36 Mad 229: (18 Ind Cas 417) (Pr 8)
('27) 50 Mad 614: (AIR 1927 Mad 620) (Pr 9)
('38) AIR 1938 Mad 304: (182 Ind Cas 120) (Pr 8)
('20) 5 Pat L J 302: (AIR 1920 Pat 97) (Pr 8)

('30) 11 Pat L T 456: (AIR 1930 Pat 557) (Pr 7)
('39) AIR 1939 Pat 540: (182 Ind Cas 132) (Pr 10)

LAKSHMIKANTA JHA, C. J.: The appeal arises out of a suit for recovery of royalty, income-tax and other public demands in respect of a lease-hold. The liability for the payment of the dues claimed in the suit is based upon the terms of a contract embodied in a mining lease. The trial Court passed a preliminary decree for a part of the claim and directed the exact amount to be ascertained by a Commissioner in the manner indicated in the judgment. Defendants Nos. 3 to 8 are members of the family of defendants Nos. 1 and 2, and defendants Nos. 9 and 10 are the transferees of the interest of defendant No. 3, but the suit has been contested only by defendants Nos. 1 to 8 and they are the appellants here.

(2) Defendants Nos. 1 and 2 took a mining lease under a registered patta and kabuliat (Ex. 1), dated the 26th April 1937, from the plaintiffs for a period of 950 years in respect of a coal mine in village Jairamdih. It is relevant to quote here paragraphs 2, 3, 4 and 6 of the kabuliat:

"2. That we as well as our heirs and successors in interest in succession shall remain bound to pay every one of you separately according to your share every month, commission at the rate of -/8/- eight annas per ton on all kinds of kucha coal, i.e., steam, rubble, slack and dust etc., and -/12/- annas per ton on burnt, i.e., soft coke and Re. 1/- per ton on hard coke, which shall be raised and despatched from the said colliery.

3. That we shall submit to every one of you a copy of account of coal which shall be raised and despatched by Railway wagons from the said colliery in each month according to the English Calendar within 7 days of the month following and the commission on the amount of coal despatched, shall be paid by us and our heirs and successors-in-interest in succession within 7 days of the month following. Should we fail to pay within the said 7 days, we as well as our heirs and successors in interest in succession shall remain bound to pay the same with interest thereon at the rate of Rs. 2/- (rupees two) per cent per month from the beginning of the month.

4. That whether we carry on colliery work or not or raise coal or not, we shall remain bound to pay you separately according to your shares, Rs. 800/- (rupees eight hundred) as minimum royalty every month. We shall remain bound to pay the said monthly minimum royalty to you within 7 days of the next month. Should we fail to pay the same to you within the said 7 days, we as well as our heirs and successors-in-interest in succession shall remain bound to pay interest thereon at the rate of Rs. 2/- (rupees two) per cent per month from the beginning of the month till realisation. Should the amount of commission in any month be less than Rs. 800/- the amount of minimum royalty, we shall remain bound to make it up to Rs. 800/- the amount of minimum royalty. Should the amount of commission be more than Rs. 800/-, the amount of the minimum royalty, in any month, we as well as our heirs and successors-in-interest in succession shall remain bound to pay commission at the aforesaid rate.

6. That over and above the aforesaid commission or minimum royalty, we as well as our heirs and successors-in-interest in succession shall remain bound to pay whatever income-tax, road cess and public cess which are fixed at present, or any new tax which may be assessed in future, and whatever Mines Board of Health and Water Board Cess are payable by you in respect of the said mauza Jairamdih and we shall not be competent to deduct the said amount from the minimum royalty or commission or any other sum payable to you. Should you be put to any loss on account of non-payment of the said cess or income-tax, etc., in time, we as well as our heirs and successors-in-interest in succession shall remain bound to make good the same with interest."

It is clear from the recital in the deed that the lessees and their heirs and successors in interest in succession had to submit accounts of the raisings and despatch of coal of each month according to the English calendar within the first week of the following month and pay the royalty within the first week following the month in which the account was to be submitted and in case of default of payment in the manner provided they made themselves liable to pay the commission or royalty with interest thereon at the rate of 2 per cent. per month from the beginning of the month in which the liability was incurred till realisation. They also made themselves liable to pay interest on public demands if not paid in time. It may be observed that under the lease a charge was created on the lease-hold in favour of the plaintiffs for the royalty and public demands which the lessees stipulated to pay under the terms of the lease (Vide Ex. 1, paragraph 7.)

(3) On the 29th of April 1937, there was a further agreement between the parties (Ex. 2), in view of a slump in the coal market, that for seven years, that is, from May 1937 to April 1944, the commission would be payable at the rate of 5 annas per ton instead of 8 annas per ton on all kinds of steam coal, and at the rate of 6 annas per ton instead of 12 annas per ton on soft coke, and it was also agreed that the annual minimum royalty for the said seven years would be Rs. 6,000/- in place of Rs. 9,600/-. It was further stipulated (Vide Ex. 2, paragraph 4) that if the amount of the said minimum royalty and commission be not paid from month to month, the lessees shall be bound to pay to the lessor the entire defaulted amount with interest payable till the final date of payment at the rate of 2 per cent per month, and it was also stipulated that, if during this period of seven years the coal of seam No. 9/10 be sold at a particular rate, the lessees shall be bound to pay the royalty and the commission according to the stipulation in the original lease (Vide Ex. 2, paragraph 5.) Other terms and conditions of the original lease however remained in force.

(4) The plaintiffs instituted the present suit on the 21st of September 1943, for recovery of a sum of Rs. 1,21,261/9/9 from the defendants, after giving deductions for the payment made, due from 1938 to August 1943, and prayed for a decree for any higher amount that may be found due to them on taking accounts from the defendants on charging additional Court-fee. There was also a prayer for a direction to the defendant to submit accounts of despatches and for the appointment of a commissioner to ascertain the dues of the plaintiffs on account of royalty. A detailed account of the claim under different heads is given at page 12 of the paper book. It appears that a sum of Rs. 86,066/8/- has been claimed as commission and Rs. 55,807/10/9 as interest thereon, and a sum of Rs. 25,391/8/- as total tax, cess and other public demands and Rs. 15,496/10/- as interest thereon. The interest under both the heads has been claimed at the rate of 24 per cent. per annum. It may be observed that, although there is a stipulation for payment of interest on public demands, there is no mention of the rate of interest chargeable under this head.

(5) The learned Subordinate Judge has passed a decree directing an account to be taken and has appointed a commissioner to ascertain, on taking evidence, the period for which the plaintiffs are entitled to claim royalty at a reduced rate and the period for which they are entitled to it at an increased rate. The commissioner has also been direced to examine the valuation of the various kinds of coal and calculate the liabilities with reference to the rates as agreed upon by the parties.

(6) Mr. B. C. De, appearing on behalf of the contesting defendant-appellants, has raised only two points before us. His first contention is that the stipulation for the payment of interest at the rate of 2 per cent per month is in the nature of penalty; and the plaintiffs having failed to show the actual loss suffered on account of non-payment of the dues according to the stipulation in the lease, they are not entitled to claim interest at a rate in excess of 9 per cent per annum because the debt is a charge on the lease-hold. His second contention is that the direction of the Court below to the commissioner to ascertain whether the lessees are liable to pay under different heads according to the stipulation of the original lease, or at the reduced rates according to the stipulation in the agreement, is wrong in law, because it amounts to the delegation of a judicial function. I think both these contentions are well founded and must prevail.

(7) I may at once deal with the second point raised by the appellants' Counsel. The plaintiffs are entitled to assess the royalty and other items of demand on the figures to be supplied by the lessees; but as the defendants did not submit their accounts, the plaintiffs have asked for an account to be taken. The learned Subordinate Judge has passed a preliminary decree directing accounts. He has, however, appointed a commissioner to find out the dues on account of royalties and commission according to the terms of the contract and has directed him to ascertain, on evidence, whether the plaintiffs are entitled to claim royalty at the reduced or the increased rate. The judgment of the learned Subordinate Judge on this point is in these terms:

> "The plaintiffs shall get the dues on account of royalties and commission according to the terms. For certain years the rate was reduced and that rate was to increase if price varied. The commissioner shall take evidence on that point and see the valuation of the various kinds of coal and calculate the liabilities with reference to the rates as agreed on by the parties by the lease and agreement, the details of which are noted in the plaint and they are admitted by the defendants' side. So the commissioner will calculate the price and calculate the liabilities with reference to rates prevailing."

It is clear from the passage quoted above that the Judge has delegated a judicial function to the commissioner in that he has left it to the commissioner to determine the prevailing rate and decide whether the plaintiffs are entitled to claim commission at the reduced or increased rate. Such delegation is not permissible in law. Under Order 26, Rule 9, or under any other provision of the Code of Civil Procedure, a Court cannot appoint a commissioner to discharge a judicial function. In 'UGRA NARAIN CHOUDHARY v. HARIBANS CHOUDHARY', 11 Pat L T 456, Das, J., held that a judge cannot delegate any of his functions to a commissioner. The Judicial Committee also in 'RAM KRISHNA v. RATAN CHAND', 58 Ind App 173 at p. 181 (PC) observed that an order of the High Court appointing a commissioner to examine the books of business and to report whether it was of a gambling nature was not warranted by law and the question was one which could not safely be left to be determined by him. The order of the learned Subordinate Judge is, therefore, wrong. He must determine the liability of the defendants himself on such evidence as may be adduced in this connection. He may, however, for the sake of convenience appoint a commissioner to examine witnesses, hold local investigations or examine accounts and ask him to submit a report, but the decision on the point must be given by him and not by the commissioner. The judgment of the learned Subordinate Judge on this point must, therefore, be set aside and the case must go back to the trial Court for a determination of the liability of the defendants in accordance with law.

(8) With regard to the first point, it is clear, on the construction of the lease, relevant portions of which have already been quoted, that the primary contract between the parties was that the lessees must pay the royalty or commission in the first week of the English calendar month following the month of accounting. In default of such payment it was contracted that the lessees would be liable to pay interest at the rate of 2 per cent per month from the beginning of the month till the date of payment. The liability to pay royalty in the manner provided in the deed is the primary obligation, and failure on the part of the lessees so to pay entails a further contractual obligation to pay interest at the stipulated rate, not from the expiry of the period for payment of royalty, namely, the first week of an English calendar month, but from the beginning of the month. The stipulation for payment of interest, in my view, is 'in terrorem', intended to secure regular payment of the royalty, and is not independent of the primary contract. If rights are created and obligations incurred under a contract to do or forbear from doing an act, and a further obligation is incurred under a stipulation for non-performance of the obligation primarily incurred under the contract, the stipulation giving rise to the second obligation is auxiliary or subsidiary to the primary contract and not independent of it. The stipulation to pay interest at 2 per cent per 'mensem' is, in my view, in the nature of a penalty, and relief can, therefore, be given by the Court under S. 74 of the Contract Act, which provides:

> "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or as the case may be, the penalty stipulated for."

If the royalty and public demands had been paid according to the terms of the contract, the liability to pay interest would not have been incurred by the defendants. The case, therefore, clearly falls within the mischief of the rule laid down in S. 74 of the Contract Act, and it is within our power, if we consider that the contractual rate of interest is exhorbitant, to reduce it to such rate as we may consider reasonable. Section 2 of the Usury Laws Repeal Act, 1855 (Act XXVIII of 1855) provides:

> "In any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties and, if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable."

According to this section, the Court must decree the suit for interest at the contractual rate. But the law laid down in S. 2 applies only to a primary contract. It does not destroy the equitable jurisdiction of the Court to give relief against a penal clause, for which an express provision is made in S. 74 of the Contract Act. It is well settled on principle that no Court is to make any contract for a party. Therefore, if a contract has been entered into by the parties with their eyes wide open and is not vitiated by undue influence, fraud or coercion, it must be given effect to, even if it operates as a hardship on any of the contracting parties. But if there is a contract to compensate at a stipulated rate and the liability arises on a breach of another contract, then the second contract, which is really intended to ensure the due performance of the former contract, is a secondary or auxiliary contract, and the Court may interfere and relieve the debtor of his contractual obligation if it is satisfied that the bargain is unjust or unreasonable.

In 'A. MUTHUKRISHNA IYER v. SANKARALINGAM PILLAI', 36 Mad 229 at p. 265, Sundara Ayyar, J. observed as follows:

"What then is the real principle underlying the Court's interference with the contract between parties as to a payment to be made by way of damages? In my opinion it can be no other than this — the doctrine that the Court will carry out all contracts between parties is confined to the carrying out of the primary contract and does not extend to a secondary or subsidiary contract to come into operation if the primary contract is broken. In bonds securing the payment of money, the contract regarded as primary is the promise to pay the amount due to the creditor with the interest, if any, agreed upon. Any further contract, to be binding on the promisor if he breaks this contract, is regarded as a secondary one intended to secure the fulfilment of the primary contract; and the Courts both in England and in India do not feel bound to carry out such a secondary contract apart from its justice and reasonableness."

The same view has been taken in 'MALAYALAM PLANTATIONS LTD. v. NAGASURI VEERARARAGHAVIAH', A I R 1938 Mad 304; 'JOHN PIERPONT MORGAN v. RAMJEE RAM', 5 Pat L J 302 and 'KHAGARAM DAS v. RAMSANKAR DAS', 42 Cal 652.

(9) The learned Advocate General, appearing for the respondents, has drawn our attention to the case of 'RAMLINGAM CHETTIAR v. SUBRAMANIA CHETTIAR', 50 Mad 614 and has contended, on the authority of that case, that the stipulation to pay interest at the rate of 24 per cent per annum in the present case is not by way of penalty and must be given effect to. The case was decided on its own facts, namely that the defendant expecting to make large profits with the money borrowed agreed of his own accord to pay a high rate of interest on the loan. This agreement, as Krishnan, J. pointed out, "was also a part of the bargain", that is to say it was part of the primary contract. Hence, the application of S. 74 of the Contract was not attracted.

Reference was also made by the learned Advocate General to the case of 'AZIZ KHAN v. DUNI CHAND', 23 Cal W N 130 (P C) in which their Lordships of the Judicial Committee held that it is difficult for a Court of Justice to give relief on grounds of simple hardship in the absence of any evidence to show that the money-lender had unduly taken advantage of his position even when the transaction appeared to be undoubtedly improvident. In that case the attack was on the ground of undue influence and not on the ground of a breach of duty arising on default, and the provisions of S. 74 of the Contract Act did not come up for consideration before their Lordships.

In 'BHAI PANNA SINGH v. ARJUN SINGH', AIR 1929 P C 179, the Judicial Committee of the Privy Council held that the effect of S. 74 of the Contract Act is to disentitle the plaintiff to recover 'simpliciter' the sum fixed in the contract, whether penalty or liquidated damages. I may also refer to the case of, 'SUNDER KOER v. SHAM KRISHEN', 34 Ind App 9 at p. 17 (P C) in which their Lordships of the Judicial Committee observed:

"The Indian Courts have invariably held that where (as in the present case) the stipulation is retrospective, and the increased interest runs from the date of the bond and not merely from the date of default, it is always to be considered a penalty, because an additional money payment in that case becomes immediately payable by the mortgagor. Their Lordships accept that view of the statute."

In the case before us the stipulation for payment of interest arises on default and is retrospective; therefore, the contract for payment of interest must be held to be penal. The principle laid down in the cases referred to by the learned Advocate General cannot, therefore, govern the case before us.

(10) Under the Bihar Moneylenders Act, 12 per cent is considered a reasonable rate of interest in case of unsecured loans and 9 per cent in case of secured loans. No money-lender is entitled to claim interest at a rate higher than 12 per cent. Here there is a charge on the lease-hold. Therefore, we consider 9 per cent per annum to be a reasonable rate of interest in this case in the absence of proof of the damage actually suffered by the plaintiffs.

In 'BUTTO KRISTO v. GOBINDARAM', AIR 1939 Pat 540, where the stipulation was to pay interest in default of the performance of the primary contract at the rate of Rs. 37/8/- per cent per annum, this Court reduced the interest to 6 per cent per annum. In the present case, however, we do not feel justified in making so drastic a reduction.

It may be observed that there is a stipulation for payment of interest for non-payment of public demands, but there is no rate of interest fixed under the contract. But as public demands have been paid by the plaintiffs, and the defendants have not paid such demands to the plaintiffs according to the stipulation, we consider the same rate of interest will meet the ends of justice. The plaintiffs will, therefore, be entitled to claim interest on the royalty that may be determined by the Court, and also on the public demands to which the plaintiffs may be held entitled on calculation by the Court, at 9 per cent per annum from the date of default up to the date of the institution of the suit. 'Pendente lite' and future interest will be at 6 per cent simple per annum as decreed by the Subordinate Judge.

(11) The decree of the Subordinate Judge is set aside and the suit is remanded to him for disposal according to law in the light of the directions contained in my judgment. As the success of the appellants is partial, they will get two thirds of their cost in this appeal.

(12) REUBEN, J.: I agree.

V.B.B. Suit remanded.

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LAKSHMIKANTA JHA C. J. AND REUBEN J.

Manir Momin and another, Appellants v. Kameshwar Singh and others, Respondents.

Letters Patent Appeal No. 13 of 1950, D/- 8-1-1952.

(a) Tenancy Laws—Bihar Tenancy Act (VIII (8) of 1885), S. 170 — Landlord of holding obtaining decree for arrears of rent due on holding — In execution holding sold — Application under O. 21 R. 58 will not lie — (Civil P. C. (1908), O. 21 R. 58). 28 Cal 382 (FB); AIR 1926 Pat 210; AIR 1926 Pat 213; AIR 1929 Pat 195; AIR 1933 Pat 32; AIR 1936 Pat 480; AIR 1950 Pat 545, Relied on. (Para 2)

Anno: C. P. C., O. 21 R. 58 N. 12.

(b) Limitation Act (1908), Art. 11 — Objection under O. 21 R. 58 not maintainable — Court refusing to entertain application on ground that it had no jurisdiction to do so — No order on objection — It must be held that there was no objection under O. 21 R. 58 and therefore there was no order under O. 21 R. 58 — Order that "Court has no jurisdiction" held could not be described as order "against" objectors — Art. 11 therefore has no application to a suit to establish right to property — Suit held governed by ordinary rule of limitation (Civil P. C. (1908), O. 21 Rr. 58 and 63). Case Law reviewed. (Para 7)

Anno: Limitation Act, Art. 11 N. 17; C. P. C., O. 21 R. 63 N. 3.

Baidyanath Prasad (No. 1), for Appellants; S. P. Srivastava, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('01) 28 Cal 382: (5 Cal W N 474 FB) (Pr 2)
('37) AIR 1937 Cal 390: (172 Ind Cas 503) (Pr 6)
('18) 41 Mad 985:(AIR 1919 Mad 738 FB) (Pr 6)
('21) 63 Ind Cas 431: (AIR 1921 Mad 488) (Pr 6)
('22) 45 Mad 827: (AIR 1923 Mad 76) (Prs 6, 6A)
('28) 112 Ind Cas 619: (AIR 1928 Mad 878) (Pr 6)
('37) AIR 1937 Nag 170: (168 Ind Cas 601) (Pr 6)
('26) 7 Pat L T 625: (AIR 1926 Pat 210) (Pr 2)
('26) 7 Pat L T 717: (AIR 1926 Pat 213) (Pr 2)
('29) 10 Pat L T 118: (AIR 1929 Pat 195) (Pr 2)
('30) 11 Pat L T 28: (AIR 1929 Pat 116) (Prs 1, 6A, 7)
('32) 11 Pat 790: (AIR 1933 Pat 32) (Pr 2)
('34) 150 Ind Cas 40: (AIR 1935 Pat 31) (Pr 6A)
('34) 13 Pat 765: (AIR 1934 Pat 511) (Pr 6A)
('36) 15 Pat 614: (AIR 1936 Pat 480) (Pr 2)
('46) 25 Pat 199: (AIR 1946 Pat 292) (Pr 7)
('50) AIR 1950 Pat 565 (Pr 2)

REUBEN, J.: This appeal by the plaintiffs raises a point of limitation. It arises out of a suit for declaration of title to and confirmation of possession of a holding of 2 bighas 5 kathas 8 dhurs in village Bharathi in 'tauzi' No. 6424, of which the proprietor is the defendant second party, and, in the alternative, for recovery of possession thereof. The plaintiffs-appellants are two brothers who, in 1921, purchased the holding from the original tenants, the defendants third party, by a registered sale deed, so that under S. 26B of the Bihar Tenancy Act the sale is binding on the landlord proprietor. The landlord proprietor, nevertheless, in the year 1941, sued the original tenants, defendants third party, for arrears of rent in respect of the holding and got a decree. In that suit, plaintiff No. 1 was impleaded as a defendant. The landlord decree-holder then put the decree into execution and purchased the holding at an auction sale held on the 14th of June 1944. He took delivery of possession over the holding on the 7th of May 1945 and settled it with the defendants first party. The Munsif, holding that plaintiff No. 2 not being a party to the rent decree is not bound by it, decreed the suit to the extent of his eight annas share of the holding. His decision has been reversed and the suit dismissed in appeal by the Subordinate Judge, Darbhanga, on the ground that the suit was barred under Art. 11 of the Schedule to the Indian Limitation Act, inasmuch as it was brought more than one year after an order passed in the rent execution case rejecting an objection under O. XXI R. 58 of the Code of Civil Procedure filed by the two plaintiffs. This decision has been upheld by Shearer, J., who considered himself bound by the decision of a Division Bench of this Court reported in 'SUBEDAR SINGH v. RAMPRIT PANDE', 11 Pat L T 28, although he felt doubtful of its correctness.

(2) The objection under O. XXI R. 58 was rejected by the executing Court on the ground that under Section 170 of the Bihar Tenancy Act it was not maintainable. Sub-section (1) of Section 170 of the Bihar Tenancy Act provides that:

> "rules 58, 63 (both inclusive) and 89 of Order XXI of the Code of Civil Procedure, 1908, shall not apply to a tenure or holding or portion of a holding attached in execution of a decree for arrears due in respect of the tenure or holding."

Here, it is not denied that the defendant second party is the landlord of the holding in suit, nor that the rent of the holding was in arrears. Nor is it denied that the decree obtained by him was a decree for arrears of the rent of the holding. In these circumstances, it is well-settled that an application under Order XXI, rule 58 will not lie 'AMRITA LAL v. NEMAI CHAND', 28 Cal 382 (FB); 'RAMESHWAR SINGH v. RAJO CHOWDHRAIN', 7 Pat L T 625; RAMESHWAR SINGH v. PURAN CHANDER', 7 Pat L T 717; 'DWARKA SINGH v. NEMA SINGH', 10 Pat L T 118; 'DEONANDAN PRASAD v. PIRTHI NARAYAN', 11 Pat 790; 'SURPAT SINGH v. SHITAL SINGH', 15 Pat 614; and 'HARIHAR PRASAD v. PRASAD MAHTON', AIR 1950 Pat 565. The leading case on the subject is the Full Bench decision in 'AMRITA LAL BOSE'S CASE" where the question referred to the Full Bench was:

> "Whether Section 170 of the Bengal Tenancy Act bars a claim under Section 278 of the Code of Civil Procedure to a tenure or holding attached in execution of a decree for arrears due thereon, in all cases, or whether the operation is confined to claims to the tenure or holding and does not extend to claims based on the ground that the property claimed does not form part of the tenure or holding attached."

The majority of the Full Bench decided that it bars such a claim in all cases. The dissenting Judge, Banerjee, J., drew a distinction between the class of cases in which the bar operates and the class in which it does not in words which have often been cited and will bear a fresh repetition:

> "Upon a claim under Section 278 of the Code of Civil Procedure being preferred, it, therefore, lies upon the party opposing the claim to show that the claim is barred by Section 170. He can show that by showing that, upon the claimant's own case, Section 170 applies to it, and bars the appli-

cation of Section 278. That will be the case where the claim is of this nature, namely, that the claimant admits, that the tenure or holding attached is held under the decree-holder, that arrears of rent are due thereon, and that the decree is in respect of such arrears, but contends that the decree ought not to be allowed to be executed by the attachment and sale of the tenure, because it was obtained against a wrong person, but the claimant was the person entitled to the tenure of holding, and that, unless and until the landlord sues him and obtains a decree against him, the tenure or holding cannot be sold. Where that is the nature of the claim, S. 170 will bar the claim upon the claimant's own case. But where the claim is of this nature, namely, that the tenure or holding attached, or rather, I should say the land said to constitute the tenure or holding attached, was not held by the claimant under the decree-holder, but was held by, him under an independent right, and that the decree for arrears is, consequently, not a decree for arrears due in respect of such land, there the decree-holder cannot say that, upon the claimant's own showing Section 170 is a bar to the claim being entertained nor can it be said that the case is one of a tenure or holding attached in execution of a decree for arrears due thereon as the decree sought to be enforced would go to show."

The case with which we are concerned clearly falls within the first class regarding which Banerjee, J., agreed that the bar of Section 170 will operate. It is not necessary for us to consider here whether the opinion of Banerjee, J., regarding the other class should be preferred to the view expressed by the majority of the Full Bench.

(3) From what I have said, it will appear that the Executing Court rightly refused to entertain the objection under Order XXI, Rule 58 on the ground that it had no jurisdiction to entertain it. The question is whether such an order operates under Article 11 of the Schedule to the Limitation Act to cut down to one year the ordinary period of limitation for the institution of a suit for declaration of title to and recovery of possession of immovable property.

(4) The relevant portion of Article 11 is as follows:

"Description of suit: By a person, against whom any of the following orders has been made to establish the right which he claims to the property comprised in the order:

(1) Order under the Code of Civil Procedure, 1908, on a claim preferred to, or an objection made to the attachment of, property attached in execution of a decree.

* * *

Period of Limitation:
One year.

Time from which period begins to run:
The date of the order."

The corresponding provision in the Limitation Act of 1877 was as follows:

"Description of suit: By a person against whom an order is passed under Sections 280, 281, 282 or 335 of the Code of Civil Procedure, to establish his right to, or to the present possession of, the property comprised in the order.
Period of limitation: One year.
Time from which period begins to run: The date of the Order."

(5) Sections 280, 281 and 282 of the Civil Procedure Code of 1877 correspond to Rules 60, 61 and 62 respectively of the present Code. We are not concerned here with Section 335, provision for which is now made in Article 11-A of the Schedule to the Limitation Act. Sections 280 and 281 provide for the release of the property from attachment or for disallowing the objection, as the case may be, on an investigation of the objection. Section 282 provides that, if the Court is satisfied that the property is subject to a mortgage or lien in favour of some person not in possession, it may continue the attachment, subject to such mortgage or lien. Anoher possible order which the Court had power to pass on an objection was to dismiss it without investigation if it considered that the objection was designedly or unnecessarily delayed. This was contained in Section 278 corresponding to Rule 58 of Order XXI. It is noticeable that in Article 11 of the Limitation Act of 1877 the limitation of one year was restricted to cases in which an order was passed under the three specific sections mentioned excluding Section 278. In the present Article 11, no specification is made, and the Article would include an order of dismissal under Order XXI, Rule 58. It is noticeable further that the difference between Article 11 in 1877 and in the present Limitation Act is identical with the difference between Section 283 of the Code of 1877 and Order XXI, Rule 63 of the present Code. Under Section 283, "an order under Section 280, 281 or 282" shall be conclusive, subject to the result of such suit, if any, as may be instituted by "the party against whom" the order is passed, whereas Order XXI, Rule 63 of the present Code provides that, where a claim or objection is preferred, "that party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute", and subject to the rent of such suit, if any, the order shall be conclusive.

(6) It was held by a Full Bench of the Madras High Court in 'M. VENKATARATNAM v. RANGANAYAKAMMA', 41 Mad 985 (FB), that the change in Article 11 was deliberately made in order to widen its scope in accordance with the general policy of the Legislature to secure the speedy decision of questions of title raised at auction-sales. The Full Bench accordingly held that an order refusing to investigate a claim on the ground that there was a delay in filing it is an order passed against the claimant within the meaning of Order XXI, Rule 63 and attracts the operation of Article 11 of the Schedule to the Limitation Act. It does not follow from the change however, that every order which results in the disposal of a claim without a decision of the claim in favour of the climant will be an order "against" the climant within the meaning of Order XXI, Rule 63 and Article 11 of the Limitation Act. In 'LAKSHMI AMMAL v. KADIRESAN CHETTIAR', 63 Ind Cas 431 (Mad), for instance, a Dvision Bench of the Madras High Court dealt with a case in which the Executing Court, finding that it had no jurisdiction to proceed with the execution, dismissed the claim by the order:

"Sale stopped. The claim cannot be investigated by this Court. Petition dismissed."

Both their Lordships agreed that this was not an order negativing the right set up by the claimant. It was merely an order declining to adjudicate the claim either for or against him. It, therefore did not attract the operation of Order XXI, Rule 63. Similarly, in 'ABDUL KADIR SAHIB v. SOMASUNDARAM CHETTIAR', 45 Mad 827, it was held that Article 11 does not apply to a case in which a claim was dismissed on the ground that the execution sale had already been concluded, Schwabe, C. J., to whom the case came on a difference of opinion between Spencer and Krishnan, JJ., observed that the District Munsiff

dismissed the application not on the ground of delay or anything of that kind, but on the ground that it had no jurisdiction to hear it. Rightly or wrongly the District Munsiff simply said: "I will not hear you." In SIVASANKARA MENON v. CHALAKATTILNATUVILEPURAKKAL KUPPAN', 112 Ind Cas 619 (Mad) another Division Bench of the Madras High Court held that, where a party by mistake filed a claim petition in a Court which had no jurisdiction to entertain it and, on his withdrawing the claim, his petition was dismissed, there was no order within the meaning of Order XXI, Rule 63. 'CHETANLAL v. LALJI', AIR 1937 Nag 170, was another such case in which the executing Court summarily rejected the claim on the ground that the execution had already been transferred to another Court. Vivian Bose, J., (as he then was), while holding that the order did not attract the operation of Article 11 of the Limitation Act, observed:

> "If an application is rejected on that ground then it cannot have been rejected under Order XXI, Rule 63, for there is then a refusal to entertain the application at all, and consequently a refusal to pass an order under that rule."

According to his Lordship, for Article 11 to apply there must be an order within the meaning of Order XXI, Rule 63, a view supported by the close correspondence between Section 283 of the Code of 1877 and Order XXI, Rule 63 of the present Code on the one hand, and Article 11 of the Limitation Act of 1877 and the present Limitation Act on the other. The case reported in 'SASTHI CHARAN v. GOPAL CHANDRA', AIR 1937 Cal 390 is interesting because the claim under Order XXI, Rule 58 was filed before a Court having jurisdiction to entertain it. Subsequent to the filing of the claim, the property was sold and the claim was dismissed for default sometime later. It was argued before their Lordships that the order of dismissal was an order against the claimant within the meaning of Article 11. Their Lordships repelled the argument holding that, at the time when he passed the order, the Munsiff had no jurisdiction to entertain such a claim and therefore his order of dismissal for default was without jurisdiction.

(6-A) In SUBEDAR SINGH v. RAMPRIT PANDE', 11 Pat L T 28, the decision the correctness of which has been doubted by Shearer, J., a Division Bench of this Court held as barred by Article 11 a suit brought more than a year after the rejection of an objection under Order XXI, Rule 58 relating to the suit property on the ground that it was not maintainable by reason of Section 170 of the Bihar Tenancy Act. The decision was referred to by Wort, J., in 'SRIKRISHNA SAHU v. DHIRJA MAHTO', 150 Ind Cas 40 (Pat) in a case in which the point did not arise for decision because his Lordship found that the claim under Order XXI, Rule 58 had been duly entertained and dismissed on its merits. His Lordship went on to observe that, assuming that the executing Court declined jurisdiction, as was contended before him, the decision in the 'CASE OF SUBEDAR SINGH', was an authority that Article 11 would apply to the subsequent suit. It appears that his Lordship felt that the decision goes too far. I say this because his Lordship then referred to the decision in 'ABDUL KADIR SAHI'S CASE', 45 Mad 827 and observed:

> "..... the mere fact that a person by mistake makes an application in a matter to which Order XXI, Rule 58, clearly does not apply, in no way brings the matter within the mischief of Article 11 of the Limitation Act; in other words if he has a right of action, the mere fact that by mistake he makes the application to which I have referred in no way alters the period of Limitation which is rightly applicable to the particular cause of action which is the subject-matter of his action."

The 'CASE OF SUBEDAR SINGH' was noticed again in 'MUKHRAM PANDE v. ARJUN MISSIR', 13 Pat 765, in which Khaja Mohammad Noor and Luby, JJ., held that where a claim under Order XXI, Rule 58 was rejected as not entertainable on the ground that the claimant had no interest in the property on the date of the attachment, the order did not come within the purview of Order XXI, Rule 63. Khaja Mohammad Noor, J., who delivered the leading judgment, distinguished the case of Subedar Singh as having been decided on its own facts, and went on to refer with approval to the decision in 'LAKSHMI AMMAL'S CASE.'

(7) It would appear from what I have said that these three learned Judges of this Court shared the view expressed in the Madras, Nagpur and Calcutta decisions to which I have referred. Shearer, J., also, by the doubt which he has expressed regarding the decision in 'SUBEDAR SINGH'S CASE', 11 Pat L T 28, has shown his inclination to take the same view. I have therefore, examined the CASE OF SUBEDAR SINGH', with some care and would say with respect that it is not inconsistent with that view. It is true that in that case, as in the present one, the plaintiffs were purchasers of an interest in an agricultural holding governed by the Bihar Tenancy Act. The nature of the objection under Order XXI, Rule 58 filed by them, however, was different. Whereas, in the present case, the plaintiffs in their petition under Order XXI, Rule 58, did not challenge that the decree under execution was a decree for arrears of the rent of the holding in question, in that case, the nature of the decree was challenged and the claim was put forward that the decree was a money decree. Such an objection is entertainable. ('Vide' 'MAHARAJ SINGH v. A. N. BOSE', 25 Pat 199.) The point was decided against the objectors and the decision was clearly one within the jurisdiction of the Executing Court. Whether the decision was correct was not considered by their Lordships who observed:

> "It may be that the Court took a wrong view and that as a matter of fact the decree under execution was a mere money decree and not a rent decree; but an erroneous order does not affect the jurisdiction of the Court making the order. It only entitles the party to come to the Civil Court to have the error rectified."

It appears from this that their Lordships acted on the objectors' case that the decree under execution was a money decree. They proceeded on the basis that at the most there was an erroneous decision by the Executing Court and that the objector's remedy was by coming to the Civil Court to have the error rectified. According to this view, the executing Court had the jurisdiction to entertain the objection and to grant the relief asked for. It is possible in such circumstances to regard the order refusing the relief as an order "against" them within the meaning of Order XXI, Rule 63 and Article 11 of the Schedule to the Limitation Act. They were entitled to be heard by the Court on the merits of their objection but the Court refused to hear them. Here, on the contrary, it was not the case of the plaintiffs in their objection that the decree under execution was other than a decree for arrears of the rent of the holding. Therefore an objection under Order XXI, Rule 58 was not maintainable and the Munsiff rightly refused to entertain one. In the words of Schwabe, C. J., he merely said: "I will not hear you", and there was no order on an objection preferred under Order

XXI, Rule 58. The petition not being maintainable and not having been entertained, it should be taken that there was no petition before the Munsiff and that his order was not an order on such a petition. Further, I doubt whether the order passed by the Munsiff can properly be described as being an order "against" the objectors. The Court had no jurisdiction to entertain their petition and merely told them so. For these reasons I think that Article 11 has no application to the present suit and it will be governed by the ordinary rule of limitation.

(8) I would accordingly allow this appeal, set aside the appellate decree and restore the decree of the Munsiff. As success is evenly divided between the parties, they will bear their own costs throughout

(9) LAKSHMIKANTA JHA, C. J.: I agree.

R.G.D. *Appeal allowed.*

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RAMASWAMI AND SARJOO PROSAD JJ.

Harmukh Rai Jairam Das, Petitioner v. State.

Misc. Judicial Case No. 62 of 1950, D/- 25-1-1952.

Sales-tax — Bihar Sales-tax Act (19 of 1947), S. 13(2)(a) and (b) — Notice under S. 13(2) not issued — Assessment is not invalid — Prejudice to assessee — Effect on assessment.

The jurisdiction to assess and the liability to pay tax are not conditional on the validity of a notice. Section 13, though a part of the Act, imposes no charge on the subject and it is merely a part of the machinery of assessment. The liability to pay sales-tax is founded upon Sections 4 and 5 of the Sales-tax Act which are the charging sections. It cannot be held on principle that the jurisdiction to assess and the liability to pay tax depends on the issue or non-issue of the notice under Section 13. AIR 1947 F C 32 and AIR 1925 Cal 890; Misc. Case No. 108 of 1947 (Pat), Expl. (Para 5)

But where the failure to issue notice under Section 13 (2) has caused prejudice to the assessee, the assessment made by the Sales-tax Officer is invalid. (Para 8)

R. Prasad and T. R. Bajaj, for Petitioner; Government Pleader, for the State.

Cases referred to:

('47) 1947-15 ITR 302: (AIR 1947 F C 32) (Pr 4)

('25) AIR 1925 Cal 890: (88 Ind Cas 404) (Pr 5)

('47) Misc. J. C. No. 108 of 1947 (Pat) (Pr 6)

('51) 1951-19 ITR 476: (AIR 1952 Pat 163) (Pr 4)

RAMASWAMI, J.: This case is stated by the Board of Revenue under Section 25 (3) of the Bihar Sales Tax Act 1947.

(2) The petitioner Harmukh Rai Jairam Das was assessed by the Sales Tax Officer of Darbhanga for the quarter ending 30th of June 1948 to sales-tax amounting to Rs. 7,656/4/-. The assessee had declared in his return a gross taxable turnover of Rs. 89,000 and odd. But the Sales Tax Officer held that the taxable turnover was five lacs and made assessment of tax thereon. It is admitted that on 1st July 1948 the Sales Tax Officer made a surprise visit to the shop of the assessee and discovered that sales to the extent of Rs. 1,349/- were not accounted for. The sales were entered in the Kacha Rokar but not in the Pucca Rokar maintained by the assessee. On 20th July 1948, the assessee filed his return and on 3rd September 1948, the Sales Tax Officer actually made the order of assessment. An appeal was preferred by the assessee to the Commissioner of Tirhut Division who dismissed the appeal. The assessee moved in revision before the Board of Revenue against the order of the Commissioner. By its order dated 11th July 1949 the Board allowed the petition in part and ordered that the gross turnover should be assessed at 3 lacs. It was contended on behalf of the assessee that the assessment was invalid since notice under Section 13 (2) had not been issued and the Sales Tax Officer had no jurisdiction to make any assessment. The Board rejected the contention on the ground that though the statutory notice was not issued the petitioner had appeared before the Sales Tax Officer and explained the registers and accounts maintained by him.

(3) As required by the High Court, the Board of Revenue has referred the following questions to be determined:

(1) Whether the Member, Board of Revenue, having held that the statutory notice under Section 13 (2) of the Bihar Sales Tax Act, 1947, had not been issued, could uphold the assessment as valid and lawful? and (2) Whether in absence of the statutory notice under Section 13 (2) of the Bihar Sales Tax Act, 1947, the Sales Tax Officer had any jurisdiction to assess the petitioner under Section 13 (2) (b) or under any other section of the Bihar Sales Tax Act 1947?

(4) In our opinion it is not necessary to deal with both the questions since they involve the self-same point of law and we propose therefore to deal in this reference with the second question in a modified form — whether in the absence of the notice under Secion 13 (2) of the Bihar Sales Tax Act, 1947, the Sales Tax Officer could validly make assessment in the circumstances of the present case.

(5) On behalf of the assessee, Mr. Rajeshwari Prasad addressed the argument that the Sales Tax Officer had no jurisdiction to make assessment under Section 13 (2) (b) since notice under Section 13 (2) was not admittedly issued. Learned Counsel pointed out that Section 13 (2) (a) requires that the Commissioner if not satisfied that the return furnished was correct and complete:

> "shall serve on such dealer a notice in the prescribed manner requiring him on a date and at a place to be specified therein, either to attend in person or to produce or to cause to be produced any evidence on which such dealer may rely in support of such returns."

Section 13 (2) (b) states that:

> "On the day specified in the notice or as soon afterwards as may be, the Commissioner, after hearnig such evidence as the dealer may produce, and such other evidence as the Commissioner may require on specified points, shall assess the amount of tax due from the dealer."

It was maintained on behalf of the assessee that the requirements of Sections 13 (2) (a) and 13 (2) (b) were imperative and the Sales Tax Officer had no jurisdiction to assess the tax unless the condition precedent, viz., the issue of the notice under Section 13 (2) (a) was satisfied. In my opinion the argument is not correct. The jurisdiction to assess and the liability to pay tax are not conditional on the validity of a notice. Section 13, though a part of the Act, imposes no charge on the subject and it is merely a part of the machinery of assessment. The liability to pay sales-tax is

founded upon Sections 4 and 5 of the Sales Tax Act which are the charging sections. It cannot be held on principle that the jurisdiction to assess and the liability to pay tax depends on the issue or non-issue of the notice under Section 13.

The principle has been accepted in 'CHATTURAM v. COMMISSIONER OF INCOME-TAX, BIHAR', 1947-15 ITR 302 (FC) in which th argument was stressed before the Federal Court that notices issued under Section 22 (1) and (2) of the Income-tax Act were invalid and the assessment was therefore 'ultra vires.' The contention was rejected by the Federal Court on the ground that it was based on a misunderstanding of the jurisdiction of the Income-tax Officer and the operation of the Income-tax Act. At page 307, Kania, J., as he then was, observed:

"It was next contended that in the present case notices under Section 22 (1), and (2) of the Income-tax Act were already issued before the Notification of the 26th May 1940. The notices were the foundation of the jurisdiction of the Income-tax Officer. At that time the Finance Act of 1940 was not operative in the area in question and the Governor, by his Notification, cannot give jurisdiction to the Income Tax Officer in respect of his ultra vires notices. This contention is founded on a misunderstanding of the jurisdiction of the Income Tax Officer and the operation of the Income-tax Act. The Income-tax assessment proceedings commence with the issue of a notice. The issue or receipt of a notice is not, however, the foundation of the jurisdiction of the Income-tax Officer to make the assessment or of the liability of the assessees to pay the tax. It may be urged that the issue and service of a notice under Section 22 (1) or (2) may affect the liability under the penal clauses which provide for failure to act as required by the notice."

To the same effect is the decision in 'JITAN RAM v. COMMISSIONER OF INCOME-TAX', 1951-19 ITR 476 (Pat). I would therefore hold in the present case that the Sales-tax Officer had jurisdiction to make assessment notwithstanding the fact that no notice had been issued under Section 13 (2) (a) of the Act.

(5a) In support of his argument Mr. Rajeshwari Prasad referred to 'NIRMAL KUMAR v. SECY. OF STATE', AIR 1925 Cal 890, in which the question was whether non-compliance with the provisions of Sub-section (2) of Section 23 would invalidate an assessment. It was found in that case that the return filed under Section 22 was examined in the presence of the assessee's Gomashtas who were fully aware of all the matters in the return which were questioned by the Income-tax Officer but no application was made by them to adduce any further evidence, oral or documentary, with regard to the disputed item. It was held by Greaves, J., that under the circumstances the notice under Section 23 (2) should be held to have been waived on behalf of the assessee. Mukherji, J., who was the other member of the Bench, was of opinion that the notice had not been waived and since non-compliance by the Income-tax Officer of the provisions of Sub-section (2) of Section 23 had prejudiced the assessee, the assessment made was not valid. The case is therefore no authority on the proposition that in the absence of a notice under Section 13 (2) the Sales-tax Officer has no jurisdiction to make assessment. On the contrary, the ratio of the case would appear to be that the assessment was invalid for the reason that non-compliance of the provisions of Section 23 (2) had caused prejudice to the assessee and hence the assessment by the taxing authorities was invalid.

(6) On behalf of the assessee reference was also made to Misc. Judicial Case No. 108 of 1947 in which the question arose whether the Sales-tax Officer was bound to serve notice under Section 10 (2) (a) of the Act before proceeding to make assessment under Section 10 (3). The assessee in that case was a registered dealer under the Act and was required to submit quarterly return to the Sales-tax authorities. As no return was filed for the quarter in question a notice was issued upon the assessee under Section 10 (4) to show cause against the assessment which was proposed to be made. The notice was served on the 28th of October. On the 20th of October 1945 the assessee filed return instead of showing cause of non-filing the return. The Sales-tax Officer asked the assessee to produce evidence on 20th of November 1945 in support of his return as he was not satisfied that the figure shown in the return were correct. The notice was not actually issued to the assessee, although it was directed to be issued, because on the 23rd of October the assessee's agent signed the order-sheet in token of having received notice. Upon these facts it was held that the requirement of Section 10 (2) (a) was satisfied and the assessment was validly made. It was pointed out by Manohar Lall, J., that the conduct of the assessee in that case amounted to a waiver even if it is assumed that the notice should have been served upon him. For the assessee appeared in the proceedings and asked for extension of time and extension was granted to him to produce his books. Further extension was not granted to him as the Sales-tax authorities had discretion to refuse or to grant. Mr. Rajeshwari Prasad contended in the alternative that even if the issue of notice under Secion 13 (2) (a) was not imperative in the sense that the jurisdiction of the Sales-tax Officer was not affected, the failure to serve the notice had caused prejudice to the petitioner in the present case and for this reason the assessment made must be held to be invalid. Learned Counsel founded his argument upon the fact that the Sales-tax Officer had paid surprise visit to the shop on 1st July 1948 and required the assessee to submit return though under Rule 19 (1), the quarterly return was not due till 1st August 1948. On 20th June 1948 the assessee made the quarterly return. The Board of Revenue has said that the failure to issue notice under Section 13 (2) caused no prejudice to the assessee since he appeared before the Sales-tax authorities on 24th July 1948 and on subsequent dates to explain his account. But the resolution of the Board dated 11th July 1949 indicates that the assessee explained the accounts of the previous three quarters and not the accounts of the quarter ending 30th June 1948, assessment for which period is disputed in the present case. Since there is no material on the record to show that the assessee had opportunity of producing account books and other papers for the period in question it must be held that the failure to issue notice has in the circumstances of the present case caused prejudice to the assessee. It is necessary to add that the Sales-tax Officer had wrongly thought that the amount of Rs. 1,349 which was not entered in the Pucca Rokar was suspicious. On this point the Board has commented that the amount of Rs. 1,349 has been explained and books were produced to show that the item has been accounted for.

(8) For these reasons I hold that the failure to issue notice under Section 13 (2) of the Act has caused prejudice to the assessee and in consequence the assessment made by the Sales-tax Officer is invalid in the circumstances of the case.

(9) The case should now recommence from the stage when the Sales-tax Officer should issue notice

under Section 13 (2) (a) of the Act on the basis of the returns which have been already furnished. After such notice is issued the assessment proceedings should be completed in the manner prescribed by the Act.

(10) There will be no order as to costs of this reference.

(11) SARJOO PROSAD, J.: I agree.

V.B.B. *Reference answered.*

A. I. R. 1952 Patna 280

RAMASWAMI, J.

Kedarnath Lal and another, Petitioners v. Sheonarain Ram and others, Opposite Party.

Civil Revn. No. 551 of 1947 with Civil Revns. Nos. 546 to 550 of 1947, D/- 20-7-1948.

(a) Civil P. C. (1908), S. 115 — Appeal to lower appellate Court competent — Revision to High Court is not barred.

The section means that the High Court cannot act only in those cases in which an appeal lies to that Court. The fact that an appeal lies to the lower appellate Court does not take away the High Court's power of revision. (Para 4)

Anno: Civil P. C., S. 115 N. 7.

(b) Civil P. C. (1908), O. 7, R. 10 — Applicability.

Where on evidence it is found by the Court that the suit transferred to it is beyond its pecuniary jurisdiction the Judge should transfer the suit back to the Court from which it was sent & not return the plaint under Order 7, Rule 10. Order 7, Rule 10 does not apply to such cases. (Paras 6, 7)

Anno: Civil P. C., O. 7, R. 10 N. 1.

Messrs. Baldeva Sahay and Girjanandan Prasad, for Petitioners; S. Mustafi, for Opposite Party.

Cases referred to:

('41) AIR 1941 Bom 69: (ILR (1941) Bom 131) (Pr 5)

('36) 63 Cal L J 105: (AIR 1936 Cal 786) (Pr 4)

('35) AIR 1935 Pat 86: (154 Ind Cas 103) (Pr 4)

('33) 11 Rang 134: (AIR 1933 Rang 64) (Pr 4)

ORDER.: On the 20th of October 1944, the applicants instituted a batch of title suits in the Court of the second Munsiff, Buxar, who had pecuniary jurisdiction up to Rs. 4,000. On the 23rd of January 1945, the defendants filed written statements. Thereafter a Pleader Commissioner was appointed who after making local inspection submitted a report. But on the 22nd of February 1947, the District Judge of Shahabad passed an administrative order transferring the batch of suits from the Court of the second Munsiff to the Court of the Additional Munsiff, Buxar, who had pecuniary jurisdiction up to Rs. 1,000. As the defendants objected that the suits were undervalued, the Munsiff proceeded to take evidence. He eventually decided that six of the title suits, namely, 198, 201, 203, 207, 208 and 209, should be valued between Rs. 1,140 and Rs. 3,360 and were, therefore, beyond his jurisdiction. The Munsiff ordered that the plaints should be returned for presentation to the proper Court.

(2) The applicants then prayed to the District Judge of Shahabad that the six title suits should be transferred back to the Court of the second Munsiff, Buxar, where they had been originally filed. The District Judge rejected the petition holding that he had no jurisdiction to transfer the suits when the plaints had been already ordered to be returned.

(3) The applicants have now obtained a rule from this Court under Section 115 of the Code of Civil Procedure.

(4) A preliminary objection was raised on behalf of the opposite party that the order of the Munsiff being made under Order 7, Rule 10, an appeal lay to the District Judge and the High Court was precluded from interfering in revision. It is not possible to accept this argument. Section 115 provides that:

> "the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies 'thereto.'"

Plainly construed, the section means that the High Court cannot act only in those cases in which an appeal lies to that Court. The fact that an appeal lies to the lower appellate Court does not take away the High Court's power of revision 'SASHI KANTA ACHARJYA v. NASIRDABAD LOAN OFFICE CO. LTD.', 63 Cal L J 105; and 'DAW MIN BAW v. A. V. P. L. N. CHETTYAR FIRM', 11 Rang 134. In 'UPAN PRASAD SINGH v. SECY. OF STATE', AIR 1935 Pat 86, Fazl Ali, J., (as he then was) emphasised that the section did not mean that the High Court could not interfere if an appeal lay to the inferior Court. It is true that the High Court will be reluctant to interfere in revision when the party has not resorted to a remedy available to him by appeal; but it does not follow that merely because the party has preferred no appeal to the District Judge the High Court has no power to interfere in revision. In the present case I am satisfied that the application in revision is competent.

(5) For the applicants learned advocate then argued that the Munsiff ought not have returned the plaints under Order 7, Rule 10, Civil Procedure Code in the present case. It is not disputed that the plaints were originally filed in the Court of the second Munsiff, Buxar, who had pecuniary jurisdiction up to Rs. 4,000. In 'BABUBHAI VAMALCHAND v. HIRALAL VAMALCHAND', AIR 1941 Bom 69, a suit for an injunction valued at Rs. 205 was instituted in the first class Subordinate Judge's Court. Subsequently by an order of the District Judge the case was sent to the Court of the second class Subordinate Judge who was one of the four Subordinate Judges attached to the first class Courts. The plaintiff then sought to make an amendment to the plaint which having been granted the suit became one beyond the pecuniary jurisdiction of the second class Subordinate Judge. The latter officer then transferred the suit to the 1st class Court and also reported the action taken by him to the District Judge who sanctioned the transfer. When the case was taken up by the first class Subordinate Judge, the defendants objected that he had no jurisdiction and that the only legal way of dealing with the case was that the second class Subordinate Judge should have returned the plaint for presentation to the first class Subordinate Judge under Order 7, Rule 10. This argument was negatived by a Division Bench who held that Order 7, Rule 10 was not applicable to the case.

(6) For the identical reasons I hold that the order of the Munsiff dated the 28th of April 1947, returning the plaints is improper and must be set aside.

(7) Under Section 24, Civil Procedure Code, 'ex majore cautela' I direct that all the twelve suits

(including the six in which plaints were directed to be returned) should be transferred from the Court of the Additional Munsiff, Buxar to the Court of the second Munsiff, Buxar.

(8) There will be no order as to costs.

M.K.S. *Order accordingly.*

A. I. R. 1952 Patna 281

NARAYAN, J.

P. C. Gangulee, Petitioner v. Sm. Kadhuri Devi, Opposite Party.

Civil Revn. No. 606 of 1951, D/- 9-11-1951.

(a) Civil P. C. (1908), Ss. 10 and 151 — Stay of suit — Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control Act (III (3) of 1947).

There is no warrant for the proposition that merely because a proceeding for fixation of fair rent is pending before the Rent Controller, a suit for arrears of rent instituted in a civil Court should be stayed. (Para 4)

Anno : C. P. C., S. 10 N. 7; S. 151 N. 2.

(b) Civil P. C. (1908), O. 14, R. 2 and S. 115 — Failure to decide preliminary issue of law— Revision.

Rule 2 of Order 14, Civil P. C. is mandatory, though before trying an issue of law as a preliminary issue the Court has to be convinced that that is an issue on which the whole case can be dismissed. Once the Court comes to the conclusion that there is a pure question of law to be decided as a preliminary issue in the case, an order refusing to decide the preliminary issue on the mere ground that the Court does not favour disposal of suits on preliminary points is not justified and would be interfered with in revision. AIR 1936 Pat 250, Foll. (Para 5)

Anno : C. P. C., O. 14, R. 2 N. 2, 3.

J. C. Sanyal, for Petitioner; Bhabanand Mukherji, for Opposite Party.

Cases referred to :

('36) 162 Ind Cas 486: (AIR 1936 Pat 250) (Pr 5)

('49) C. R. Nos. 451 & 456 of 1949 (Pat) (Pr 5)

ORDER : This application is directed against an order of Mr. C. B. Mitra Munsif, Patna, rejecting the prayer of the defendant in Money suit No. 10 of 1951 pending before the Learned Munsif, for staying the further proceeding in the case or in the alternative for deciding the issue regarding the maintainability of the suit as a preliminary issue in the case.

(2) The facts relevant for our present purpose are that the defendant petitioner is occupying a flat in a house belonging to the opposite party as a tenant. On the 10th of January 1951 he filed a petition before the Rent Controller for the fixation of fair rent for the portion of the building in his occupation. On the same date the opposite party instituted a suit for the recovery of arrears of rent with regard to the building in the occupation of the petitioner. A day before, that is, on 9-1-51 the opposite party had filed an application before the Controller for the eviction of the petitioner from the building and it has been pointed out that this petition for the eviction of the petitioner was filed after a notice had been served on the opposite party for the fixation of fair rent. It appears that a proceeding under S. 107 of the Code of Criminal Procedure has also been started against the opposite party and her husband at the instance of the petitioner and that proceeding is still pending. The relations between the parties are strained and an allegation has been made in this petition that the husband of the opposite party tried to evict the petitioner by force.

(3) The short points for determination in the case are whether a stay can be granted and in the alternative whether the issue regarding the maintainability of the suit can be tried as a preliminary issue in the case.

(4) Mr. Sanyal who appeared for the petitioner before me could not seriously press the contention that the further proceeding of the suit should be stayed because a proceeding for the fixation of fair rent is pending before the Controller. I do not find any warrant for the proposition that because a proceeding for the fixation of fair rent is pending before the Controller the suit pending before the learned Munsif which is a suit for arrears of rent should be stayed. The learned Munsif was therefore perfectly justified in rejecting the prayer of the petitioner for the stay of further proceeding in the suit.

(5) But I am inclined to agree with Mr. Sanyal that the learned Munsif should have tried the issue regarding the maintainability of the suit as a preliminary issue in the case. Rule 2 of O. XIV is mandatory, though before trying an issue of law as a preliminary issue the Court has to be convinced that that is an issue on which the whole case be dismissed. The order of the learned Munsif in this case does not show that there is no issue in this case which can be decided as a preliminary issue and on the decision of which the fate of the suit may depend. On the other hand, the learned Munsif seems to be satisfied that there is an issue of law in this case which can be decided as a preliminary issue, and the only ground which he has given in his order for not acceding to the prayer of the petitioner for deciding the issue of law as a preliminary issue is that this Court "does not favour disposal of suits on decision of preliminary points." As a matter of fact, Mr. Sanyal has referred to certain provisions of the Bihar Buildings (Lease, Rent and Eviction) Control Act 1947 (Bihar Act III of 1947) in support of his contention that there is a very important issue of law to be decided in this case, and he has discussed Ss. 5 and 6 of the Act.

Sub-s. (2) of S. 6 lays down that it should not be lawful for a landlord to let any building the fair rent of which has not been previously determined under the provisions of sub-s. (2) of S. 5 or sub-s. (1) of this section and the contention of the defendant-petitioner is that in view of these and certain other provisions in the Act the suit is not maintainable until the fair rent is determined. Evidently, when the learned Munsif framed the issue "Is the suit as framed maintainable?" he had in his mind this defence and his order clearly shows that the petitioner has seriously contended before him that the issue of law should be decided as a preliminary issue. Without expressing myself finally on the question which has been raised by Mr. Sanyal, I am to point out that the learned Munsif should have complied with the provisions of Order XIV, R. 2 if he was of opinion that there was a pure question of law to be decided in this case as a preliminary issue. This the learned Munsif failed to do and therefore his order has to be interfered with. It was laid down by Courtney Terrell C. J. in 'JANKI DAS v. KALU RAM', 162 Ind Cas 486 (Pat) as follows:

"The fact is that some harmony has to be observed between the general principle that it is undesirable to try cases piecemeal and the specific and wholesome provision of O. XIV, R. 2, Civil Procedure Code which is for the purpose of preventing the injustice of a party being able to force his opponent to go at great length into evidence when the simple decision on a point of law might render the investigation of the facts unnecessary."

In that case the Court below had not expressed the opinion that the case could not be disposed of on the question of law only, and in this case the order of the learned Munsif shows that he was satisfied that the case could be disposed of on the question of law alone. This decision of Courtney Terrell, C. J. was followed by a Division Bench of this Court in 'C. R. Nos. 451 and 456 of 1949 (Pat)' and the judgment of the Bench was delivered by me. The 'ratio decidendi' of these cases certainly is that the provisions of O. XIV, R. 2 have to be strictly followed when it is found that there is an issue of law to be decided as a preliminary issue. The defendant-petitioner is very seriously urging in this case that in view of certain provisions of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, the suit for arrears of rent is not maintainable and I think the learned Munsif should decide this question as a preliminary issue in the case.

(6) In the result this application is allowed in part and the Court below is directed to decide the issue regarding the maintainability of the suit as a preliminary issue in the case. There will be no order for the costs of this Civil revision application.

K.S. Revision allowed.

A. I. R. 1952 Patna 282

SHEARER AND NARAYAN JJ.

Mt. Sahidan, Appellant v. Rahmat Ali, Respondent.

A. F. A. D. No. 194 of 1947, D/- 4-10-1950.

(a) Bengal, Agra and Assam Civil Courts Act (1887), S. 19 (2), Proviso — No further notification by Government after modification of section in 1922 — Munsiff's jurisdiction to try suits up to value of Rs. 2000.

It cannot be contended that because no further notification was issued by the Local Government under the proviso to sub-s. (2) of S. 19 after it was notified in 1922 the Munsiff has no jurisdiction to try suits even up to the value of Rs. 2000/-. The notification of 1916 by which the Government delegated to the High Court its power to confer on Munsiffs jurisdiction to try suits up to a value of Rs. 2000/- could not lose its force. (Para 3)

(b) Bihar (Munsif's Proceedings) Validation Act (VII (7) of 1945), S. 1 — Subject-matter of Act falls clearly under item 2 of Provincial Legislative List (Government of India Act (1935), Sch. II, List II, Item 2).

(Paras 1 and 4)

Mehdi Imam and K. D. Chatterji, for Appellant; Mahabir Prasad, Brijkishore, N. Singh and N. C. Ghosh, for Respondent.

Case referred to:

(1921) Probate 204: (90 LJP 242) (Pr 1)

SHEARER, J.: The question that is sought to be agitated in this second appeal is as to the validity of the Bihar (Munsif's Proceedings) Validation Act, 1945. Under S. 19(1) of the Bengal, Agra and Assam Civil Courts Act, 1887, the jurisdiction of a munsif extends to all original suits cognizable by Civil Courts of which the value does not exceed one thousand rupees. Sub-s. (2) of S. 19, as it stood originally, empowered the Local Government, on the recommendation of the High Court, to direct by notification in the official gazette with respect to any munsif named therein that his jurisdiction should extend to all like suits of such value not exceeding two thousand rupees as might be specified in the notification.

In 1914, by the Decentralisation Act, a proviso was added to this sub-section that the Provincial Government may, by notification in the official gazette, delegate to the High Court its powers under it. In 1916 the Local Government of Bihar and Orissa issued a notification delegating this power to the High Court. In 1922 sub-s. (2) of S. 19, was modified so as to enable power to be conferred on munsifs to try suits of a value not exceeding four thousand rupees. No further notification was, however, issued by the Local Government under the proviso to the sub-section. This omission was not realised until 1944 or thereabouts, and, in consequence, the Act, which is now sought to be challenged, was passed in order to remove any doubts as to the validity of decrees which had, in the interval, been passed by Munsifs.

Mr. Mehdi Imam, for the appellants, has referred to a passage in Cooley's Constitutional Limitations, volume II, page 792, where it is stated that "if there was originally a failure of jurisdiction, no subsequent law can confer it". Whatever the position may be in the United States of America, legislation of this kind has been passed both in Great Britain and in India, and its validity has not previously been questioned. In 1921 in 'KEYES v. KEYES AND GRAY', 1921 Probate 204, the divorce Court in England held that a decree for dissolution of marriage passed by a High Court in India had been passed without jurisdiction. As, in similar circumstances, a number of such decrees has been passed by the High Courts in India acting in exercise of the jurisdiction conferred on them by the Indian Divorce Act of 1869, the British Parliament enacted the Indian Divorces (Validity) Act, 1921.

The ground on which the validity of the decree in 'KEYES v. KEYES AND GRAY', had been successfully challenged was that the parties had not been domiciled in India, and the Indian Divorces (Validity) Act, 1921, provided that such a decree should "be as valid, and be deemed always to have been as valid, in all respects, as though the parties to the marriage had been domiciled in India". In or about 1936 the Judicial Commissioner of the Central Provinces held that, for certain reasons, a decree passed by the High Court of Bombay was a nullity. The Indian Legislature thereafter passed the Decrees and Orders Validating Act, 1936. This Act was, presumably, introduced in the Central Legislature as the object of it was to validate decrees passed by each of the High Courts in three presidency towns. I can see no reason myself to suppose that the provincial Legislature had no jurisdiction to enact the Bihar (Munsif's Proceedings) Validation Act, 1945, and that legislative jurisdiction to do so was possessed by the Indian Legislature alone. The subject-matter of the enactment appears to me to fall clearly under item 2 in the Provincial Legislative List.

(2) It is not, however, really necessary to decide the point raised by Mr. Syed Mehdi Imam. The value of the suit, out of which this second appeal arises, was under two thousand rupees. Now, as I have already said, in 1916 the Government of Bihar

and Orissa had delegated to the High Court its power to confer on munsifs jurisdiction to try suits up to a value of Rs. 2,000/-. Under S. 24, read with S. 3 (17) of the General Clauses Act, the notification issued in 1916 continued in force. Whether or not under the notification, which was issued by the High Court, the learned munsif, who tried the suit, was legally entitled to try suits of a value exceeding Rs. 2000/-, there can be no doubt but that he had jurisdiction to try suits not exceeding Rs. 2,000/-, in value.

Speaking for myself, I entertain some doubt as to whether it was really necessary, however advisable it may have been, for the Legislature to enact the Bihar (Munsifs' Proceedings) Validation Act, 1945. The intention of the Local Government of Bihar and Orissa in 1916 was to delegate to the High Court power to confer on munsifs jurisdiction to try suits of any value not exceeding the maximum value, and, if subsequently the maximum value was raised from Rs. 2,000/- to Rs. 4,000/-, it is, I think, arguable that no further notification was required to be issued by the Local Government. In my opinion, there is no merit in this appeal, and I would accordingly dismiss it with costs.

(3) NARAYAN, J: I agree that the appeal should be dismissed. This appeal can be disposed of even without deciding the question whether the Bihar (Munsifs' Proceedings) Validation Act, 1945, was within the competence of the Provincial Legislature, because the suit out of which this second appeal arises was valued at Rs. 1932/- only. There is absolutely no force in the contention of Mr. Imam that because no further notification was issued by the Local Government under the proviso to sub-s. (2) of S. 19 the Munsif had no jurisdiction to try suits even up to the value of Rs. 2000/. The notification of 1916 by which the Government delegated to the High Court its power to confer on Munsifs jurisdiction to try suits up to a value of Rs. 2000/- could not lose its force.

(4) I also agree with my learned brother that the subject-matter of the enactment falls clearly under item No. 2 of the Provincial Legislative List.

V.R.B. Appeal dismissed.

A. I. R. 1952 Patna 283

RAMASWAMI AND SARJOO PROSAD JJ.

Madan Mohan Singh, Appellant v. Bhirgunath Singh and others, Respondents.

A. F. A. D. No. 262 of 1949, D/- 28-2-1952.

Tort — Malicious prosecution — Foundation of action — Test — Prosecution when starts in criminal cases.

The foundation of the action for malicious prosecution lies in abuse of the process of the Court by wrongfully setting the law in motion and it is designed to discourage the perversion of the machinery of justice for an improper purpose. In order to succeed, the plaintiff must prove that the proceedings were malicious, without reasonable and probable cause, that they terminated in his favour and that he had suffered damage. The word 'prosecution' in the title of the action is not used in the technical sense which it bears in Criminal Law. For, the action lies for the malicious prosecution of certain classes of civil proceedings, for instance, falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company. (1883) 11 Q B D 674; 18 Ind Cas 737 (Cal); AIR 1915 Cal 79, Ref. to. (Para 5)

To found an action for malicious prosecution the test is therefore not whether the criminal proceedings have reached a stage at which the Magistrate could take cognizance. The test is whether the defendant was actively instrumental in putting the criminal law into force, in other words, whether the defendant maliciously set the law in motion through a constituted authority without regard to the technical form in which the charge has been preferred. (Para 6)

The defendant had lodged information at the thana wherein he asserted that he identified all the plaintiffs as having taken part in the dacoity in his house. As a result of the information, the police searched the house of the plaintiffs and placed them under arrest. The plaintiffs were subsequently produced before the Magistrate and an order of remand was taken. In the result, the plaintiffs suffered imprisonment for thirtynine days and their reputation was also damaged. The plaintiffs brought an action for malicious prosecution.

Held that the defendant must be taken to have actively instigated the prosecution of the plaintiffs. It was immaterial that the defendant made no formal charge before the Magistrate or that the proceedings did not reach the stage at which the Magistrate could take formal cognizance. He was therefore, liable in damages. 30 All 525 PC; AIR 1926 PC 46, Relied on; AIR 1930 Cal 392 and AIR 1949 Bom 100, Dist. (Para 6)

Held further that as the plaintiffs suffered the imprisonment not on account of any ministerial act but a judicial act exercised by the Magistrate under S. 170 or S. 344, Criminal P. C. the action was maintainable. The distinction between a judicial act and a ministerial act is important. In the former, the party appeals to the discretion of a Judge or Magistrate, which is thus interposed and the steps taken result immediately from the exercise of that discretion and not from the act of the party. In case of the latter, the party employs the machinery of the law at his own risk and is directly responsible for the consequences. (1870) LR 5 C. P. 534, Ref. (Para 10)

Rai Inderbehari Saran, for Appellant; Umesh Chandra Pd. Sinha, Harians Kumar and S. P. Jamuar, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('08) 30 All 525: (35 Ind App 189 PC) (Prs 7, 9)
('26) 30 Cal W N 866: (AIR 1926 PC 46) (Pr 8)
('48) 50 Bom L R 622: (AIR 1949 Bom 100) (Pr 9)
('13) 17 Cal W N 554: (18 Ind Cas 737) (Pr 5)
('14) 20 Cal L J 518: (AIR 1915 Cal 79) (Pr 5)
('30) 57 Cal 25: (AIR 1930 Cal 392) (Pr 9)
(1870) LR 5 CP 534: (39 LJCP 260) (Pr 10)
(1883) 11 QBD 674: (52 LJQB 488) (Pr 5)

RAMASWAMI, J.: The question for determination in this appeal is whether upon the facts found

the appellant is liable in law to pay damages for malicious prosecution.

(2) The plaintiffs brought the suit alleging that on 13th April 1945 defendant No. 5 lodged first information report before the Sub-inspector of Hunterganj thana alleging that on the previous night a dacoity was committed in his house and a suit case containing ornaments and cash was looted. The defendant asserted that he identified the plaintiffs among the dacoits at the time the offence was being committed. The police commenced investigation of the case. On 14th April 1945 the house of the plaintiffs was searched but nothing incriminating was found. The plaintiffs were arrested by the police who applied for remand before the Magistrate. The plaintiffs were remanded by the Maigstrate and kept in imprisonment for 39 days. Plaintiffs declared that the appellant had lodged false information maliciously and without reasonable and probable cause. The main ground of defence was that defendant No. 5 lodged true information at the police station and that he honestly believed that the plaintiffs had taken part in the dacioty. Upon a consideration of the evidence the Munsif held that the defendant had lodged false information at the thana, that there was no reasonable and probable cause and that the appellant was actuated by malice. The Munsif accordingly granted a decree for damages to the extent of Rs. 500 in favour of the plaintiffs. The decree has been affirmed by the Additional Subordinate Judge of Ranchi in appeal.

(3) The main question in the appeal is whether upon the facts found there was a 'prosecution' of the respondents, upon which an action for malicious prosecution could be based.

(4) It is necessary in this context to refer to the relevant provisions of the Criminal P. C. Section 154 states:

"Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station shall be reduced to writing by him or under his direction, and be read over to the informant."

Section 157 provides:

"If from information received or otherwise an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under S. 156, to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report."

Section 167(1) enacts:

"Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by S. 61, and there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station.....shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary .....and shall at the same time forward the accused to such Magistrate."

Section 167(2) provides:

"The Magistrate to whom an accused person is forwarded.....from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole."

If after the period of 15 days prescribed by this section the police wish to detain the accused in custody they can only proceed by forwarding the accused under S. 170, to a Magistrate empowered to take cognizance of a case. The Magistrate may thereafter under S. 344 remand the accused to custody if there are reasonable grounds for doing so. Section 344 provides that

"If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing.....postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody: provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time."

(5) The argument addressed on behalf of the appellant is that arrest or house search during police investigation of a case did not constitute 'prosecution' of the plaintiffs upon which an action in tort could be founded. Counsel pointed out that the Criminal P. C. is divided into several parts, of which Part V deals with information to the police and their powers to investigate and Part VI deals with proceedings in prosecution. Since Ss. 154, 167 and 170 are placed in V part it was argued that proceedings under these sections cannot be deemed a prosecution, upon which an action in tort can be based. It was contended that unless the Magistrate takes cognizance of the offence under S. 190 Criminal P. C. no action could be brought for malicious prosecution. In my opinion the argument proceeds upon a misconception. The foundation of the action in tort lies in abuse of the process of the Court by wrongfully setting the law in motion and it is designed to discourage the perversion of the machinery of justice for an improper purpose. In order to succeed, the plaintiff must prove that the proceedings were malicious, without reasonable and probable cause, that they terminated in his favour and that he had suffered damage. The word 'prosecution' in the title of the action is not used in the technical sense which it bears in Criminal Law. For the action lies for the malicious prosecution of certain classes of civil proceedings, for instance, falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company (QARTZ HILL CONSOLIDATED GOLD MINING CO. v. EYRE', (1883) 11 Q B D 674). An application to a Magistrate to take cognizance under S. 107, Criminal P. C. would also amount to a prosecution upon which an action could be brought ('C. H. CROWDY v. O'REILLY', 17 Cal W N 554 and 'BISHUN PERGESH v. FULMAN SINGH', 20 Cal L J 518). To found an action for malicious prosecution the test is therefore not whether the criminal proceedings have reached a stage at which the Magistrate could take cognizance. The test is whether the defendant was actively instrumental in putting the criminal law into force in other words — whether the defendant maliciously set the law in motion through a constituted authority without regard to the technical form in which the charge has been preferred.

(6) Upon the facts found I have come to the conclusion that the appellant actively instigated the prosecution of the plaintiffs. The appellant had lodged information at the thana wherein he asserted that he identified all the plaintiffs as having taken part in the dacoity in his house. As a result of the information, the police searched the house of the plaintiffs and placed them under arrest. The plaintiffs were subsequently produced before the Magistrate and an order of remand was taken. In the result, the plaintiffs suffered imprisonment for thirtynine days and their reputation was also damaged. It is immaterial that the defendant made no formal charge before the Magistrate or that the proceeding did not reach the stage at which the Magistrate could take formal cognizance. When a person formally makes a charge of a cognizable offence to a police officer he in

effect asks the police to investigate the charge, arrest the accused and send him for trial before a Magistrate. It is manifest upon the facts of this case that the appellant had instigated the prosecution of the respondents and is therefore liable to pay damages in tort.

(7) This opinion is supported by the decision of the Judicial Committee 'GAYA PRASAD v. BHAGAT SINGH', 30 All 525 in which the defendants were responsible for a charge of rioting being made against the plaintiff and had produced false witnesses to support the charge at the investigation by the police and had taken the principal part in the conduct of the case before the police and in the Court of the Magistrate. It was argued before the Judicial Committee that no one but a person who had made a formal complaint or an application for process to a Court could be sued for malicious prosecution. The argument was rejected by the Judicial Committee and it was held that the action for malicious prosecution was well-founded. At page 533 Sir Andrew Scoble states:

"In India the police have special powers in regard to the investigation of criminal charges and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant; if he misleads the police by bringing suborned witnesses to support it; if he influences the police to assist him in sending an innocent man for trial before the Magistrate — it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him."

(8) The same principle has been applied in a later case 'BALBHADDAR SINGH v. BADRI SAH', 30 Cal W N 866 in which the Judicial Committee observed that in a country like India where prosecution is not private, giving information to the police which leads to prosecution, amounts to prosecution for the purpose of a suit for damages for malicious prosecution. At page 872 of the Report Lord Dunedin states:

"In any country, where, as in India, prosecution is not private, an action for malicious prosecution in the most literal sense of the word could not be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. And if that is done and trouble caused, an action will lie."

(9) Learned counsel for the appellant relied upon 'NAGENDRA NATH ROY v. BASANTA DAS BAIRAGYA', 57 Cal 25 and 'DATTATRAYA PANDURANG v. HARI KESHAV', 50 Bom L R 622. But these cases do not assist the appellant. In '57 Cal 25' the High Court found that there was no iota of evidence to suggest that the defendant ever went beyond giving a true information of the occurrence and also a true statement of the fact that he suspected the plaintiff. In '50 Bom L R 622' also the learned Judge held that there was no averment that the charge was false to the knowledge of the defendant or that the latter influenced the police in sending an innocent man before a Magistrate. The material facts of the present case are widely different and the principle laid down by the Judicial Committee in 'GAYA PRASAD'S CASE' (30 All 525) is directly applicable.

(10) The next branch of argument on behalf of the appellant is that the plaintiffs suffered imprisonment on account of a ministerial act and an action for damage on account of malicious prosecution is not competent. But the submission is not correct. The plaintiffs suffered imprisonment for 39 days before the Magistrate ordered remand under S. 170 or S. 344, Criminal P. C. There is no doubt that in remanding the accused, the Magistrate acted in a judicial capacity and exercised judicial discretion. The distinction between a judicial act and a ministerial act is important. In the former, the party appeals to the discretion of a judge or Magistrate, which is thus interposed and the steps taken result immediately from the exercise of that discretion and not from the act of the party. In case of the latter, the party employes the machinery of the law at his own risk and is directly responsible for the consequences. In 'AUSTIN v. DOWLING', (1870) L R 5 C P 534 Willes J. observed:

"How long did the state of false imprisonment last? So long of course as the plaintiff remained in the custody of a ministerial officer of the law whose duty it was to detain him until he could be brought before a judicial officer. Until he was so brought before the judicial officer, there was no malicious prosecution. The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a Magistrate, one makes a charge against another, whereupon a Magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment."

(11) Upon the facts found in this case I am of opinion that the action for malicious prosecution is well-founded and that the decision of the lower appellate Court is right. I would accordingly dismiss this appeal with costs.

(12) SARJOO PROSAD J.: I entirely agree.

K.S. Appeal dismissed.

A. I. R. 1952 Patna 285
SHEARER J.

Mathura Nath Sah Deo and another, Petitioners v. Biria Uraon, Opposite Party.

Criminal Revn. No. 789 of 1951, D/- 2-1-1952.

Penal Code (1860), S. 423 — False statement of consideration.

The petitioners obtained a loan from the Government by making a false statement as to the area of land in their possession. A charge for the consideration was created on the land.

Held that the false statement made did not relate to the consideration for the charge which was created on the land and hence the petitioners were not punishable under S. 423. AIR 1915 Mad 233, Rel. on; AIR 1921 Cal 226, Disting. (Para 1)

Anno: Penal Code, S. 423 N. 1.

Baldeva Sahay, L. K. Chowdhury and Sunial Kumar Chowdhury, for Petitioners; B. N. Mitter and A. K. Mitter, for Opposite Party.

Cases referred to:
('14) 37 Mad 47: (AIR 1915 Mad 233: 12 Cri L J 547) (Pr 1)
('21) 48 Cal 911: (AIR 1921 Cal 226: 23 Cri L J 340) (Pr 1)

ORDER: The petitioners, who are father and son, obtained a loan of Rs. 885/- from the Deputy Commissioner of Ranchi for the purpose of reclaiming or improving certain land belonging to them. In the application which they made for this loan they gave particulars of their land, stating that in all it comprised an area of 38.03 acres. The Courts below have both come to the conclusion that while 36.07 acres of this land was in the possession of the petitioners, the remaining 1.96 acres belonged to the prosecutor Biria Uraon, and that the petitioners had deliberately made a false statement in the hope that eventually they might be able to dispossess Biria Uraon from this land.

Now, even if this was so, it is quite impossible to maintain the conviction of the petitioners under S. 423 of the Penal Code as the false statement which they made was not a false statement of the kind made punishable by that section. Clearly it is not a false statement relating to the consideration for the charge which was created on their land. The decision of Spencer, J. in 'IN RE: MANIA GOUNDAN', 37 Mad 47 supports the argument of Mr. Baldeva Sahay for the petitioners. The other decision relied on by the lower appellate Court, 'LEGAL REMEMBRANCER v. AHI LAL MANDAL', 48 Cal 911, is also of no real assistance to the prosecution. In that case it is clear that the false statement was a false statement relating to the consideration for the transfer, and the only question that arose was whether or not the document had been executed fraudulently. On the view taken by the Courts below the petitioners no doubt acted fraudulently. That, however, was not enough. In order to make them criminally liable it had also to be shown that the false statement which they made was a statement which came clearly within the purview of S. 423 of the Penal Code. An argument which weighed with the Courts below was that the petitioners would not have obtained so large a loan as they did if they had admitted that the area of land in their possession was less than they represented it was. This, however, does not appear to have been clearly established. In any event, it would be quite wrong for me to alter the conviction from one under S. 423 to one under S. 415 of the Penal Code now. The application will be allowed, and the conviction and sentence will be set aside.

V.B.B. Conviction set aside.

A. I. R. 1952 Patna 286

RAMASWAMI AND SARJOO PROSAD JJ.

Deo Saran Singh and others, Appellants v. Barhu Singh and others, Respondents.

A. F. A. D. No. 2123 of 1948, D/- 19-2-1952.

(a) Landlord and Tenant — Rent — Liability — Holding mortgaged in parts to various mortgagees — Mortgagees in possession — Some responsible to pay rent on portion mortgaged to them to landlord — Rents not split up with consent of landlord — Liability to pay rent if implies liability for entire rent payable in respect of holding. (Para 5a)

(b) T. P. Act (1882), S. 76 (c) — Mortgage of holding with possession — Deed of mortgage silent as to liability to pay rent to landlord — Mortgagee is liable. (Para 5a)

Anno: T. P. Act, S. 76 N. 8.

(c) Trusts Act (1882), S. 90 — Mortgagee in possession committing default in payment of rent — Property sold in execution of rent decree obtained by landlord and purchased by mortgagee in name of benamidar — S. 90 applies — Mortgagor's interest subsists.

Where the mortgagee in possession by committing default in payment of the landlord's rent suffers the mortgaged property to be sold and buys it himself in the name of his benamidar, he cannot claim the property to be his own in derogation of the mortgagor's interest in the property. In other words, the mortgage interest will continue to subsist on account of the trust imposed upon the estate held by the mortgagee and the mortgagor will be entitled to redeem. The mortgagee cannot be allowed to take advantage of his own default. Fraud or misrepresentation or suppression of facts need not necessarily lead to the advantage gained; S. 90 does not contemplate the presence of these elements, which by themselves are sufficient to vitiate all transactions. Different considerations would, however arise where the interest in the property has passed on to a purchaser unaffected by the mortgage and thereafter the mortgagee whose mortgage is extinguished on account of the purchase buys the property from that purchaser and acquires an independent title through him just as much as any other transferee would do; provided always that the purchase by the third party and the subesquent transfer to the mortgagee is not found to be a mere artifice on the part of the mortgagee to acquire the property for himself. 10 Moo Ind App 540 PC; AIR 1916 PC 227; AIR 1951 Pat 566, Relied. (Para 6)

Anno: Trusts Act, S. 90 N. 3.

G. P. Das and Krishna Das De, for Appellants; Lal Narayan Sinha and Ramanugrah Pd., for Resondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

(1863-66) 10 Moo Ind App 540: (5 WR 83 PC)) (Pr 8)
('17) 44 Ind App 30: (AIR 1916 PC 227) (Prs 9, 11)
('27) AIR 1927 All 747: (50 All 36) (Pr 11)
('89) 16 Cal 194 (Pr 9)
('96) 20 Bom 492 (Pr 11)
('16) 40 Bom 483: (AIR 1916 Bom 108) (Pr 11)
('28) AIR 1928 Pat 17: (104 Ind Cas 644) (Pr 11)
('34) AIR 1934 Pat 307: (151 Ind Cas 255) (Pr 11)
('36) AIR 1936 Pat 434: (164 Ind Cas 213) (Pr 10)
('39) 18 Pat 133: (AIR 1939 Pat 382) (Pr 10)
('40) 21 Pat L T 699 (Pr 11)
('51) 30 Pat 391: (AIR 1951 Pat 566) (Pr 10)
(1767) 2 Wils (KB) 341 (Pr 8)

SARJOO PROSAD, J.: The plaintiffs, who are the appellants in this appeal, sued for redemption in respect of four mortgage bonds relating to plots Nos. 296, 831, 850 and 858 of khata No. 109 situate in village Harpur Akauna.

(2) The case of the plaintiffs is that the khata in question was their raiyati kasht land, and from

time to time their family being in need of money borrowed from the defendants various sums of money under the bonds in suit. The first bond (Ex. 1-c) is dated the 16th of July 1927, under which a sum of Rs. 200/- was borrowed from the defendant No. 1. The next (Ex. 1-b) is dated the 10th of August, 1928, under which a similar sum of money was borrowed from Doman Das, the husband of defendant No. 9. The third (Ex. 1) is dated the 2nd of June 1930, in favour of defendants 11 to 14 for a sum of Rs. 190, and the last one (Ex. 1-a) is dated the 14th of July, 1930 for Rs. 200/- from the defendant No. 15. The total area given in rehan covered almost the entire khata except for a small area of 2½ kathas of land which is said to have remained in possession of the mortgagors. The plaintiffs alleged that when they wanted to redeem the mortgage, the defendants refused to accept the mortgage dues on the ground that the entire holding had been sold in execution of a rent decree. The plaintiffs learnt that the said purchase was by the defendants-mortgagees themselves in the name of their relations, and that the ex parte rent decree in execution of which the sale had taken place was a fraudulent and collusive decree at the instance of the defendants who had suppressed the processes and got the lands sold in execution with a view to purchase the same. The plaintiffs further stated that the mortgagees in spite of the fraudulent decree and sale continued to be in possession of the property, and their character as mortgagees had never changed, the plaintiffs as such being entitled to redemption. It was also stated by the plaintiffs that under the mortgage deeds in question the mortgagees were liable to pay rent to the landlord and they could not take advantage of their default in paying the rent to the detriment of the plaintiffs in getting the ex parte decree passed and purchasing the property themselves in execution of such a decree with a dishonest intention of wiping out the mortgage.

(3) It may be stated at the outset that the defendants 11 to 14, the defendants third party, who were mortgagees under the rehan bond of the 2nd of June, 1930, in respect of 62 decimals of plots 850 and 858 of the khata in suit, have already compromised with the plaintiffs and allowed the plaintiffs to redeem the bond in question. The dispute is, therefore, confined to the defendants interested in the other three mortgagees. They have in their respective written statements taken up a common defence which in substance is that the decree passed in the rent suit and the sale which followed in execution were good and valid and binding on the plaintiffs; and as a result of the sale the mortgage interest of the plaintiffs had been completely extinguished. They denied that the defendants were liable to pay rent to the landlord for the lands mortgaged to them, and, on the contrary, asserted that the entire liability for the payment of the said rent was on the plaintiffs, and that the plaintiffs having defaulted in payment of rent, the decree had been validly passed against them. They also stated that the auction purchasers were not the farzidars of the mortgagees but independent purchasers in their own right, and all the allegations of the plaintiffs to the contrary were false and unfounded. On these allegations they contended that the plaintiffs' suit for redemption did not lie as the mortgage interest no longer subsisted, the holding having been sold in execution of the rent decree.

(4) The Courts below have concurrently found after a careful consideration of the evidence on record that it had been established that the lands in suit had been purchased by the rehandars themselves. In fact, the finding of the trial Court that the auction-purchases were made by the rehandars themselves was not even challenged before the Court of appeal below. The learned Munsif held that the documents (Exs. 1 to 1-b) showed that the mortgagees were liable to pay rent in respect of the lands mortgaged to them, but so far as Ex. 1-C is concerned, namely, the earliest bond in favour of the defendant No. 1 Barhu Singh, there was nothing to show that the mortgagee under the terms of the bond undertook to pay the liability, and the plaintiffs' evidence that there was some oral agreement between the parties under which all the mortgagees undertook to pay the rent irrespective of the terms of the bond was not accepted. The learned Munsif accordingly held that besides the said mortgagees themselves, the plaintiffs were liable to pay rent in respect of 2½ kathas of the holding in question which remained in possession of the plaintiffs' family and also in respect of the land given in mortgage to defendant No. 1, and as such, there was default on the part of the plaintiffs as well in not paying rent to the landlord. He also found that there was no fraud or collusion so far as the rent decree and execution was concerned, and consequently the plaintiffs were not entitled to redeem the mortgage bonds and to take advantage of their own default resulting in the sale of the disputed lands.

(5) The learned Subordinate Judge also agreed with the Munsiff in respect of his finding that the decree and the execution sale were not fraudulent or collusive. He, however, held that under the bonds (Exs. 1 to 1-b) it was quite clear that the liability to pay rent was on the mortgagees though in the bond (Ex. 1-c) the liability was left with the mortgagors. He also disbelieved the plaintiffs' evidence in regard to the oral agreement set up by them as to the liability to pay rent, and finally came to the conclusion in agreement with the learned Munsiff that the liability for payment of rent at least in respect of 2½ kathas was with the plaintiffs, and the plaintiffs themselves being liable for payment of rent of a portion of the holding, and the sale not being entirely due to the fault of the rehandars, the sale was a valid sale and extinguished the mortgaged interest. On these findings the suit has been dismissed by the two Courts below.

(5-a) Mr. G. P. Das, on behalf of the appellants contends that the rent of the khata had not been split up and the mortgage bonds (Exs. 1 and 1-b) did not show at all that the rent payable by the mortgagee was only in respect of the lands mortgaged. On the contrary the documents showed that the liability was in respect of the entire rental of the holding in question. In support of his argument he has placed before us a translation of those bonds in suit, and these documents show that the mortgagees were to enter into possession of the mortgaged property and appropriate the produce thereof in lieu of rehan money after making payment of the annual rent to the landlord. There is no share of the rent specified in the documents but what the documents speak of is the annual rental payable to the landlord which implies the entire rental payable in respect of the holding in question and not only in respect of a part of the holding. It was open to the mortgagors and the mortgagees to distribute the liability for the payment of rent between themselves without, of course, binding the landlord who was entitled to take the entire rent for the holding; but the documents do not establish any such arrangement. The finding of the learned Subordinate Judge on the point is rather ambiguous, because he does no alogether agree with the learned Munsiff that the liability to pay rent on some of the mort-

gagees was only in respect of the lands actually mortgaged to them. In my opinion, the rent of the various portions of the holding not having been split up with the consent of the landlord, the liability to pay rent must of necessity imply the liability for the entire rent payable in respect of the holding.

Mr. Lal Narayan Sinha on behalf of the respondents contends that such a construction would lead to anomalies, because it could not be held that each of the mortgagees under the bonds in question would be liable to pay the entire rent and be accountable to the mortgagors for the default in paying the rent. I do not see how any anomaly arises; because if any one of them pays rent to the landlord, he would not be accountable to the mortgagors to that extent, and the person who does not pay him has to account for his failure to do so. The contention of the learned counsel that usually the parties in such cases do not desire to undertake a liability for accounting does not hold water in the present case. I cannot, therefore, accept the construction of Mr. Sinha that the said documents made the mortgagees under two of those mortgage bonds responsible for the payment of only a part of the rent payable to the landlord.

In regard to the first mortgage bond, dated the 16th of July 1927, in favour of the defendant No. 1, it has been argued on behalf of the appellants that the bond was silent as to the liability to pay the landlord's rent. In such a case under Section 76 (c) of the Transfer of Property Act (Act IV of 1882), as amended up to date the liability to pay the rent accruing due during the period of such possession was upon the mortgagee. The learned Subordinate Judge has, however, held that the liability under the bond was left with the mortgagors. Be that as it may, the situation does not improve in favour of this defendant because he has made a joint purchase of the mortgaged property along with the other defendants who were undoubtedly liable to pay the landlord's rent and did not make the payment. The purchase being joint and the shares of the purchasers being undefined, he cannot claim any special advantage for himself. Even if the interpretation of Mr. Sinha is accepted, the legal position, as I shall presently show, is not affected.

(6) The facts which emerge out of the findings of the Court below are these: (i) that the plaintiffs and the defendants stand in the relationship of mortgagors and mortgagees; (ii) that the mortgagees or at least some of them were liable to pay the rent due to the landlord; (iii) that the said mortgagees committed default in payment of the rent; (iv) that when the landlord obtained an ex parte decree for rent and proceeded to sell the mortgaged property in execution, all the mortgagees jointly purchased the same in the name of their benamidars; and (v) that they have all along continued to be in possession of the properties originally mortgaged. The question then arises whether they can say to their mortgagors: "You cannot redeem this property now, because by the sale your rights have been extinguished. You were also responsible for the payment of rent to the landlord as such as we were and you must suffer on account of your own default." If it were an ordinary case of 'pari delicto' I agree that the position of the defendants would be better and there would be much force in the argument of Mr. Sinha. But the answer to the question posed by me is furnished, in my opinion, by Section 90 of the Indian Trusts Act (Act II of 1882) applicable to this State. The said section as also the relevant illustration thereunder runs as follows:

"Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage.

* * *

"(c) A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, B holds the land for the benefit of A."

The section embodies a well-known principle of equity, justice and good conscience. A person who stands on a fiduciary position to another cannot take advantage of that position in derogation of rights of others, and if he does gain any such advantage it will ensure to the benefit of all the persons interested subject to the equities in favour of the former. Therefore, where the mortgagee in possession by committing default in payment of the landlord's rent suffers the mortgaged property to be sold and buys it himself in the name of his benamidar, he cannot claim the property to be his own in derogation of the mortgagor's interest in the property. In other words, the mortgage interest will continue to subsist on account of the trust imposed upon the estate held by the mortgagee. The mortgagee cannot be allowed to take advantage of his own default. Fraud or misrepresentation or suppression of facts need not necessarily lead to the advantage gained; the section does not contemplate the presence of these elements, which by themselves are sufficient to vitiate all transactions. Different considerations would, however arise where the interest in the property has passed on to a purchaser unaffected by the mortgage and thereafter the mortgagee whose mortgage is extinguished on account of that purchase buys the property from that purchaser and acquires an independent title through him just as much as any other transferee would do; provided always that the purchase by the third party and the subsequent transfer to the mortgagee is not found to be a mere artifice on the part of the mortgagee to acquire the property for himself.

(7) Section 90, as discussed above, incorporates a wholesome doctrine of trust and whenever occasion has arisen Judges have been always alert and astute to give effect to this doctrine despite all the artifice and subterfuge devised by human ingenuity to defeat it. It is needless to multiply authorities, but to illustrate my point I shall refer to a few of them in order to show how Judges have from time to time re-acted to this doctrine.

(8) The first case which needs reference is a decision of the Judicial Committee in 'NAWAB SIDHEE NUZUR ALLY KHAN v. RAJAH OJOODHYARAM KHAN', 10 Moo Ind App 540. There a mortgagee had wilfully suffered an estate to fall into arrears of Government revenue and had entered into an agreement with the auction-purchaser for the purchase of the estate benami which the auction-purchaser actually did. The

Judicial Committee in dealing with the case laid down two important principles: (i) It referred with approval to the 'KINGSTON'S CASE', where the learned Chief Justice observed:

"Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of justice. Lord Coke says, it avoids all judicial acts, Ecclesiastical or Temporal."

It also referred to the case of 'COLLINS v. BLANTERN', (1767) 2 Wils. 341, as an authority for the proposition that "a Court will strip off all disguises from a case of fraud, and look at the transaction as it really is." (ii) the second important principle propounded was as follows:

"Again, a title by estoppel is a well-known title. The doctrine that a man cannot take advantage of his own wrong, as used and applied by Mr. Justice Bayley to this title to redeem, is a correct application of that doctrine, if the facts support him. Assuming as we must, the agreement to be proved, was this sale, as between Abbott and M' Arthur, really meant to be a sale under the Revenue laws for arrears of revenue, or was it a device — part of the machinery, as it were to effect a fraud? Under a private conveyance in the state of the title and of these parties, the estate, if conveyed by Abbot to M' Arthur, would have been redeemable by the plaintiff."

Their Lordships of the Judicial Committee were cautious in pointing out that their decision proceeded entirely upon the ground that as between the parties the sale must be considered as a private sale, and the decision had no application to interest derived under a real auction-sale; and the effect of the mortgagor's suit was, as it were, to claim a right to confess and avoid the sale, "by imposing a trust on the estate which passed under it. This decision, therefore, fully bears out the principle which I have discussed above, namely, that the mortgagees could not take advantage of his own wrong and claim protection under the sale and purchase made by him to extinguish the right of redemption.

(9) The case more in point is another decision of the Judicial Committee of the Privy Council in 'DEONANDAN PRASAD v. JANKI SINGH', 44 Ind App 30 (PC). There again the agents for a minor, the mortgagee of a separately owned share in property, intentionally made default in paying the revenue for which he was responsible with a view to have the property sold and purchased on behalf of the mortgagee, which in fact happened. The Judicial Committee held that it should be declared that the property was held for the benefit of all the co-sharers and the mortgagee, according to their several interests at the date of the sale, subject to repayment to the mortgagee of the expense properly incurred in the purchase, together with interest on the amount. Their Lordships found that Government revenue was intentionally allowed by the agents of the minor mortgagee to fall into arrear with a view to the property being put up to sale and bought on behalf of the minor, and then Sir Lawrence Jenkins, who delivered the judgment of the Board, proceeded to observe:

"If this be the true view, as their Lordships hold, then, however free from personal blame the minor may have been, he cannot profit by his agents' deliberate default committed in breach of the terms of the mortgage. As against his mortgagor, therefore, the mortgagee cannot be allowed to hold for himself the advantage gained by the default for which his agents were responsible."

In regard to the co-owners also their Lordships applied the same principle as is apparent from the following quotation:

"Equally in relation to the co-owners was the deault designed with a view to a subsequent sale and to a purchase on the minor's behalf, and the advantage gained by this scheme must, in like manner, be held for the benefit of the co-owners, who are not shown to have been aware of the default or sale, or to have disentitled themselves to this equitable relief."

The above decision of Sir Lawrence Jenkins fully elucidates the doctrine of trust under consideration. In course of the decision Sir Lawrence Jenkins in criticising a case strongly relied upon by the appellant made these highly significant and pertinent remarks:

"The decision in 'DOORGA SINGH v. SHEO PERSHAD SINGH', 16 Cal 194 applied to lax a standard of reciprocal conduct in holding that fraud in its strictest sense; such fraud as would support a common law action of deceit, was the test by which to judge these transactions. It failed to pay due regard to the relative position of co-owners in respect of the payment of revenue and to the need of demanding from each such measure of candid dealing and good faith as would ensure that a sharer would not be tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property. Here Deonandan, through his representatives, had a duty to perform, which was inconsistent with his becoming a purchaser of the property in the way he did; therefore his title cannot operate to the exclusion of the co-owners."

Finally, they concluded the judgment with a direction that the sale stood out, in the circumstances, the transaction was to be regarded in effect as nothing more than payment of an arrear of revenue enuring for the benefit of all, and instead of granting a declaration that the decree, sale and purchase were invalid, they substituted a declaration to the effect that the property purchased must be held for the benefit of the plaintiffs and the other co-sharers according to their several interests at the date of the sale, subject to payment to the mortgagee of the expenses incurred by him.

(10) I will now refer to a very recent decision of this Court in 'RAM RUP v. JANG BAHADUR' 30 Pat 391, where his Lordship the Chief Justice being confronted with a similar situation has followed the principles discussed above. In the case in question the plaintiffs had executed a Sudhbharna and left the consideration money with the sudbharnadars to satisfy a rent decree upon his properties. The Sudbharnadars did not pay the rent decree and the properties were sold in execution thereof and purchased by the landlord who subsequently settled them with the Sudbharnadars. The learned Chief Justice held as follows:

"Thus on the evidence it is clear that the defendants took possession as mortgagees and it was their clear duty to save the property from the Court sale which took place on the 20th of August 1937, in execution of the rent decree. Admittedly, the landlords became the auction-purchasers and the defendants took settlement from them and are in possession of the disputed land. In my opinion, the defendants, by taking the settlement from the landlords could not change the character of their possession as against the plaintiffs. The defendants were clearly in the wrong in allowing the property to be sold, and, therefore, if the holding has

come back into their hands, they cannot take advantage of their own wrong and deprive the plaintiffs of their right of redemption. It is a well-known legal maxim that convenience cannot accrue to a party from his own wrong (commodum ex injuria sua memo habere debet.)"

It is true that on the evidence there also appears to be sufficient material to establish fraud on the part of the mortgagee in bringing about the sale in collusion with the landlord's 'amlas.' The decision, however, rests not only on the principle of fraud but also upon the principle of trust created by the relationship of the mortgagor and the mortgagee as it is manifest from the passage above mentioned. This decision is important in another respect because Mr Lal Narayan Sinha who appeared on behalf of the mortgagees relied in that case as he seeks to rely in the present case also upon two decisions of this Court in 'GAURI SHANKER v. SHEOTAHAL GIR', AIR 1936 Pat 434 and 'FEKUA MAHTO v. BABU LAL SAHU', 18 Patna 133. Both these cases have been elaborately discussed and distinguished by the learned Chief Justice, and I respectfully endorse the decision, and it would be unnecessary for me to encumber this judgment by a repetition of those reasons. Those cases do not on close analysis support the argument of the learned counsel.

(11) The learned Counsel for the respondents has also endeavoured to explain the decisions quoted above on the ground that they were all cases of fraud, and therefore could not be pressed in aid to support the appellants' contention. There is in fact no charm in the word 'fraud'. It is true that on the findings of the Courts below in this case fraud in the actual processes of the Court has not been established. But if fraud means, as it does, causing wrongful gain to oneself and wrongful loss to another, then evidently there was fraud on the part of the mortgagees in the present case in making default in payment of the landlord's rent which, under the terms of the mortgage, some of them were liable to pay, and in purchasing the property jointly themselves in the name of their benamidars with a view to deprive the mortgagors of their interest. There can be no doubt that their intention at the date of sale was clearly dishonest. But, as Sir Lawrence Jenkins pointed out in 'DEONANDAN PRASHAD'S CASE', 44 Ind App 30 PC (Supra), the matter in the present case does not rest upon the fact that fraud in its stricter sense so as to support a common law action of deceit must necessarily be proved; it would be enough to rest one's decision in the present case upon the principle governing the relative position of mortgagor and mortgagee and based upon the doctrine of trust demanding from each a high measure of candid dealing and good faith so as to ensure that the mortgagee would not be tempted to make a deliberate default with a view to deprive the mortgagor of his interest or to oust him from the property in order to make it his own.

The principle applies with equal force to cosharers also. I am fortified in this view by several other decisions of this Court and of other Courts where irrespective of the existence of fraud, Courts have interfered in irudication of this principle; for instance; 'KALAPPA v. SHIVAYA', 20 Bom 492; 'CHHITA BHULA v. BAI-JAMNI', 40 Bom 483 at pp. 489, 490; 'JAI KARAN v. SHEO KUMAR SINGH', AIR 1927 All 747, a case of default of the mortgagee in paying the rent and subsequent purchase by the mortgagee: 'TALI MAHTON v. LEKHRAJ MAHTON', AIR 1928 Pat 17; 'RAM KISHORE v. JAGARNATH', AIR 1934 Pat 307 and 'CHANDI MANDER v. SITABI BHAGAT', 21 Pat L T 699 (another case where a mortgagee bound by the terms of a mortgage to pay rent was held not entitled to claim the benefit arising from his own default.)

(12) For the reasons stated above, I cannot agree with the decision of the Courts below which is based upon an erroneous view of the law on the point. The appeal, therefore, must succeed and the decision of the Courts below must be set aside, and the plaintiffs' suit must be decreed with costs throughout. In addition to the usual reliefs in a suit for redemption, the plaintiffs will be entitled to a declaration that the purchase made by the mortgagees did not in any manner affect the rights of the plaintiffs to redeem the property mortgaged. The decree will be subject to the payment not only of the mortgage dues but also of the amount paid by the mortgagees in acquiring the property at the sale held in execution of the rent decree with interest at 6 per cent per annum on the amount from the date of sale. I further direct that on such payment being made, the defendants shall reconvey the property to the plaintiffs mortgagors within a date to be fixed by the learned Subordinate Judge on the entire amount being deposited by the plaintiffs mortgagors.

(13) RAMASWAMI, J.: I agree.

R.G.D. *Appeal allowed.*

A. I R. 1952 Patna 290

JAMUAR AND RAI, JJ.

Kandhai Mahton and another, Plaintiffs-Appellants v. Prasad Mahton and another, Defendants-Respondents.

A. F. O. O. No. 338 of 1950, D/- 29-1-1952.

(a) Suits Valuation Act (1887), S. 8 — Partition suit — Appeal — Forum of appeal.

In a suit by an excluded co-sharer for partition of the plaintiffs' share in the suit properties, the valuation given in the plaint for purposes of jurisdiction would be the basis for determining the forum of appeal: AIR 1921 Pat 78 and AIR 1944 P C 65 Disting; AIR 1923 Pat 342, Ref. (Para 6)

Anno: S. V. Act, S. 8 N. 4, 33.

(b) Civil P. C. (1908), O. 7, R. 10 — Order returning memorandum of appeal to be presented to proper Court is not appealable. 31 Cal 344 and AIR 1918 All 152, Rel. on. (Para 7)

Anno: C. P. C., O. 7, R. 10 N. 11.

S. C. Ghosh and J. P. Sinha, for Respondents.

Rajeshwari Prasad, for Appellants;

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('44) 71 Ind App 142: (AIR 1944 P C 65) (Prs 3, 5)

('18) 40 All 648: (AIR 1918 All 152) (Pr 7)

('04) 31 Cal 344 (Pr 7)

('20) 5 Pat L J 540: (AIR 1921 Pat 78) (Prs 3, 4)

('23) 2 Pat 432: (AIR 1923 Pat 342) (Pr 4)

RAI, J.: This appeal by the plaintiffs is directed against the order of the Court of appeal below returning the memorandum of appeal filed before that Court to be presented before a proper Court.

(2) The plaintiffs had filed a suit in the Court of the Additional Subordinate Judge, 2nd Court,

Patna, for partition of their one-fourth share in the properties in suit. The suit was valued for purposes of jurisdiction at Rs. 7,929/12/- as appears from paragraph 11 of the plaint which is as follows:

"That the property in suit is valued at Rs. 7,929/12/- for purposes of jurisdiction; but as the claim is for partition, a fixed court-fee of Rs. 20/10/- is paid."

It appears that, at the time of hearing of the partition suit, an objection was raised on behalf of the defendant No. 1 that, as the plaintiffs had failed to prove their possession over the properties in suit, it was bound to fail until the plaintiffs had paid 'ad valorem' court-fee on their one-fourth share in the properties. Arguments were concluded on the 21st of February 1950, and the suit was postponed to the 1st of March 1950, for judgment. On the 22nd of February 1950, the plaintiffs filed a petition stating that they were prepared to pay 'ad valorem' court-fee over one-fourth share of the properties in dispute, if the Court be of opinion that they were not in possession of the same. The trial Court thereupon passed the following order:

"I think the plaintiff has paid insufficient court-fees in this case. He is directed to pay ad valorem court-fees on a sum of Rs. 1,982/7/- by 9-3-1950. Inform. The judgment will be delivered on that date after the above court-fee is paid."

Thereafter, the plaintiffs paid the deficit court-fee. On the 10th of March 1950, judgment was delivered, and the suit was dismissed. Thereafter, the plaintiffs filed an appeal before the District Judge of Patna who was of opinion that the appeal should have been presented before the High Court, and not before him, on the ground that the valuation of Rs. 7,929/12/- given in the plaint for purposes of jurisdiction would be the basis for determining the forum of appeal.

(3) The learned Advocate for the appellants contended that the order of the Court of Appeal below was erroneous. In support of his contention, he relied on the cases of 'DUKHI SINGH v. HARIHAR SHAH', 5 Pat L J 540 and 'SHEVANTIBAI v. JANARDHAN RAGHUNATH', 71 Ind App 142 (PC). Both these cases, in my opinion, are distinguishable. In 5 Pat L J 540, the plaintiff had valued the suit for purposes of jurisdiction at Rs. 1,915/6/2 representing the value of his own shar in the properties in suit. The trial Court had fixed the valuation of the suit for purposes of court-fee and jurisdiction at Rs. 1,700/- which was one-thirteenth of the value of the entire properties which were the subject-matter of the suit. The trial Court had in that suit issued a temporary injunction against the defendant No. 1 of that suit restraining him from proceeding with the execution of the decree challenged in that suit. Defendant No 1 had filed a miscellaneous appeal before the High Court against that order. A preliminary objection was raised by the plaintiff-respondent that a miscellaneous appeal should have been filed before the lower Court and not before the High Court. The objection was upheld mainly on the ground that the order of the trial Court fixing the value of that suit for purposes of jurisdiction, which had not been challenged and had become final, would determine the forum of appeal.

(4) The case of 'DUKHI SINGH v. HARIHAR SHAH', 5 Pat L J 540, was considered and distinguished in a later decision of this Court in the case of 'RANJIT SAHI v. MUHAMMAD QASIM', 2 Pat 432, where Kulwant Sahay, J., with whom Das, J., agreed, held:

"No doubt in considering the question as to whether the appeal in the case lay to the High Court or to the District Court, their Lordships considered the broad question as to the value of suits in partition cases, but to my mind there is a distinction between suits for partition pure & simple, where the plaintiff is in joint possession of his share and there is no dispute as to his title or share, and suits where the plaintiff seeks for an adjudication of his title or extent of share and for partition after such adjudication. In the latter case, it is the value of the plaintiff's share which will determine the jurisdiction of the Court and not the value of the entire property."

(5) In the case of 'BAI SHEVANTIBAI', 71 Ind App 142 P C, their Lordships of the Judicial Committee were of opinion that, where the appellant's claim for partition of joint family property had been dismissed by the Courts below on the ground of limitation, "the value of the subject-matter in dispute on appeal to His Majesty in Council" for the purposes of Section 110 of the Code of Civil Procedure was the value of the share of the joint family property in respect of which the appellant's claim had been dismissed.

(6) In the present case, however, on the valuation for purposes of jurisdiction given in the plaint and the decree of the trial Court, the Court of appeal below was entitled to return the memorandum of appeal to be presented before a proper Court.

(7) The learned Advocate for the respondents raised an objection that no appeal lies to this Court against the order of the Court of appeal below returning a memorandum of appeal to be presented to the proper Court. In support of his contention he relied on the cases of 'RAGHUNATH CHARAN SINGH v. SHAMA KOERI', 31 Cal 344 & 'GORDHAN LALJI v. MAKSUDAN BALLAB', 40 All 648. In my opinion the objection raised on behalf of the respondents appears to be well-founded. But, as I have held above that the order passed by the Court of appeal below is not erroneous, it is not necessary for me to dispose of this appeal on this objection alone.

(8) The result is that the appeal fails, and is dismissed; but, in the circumstances of this case, there will be no order for costs.

(9) JAMUAR, J.: I agree.

V.B.B. *Appeal dismissed.*

A. I. R. 1952 Patna 291

RAMASWAMI AND SARJOO PROSAD JJ.

Banarsi Lal, Petitioner v. The Province of Bihar, Opposite Party.

Misc. Judicial Case No. 152 of 1949, D/- 23-1-1952.

(a) Sales-tax — Bihar Sales-tax Act (VI (6) of 1944), S. 4(2) — 'Year' means financial year — Findings that assessee had no taxable business upto 31st March 1945 — Assessment for 1st October 1944 to 30th June 1945 is illegal. (Para 4)

(b) Sales-tax — Bihar Sales-tax Act (VI (6) of 1944), S. 20(3) — Board's power of revision — Extent of — Interference with findings of fact — Discretion — Concurrent findings.

The power of revision of the Revenue Board is expressed in wide terms in S. 20(3) and the Board is entitled in exercise of its revisional jurisdiction to go into questions

of fact. But it is a matter of discretion in each case whether the Board would exercise its power of going into question of fact. But the discretion must be exercised not arbitrarily but in a judicial manner. Where the Board refused in its discretion to go into a question of fact in view of the failure of the assessee to maintain books and to produce accounts and because of the concurrent findings of the two Courts as to the quantum of business, it cannot be held that the refusal of the Board in its power of revision to go into questions of fact was illegal. (Para 5)

Ramanugrah Pd., for Assessee; Government Advocate and R. Prasad, for Opposite Party.

ORDER: This case is stated by the Board of Revenue under S. 21(3) of the Bihar Sales-tax Act VI (6) of 1944 which corresponds to S. 25(3) of the Act of 1947.

(2) The following questions have been referred:

(1) Whether, in view of the Board's finding that the assessee had not a taxable business up to 31st of March 1945, the assessment upto the 30th June 1945 was legal; and (2) whether the refusal of the Board in its powers of revision to go into the questions of fact is legal, specially in view of the fact that the Board's powers of revision under the Act in question have not been defined specifically.

(3) The assessee is a dealer in betel and sweatmeat and a resident of Mahalla Kadam Kuan, Patna. He was assessed to sales-tax on a taxable turnover of Rs. 13,230 for the period from 1st October 1944 to 31st March 1945 and on a taxable turnover of Rs. 26,460 for the period from 1st April 1945 to 31st March 1946 by the Sales-tax Officer, Patna Urban Circle. The assessee preferred appeals to the Assistant Commissioner of Sales-tax but the appeals were dismissed. In revision the Deputy Commissioner of Commercial Taxes remitted the penalties imposed on the assessee but otherwise upheld the assessments made by the Sales-tax Officer. The assessee then moved the Board of Revenue who after hearing the parties remitted the tax for the period from 1st October 1944 to 31st March 1945 but affirmed the assessment made for the period 1st April 1945 to 31st March 1946.

(4) As regards the first question it was pointed out by Mr. Ramanugrah Prasad on behalf of the assessee that the assessment for the period from 1st October 1944 to 30th June 1945 was illegal upon the finding of the Board that the assessee had no taxable business upto 31st March 1945. Learned counsel founded his argument upon S. 4(1) and S. 4(2) of the Bihar Act VI (6) of 1944. S. 4(1) states:

"Subject to the provisions of Ss. 5 and 6 and with effect from such date as the Provincial Government may, by notification in the Official Gazette, appoint, being not earlier than thirty days after the date of the said notification, every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded Rs. 5,000 shall be liable to pay tax under this Act on sales effected after the date so notified."

Section 4(2) enacts:

"Every dealer to whom sub-section (1) does not apply shall be liable to pay tax under this Act with effect from three months after the commencement of the year immediately following that during which his gross turnover first exceeded Rs. 5,000."

It is undisputed in this case that section 4(1) is not applicable. It follows that under section 4(2), the assessee is not liable to pay tax with effect from three months after the commencement of the year immediately following that during which his gross turnover first exceeded Rs. 5,000. Under S. 2(j), 'year' means financial year. It is therefore manifest that the assessee is not liable to pay tax for the period 31st March 1945 to 30th June 1945. This question must be therefore answered in favour of the assessee.

(5) As regards second question, the argument was stressed by Mr. Ramanugrah Prasad that the assessment was arbitrary and a betel shop could not sell articles to the extent of Rs. 150 per day. It was argued that the Board of Revenue had power in its revisional jurisdiction not only to examine questions of law but also questions of fact. Reference was made to S. 20, Cl. (3) of the Act which provides that the Commissioner may upon application or of his own motion revise any order passed under the Act and subject to such rules as have been prescribed the Board of Revenue may in like manner revise any order passed by the Commissioner. It was pointed out by the learned counsel that the power of revision is expressed in wide terms and the Board of Revenue was entitled in exercise of its revisional jurisdiction to go into questions of fact. In our opinion the argument of the learned counsel is correct. There is no express limitation in the statute upon the powers of revision conferred upon the Board of Revenue. It is obvious that in exercise of its revisional jurisdiction the Board of Revenue may examine not merely questions of law but also questions of fact. In the present case the Board of Revenue has rejected the contention of the assessee as regards the quantum of business for the reason that there were concurrent findings of fact. Mr. Ramanugrah Prasad however pointed out that on this part of the case the Board of Revenue perhaps misdirected itself in holding that it could interfere only if questions of law were involved. In support of his contention learned counsel pointed out that the Board has said in its resolution dated 31st July 1948 "As regards the first point, it is a question of fact that in view of the concurrent findings I do not find it necessary to interfere in revision on grounds of law". This reasoning is rather ambiguous and it is difficult to gather from the resolution whether the Board rejected the contention of the assessee because there were concurrent findings of the two lower Courts or because there was no ground of law apparent. On behalf of the State of Bihar the Government Advocate pointed out that though the ambit of revisional jurisdiction was wide, it is a question of discretion in each case whether the Board would exercise its power of going into question of fact. There is truth in this argument which requires qualification

only in this sense that the discretion vested in the Board must be exercised not arbitrarily but in a judicial manner. Though the judgment of the Board in this case is defective the subsequent resolution dated 19th May 1949 makes it clear that the Board refused in its discretion to go into question of fact in view of the failure of the assessee to maintain books and to produce accounts and because of the concurrent findings of the two Courts as to the quantum of business. Upon the particular circumstances of this case it cannot be held that the refusal of the Board in its power of revision to go into questions of fact is illegal. The question referred must, therefore, be answered against the assessee.

(6) We do not propose to make any order as to costs of this reference. The assessee is entitled to refund of the amount of Rs. 100 in deposit since the first question has been answered in his favour.

R.G.D. Answers accordingly.

A. I. R 1952 Patna 293

RAMASWAMI AND RAI JJ.

Dukhu Mahtha, Appellant v. Nandlal Tewari and others, Respondents.

A. F. A. D. No. 1332 of 1948, D/- 5-2-1951.

Limitation Act (1908), Art. 144 — Trespasser — Acquisition of right of permanent tenant by prescription — (Tenancy Laws — Chota Nagpur Tenancy Act (VI (6) of 1908), S. 46 (1) (a)).

A person coming into possession of land under a lease which is void or invalid as against the person seeking to eject him is really a trespasser, and there is no reason why he should not acquire by prescription the right of a permanent tenant after the expiration of the period prescribed by Art. 144. (Para 4)

Two brothers were 'khorta' tenants with respect to a part of the land of which the plaintiff was an occupancy tenant. The plaintiff alleged that he obtained 'khas' possession of the land soon after, but in 1944 he was dispossessed by the defendants. The plaintiff therefore brought the suit for ejecting the defendants. The lower Court held that the defendants had established that they were in adverse possession for more than 12 years. The plaintiff in appeal contended that S. 46 of the Chota Nagpur Tenancy Act was a complete bar to a permanent transfer by a 'ryot' of his right in a holding or any portion thereof.

Held that the defendants acquired a valid title by prescription against the plaintiff by adverse possession for more than twelve years; for defendants came into possession of land not as tenants under plaintiff but as trespassers and as such after the statutory period of twelve years they acquired by prescription the right of permanent tenant which they had asserted. 'Case law discussed'. (Para 6)

Anno: Lim. Act, Arts. 142 and 144 N. 61.

G. C. Mukharji and S. K. Sarkar for Appellant; R. S. Chatterji, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

(1900) 27 Ind App 69: (23 Mad 271 PC) (Pr 6)
('23) 47 Bom 798: (AIR 1923 PC 205) (Pr 3)
('24) 47 Mad 337: (AIR 1924 PC 65) (Pr 5)
('28) 7 Pat 649: (AIR 1928 PC 146) (Pr 6)
('85) 9 Bom 198 (FB) (Pr 6)
('33) 14 Pat L T 294: (AIR 1933 Pat 288) (Pr 7)
('49) AIR 1949 Pat 124 (Pr 7)

RAMASWAMI J.: The question to be determined in this appeal is whether the claim of the plaintiff is barred by adverse possession under Art. 144 of the Indian Limitation Act.

(2) To enable this question to be considered it is necessary to state the material facts. It is the admitted case that the plaintiff is the occupancy tenant of 'khata' Nos. 36 and 37 of village Silphore, that Thakkan Tewari and his brother Kali Tewari were 'khorfa' tenants with respect to a part of the land comprised in the two 'khatas' and they used to pay annual rent of Rs. 3 to the plaintiff. In the record of rights prepared in 1922 Thakkan Tewari and Kali Tewari are shown as underraiyats paying rent to the plaintiff. In 1924 Thakkan Tewari and Kali Tewari died. The plaintiff alleged that he obtained 'khas' possession of the land soon after; but in 1944 he was dispossessed by the defendants. The plaintiff therefore brought the suit for ejecting the defendants.

The main ground of defence was that the plaintiff never obtained possession of the land after the death of Thakkan Tewari and Kali Tewari. The defendants asserted that they continued in possession as heirs of Thakkan and Kali Tewari, that they were permanent tenants of the land and were not liable to be ejected. The learned Subordinate Judge accepted the case of the plaintiff and decreed the suit in his favour. In appeal the decree of the Subordinate Judge has been reversed by the District Judge of Purulia, who held that the defendants had established that they were in adverse possession for a period of more than twelve years and the suit was barred by time.

(3) In support of this appeal Mr. G. C. Mukharji addressed the argument that S. 46 of the Chotanagpore Tenancy Act was a complete bar to a permanent transfer by a 'ryot' of his right in a holding or any portion thereof and the learned District Judge was erroneous to hold that the defendants had established adverse possession of an interest which is proscribed by statute. Section 46 of the Chotanagpore Tenancy Act states:

"(1) No transfer by a 'raiyat' of his right in his holding or any portion thereof,

(a) by mortgage or lease, for any period, expressed or implied, which exceeds or might in any possible event exceed five years, or

(b) by sale, gift or any other contract or agreement, shall be valid to any extent.

Provided that a 'raiyat' may enter into a 'bhugut bandha' mortgage of his holding or any portion thereof for any period not exceeding seven years.

* * * *

3. No transfer in contravention of sub-section (1) shall be registered, or shall be in

any way recognised as valid by any Court, whether in the exercise of civil, criminal or revenue jurisdiction."

In support of his argument learned counsel placed reliance upon 'MADHAVRAO WAMAN v. RAGHUNATH VENKATESH', 47 Bom 798 in which 'watandars' had brought a suit for ejectment of the defendants from service 'watan' lands in mouza Bhivashi in the district of Belgaum. The defendants were not 'watandars but they alleged in the written statement that they had acquired by adverse possession a right to hold the land as permanent tenants. Section 5 of Bombay Act III (3) of 1874 which applied to the land in question prohibited alienation by a watandar. That section is as follows:

"No 'watandar' shall, without the sanction of Government sell, mortgage, or otherwise alienate or assign any 'watan' or part thereof or interest therein to any person not a 'watandar' of the same watan."

Upon the facts proved the Subordinate Judge gave the plaintiffs a decree for six years' rent but otherwise dismissed the suit with costs. From that decree the plaintiffs appealed to the High Court and the only question argued in the appeal was whether the defendants can claim to have established a right of a permanent tenancy by adverse possession. The High Court held that there had been two breaks in the alleged adverse possession within 12 years of the death of Venkatrao and the defendants cannot upon the evidence contend that there has been any continuous adverse possession for 12 years until the plaintiffs' father's death in 1902, which would entitle them to claim to occupy the land as permanent tenants. The High Court accordingly set aside the decree of the lower Court and passed a decree in favour of the plaintiffs for possession and for mesne profits of the land in occupation of the defendants. From this decree an appeal was preferred to the Judicial Committee who dismissed it holding that persons who were tenants of service 'watan' lands cannot acquire title to a permanent tenancy of the lands by adverse possession as against the watandars from whom they hold. At page 809 Sir John Edge states:

"In the present case the defence of 12 years' adverse possession as permanent tenants is set up by persons who and their predecessors in title, always claimed to be and were tenants of service 'watan' land, and in the opinion of their Lordships neither the defendants nor their predecessors in title could have acquired any title to a permanent tenancy in the lands by adverse possession as against the 'watandars' from whom they held the lands."

(4) The authority of this case is not of much assistance to the appellant for it is, in my opinion, impossible to find in the case any trace of the underlying principle or 'ratio decidendi' as contended by Mr. G. C. Mukharji. It is manifest that the decision is confined to the case of a permanent tenancy claimed by a person who was the tenant of the 'watan' land. The true 'ratio' of the case is that a person who lawfully came into possession of land as a tenant from year to year or for a term of years cannot by setting up during the continuance of such relation any title adverse to that of the landlord inconsistent with the legal relation between them, acquire by the operation of the law of limitation, title as owner or any other title inconsistent with that under which he was let in possession. But a person coming into possession of land under a lease which is void or invalid as against the person seeking to eject him is really a trespasser, and there is no reason why he should not acquire by prescription the right of a permanent tenant after the expiration of the period prescribed by Art. 144 of the Limitation Act.

(5) Mr. G. C. Mukharji also relied upon 'NAINAPILLAI MARAKAYAR v. RAMANATHAN CHETTIAR', 47 Mad 337 in which the trustees of a Hindu temple brought two suits to eject the defendants who were tenants in the "inam' village of Mangal, which formed part of the endowed property of the temple. The defence was that under the Madras Act I (1) of 1908 the defendants had a permanent right of occupancy and further that the defendants had that right apart from the Act. The Judicial Committee held that having regard to the documents the grant to the temple included both the 'kudivaram' and the 'melvaram' of the whole village, and that therefore it was not an "estate" within the definition in S. 3 of the Madras Act I (1) of 1908 and that the defendants had not acquired permanent right of occupancy. A grant of a permanent right by the 'shebait' or trustees would have been in breach of duty, and therefore could not be presumed and the defendants being tenants could not obtain the right by prescription.

But this decision is based upon facts which are sufficient to distinguish it from the present case. It was not disputed that the defendants were 'tenants' of the temple of lands to which the suits related, and it was held that a tenant of land in India cannot obtain as such any right to a permanent tenancy by prescription against his landlord from whom he holds the land. But in the present case the material facts are different. The lower appellate Court has found that the defendants' father and uncle had died more than 20 years back, that afterwards the defendants had been in continuous possession without paying any 'khorf' or rent to the plaintiff. As it is not admitted or established that there was any relationship of landlord and tenant between the parties the 'ratio' of the two Privy Council decisions will not be applicable.

(6) On the contrary I am of opinion that the defendants have acquired a valid title by prescription against the plaintiff by adverse possession for more than twelve years; for defendants came into possession of land not as tenants under plaintiff but as trespassers and as such after the statutory period of twelve years they acquired by prescription the right of permanent tenant which they had asserted. This view is supported by 'RADHABAI v. ANANTRAV BHAGVANT', 9 Bom 198 in which the material question for decision was whether in the absence of fraud and collusion, adverse possession for twelve years during the lifetime of one holder of service 'watan' lands was a bar to succeeding holders. The lands in question were service 'watan'

lands, to which S. 20 of Regulation XVI (16) of 1827 applied.

The plaintiff sued for the possession of service 'watan' lands and for mesne profits. The defendants claimed to be in possession of the lands under a grant of 1838 made by the plaintiffs' grandfather, who was, at the time of the grant, the 'watandar', and they pleaded limitation by adverse possession; the adverse possession relied upon by the defendants being apparently their having continued in undisturbed possession for a period of twelve years after the death of the grantor. The plaintiff's case was that his grandfather the grantor had no power to make a grant of the lands except for his lifetime and that the plaintiff's father had no authority to allow the lands to continue in possession of the defendants.

Sargent, C. J. and Haridas J. referred the question to the Full Bench, viz., whether adverse possession for 12 years during the lifetime of one holder is a bar to succeeding holders. The Full Bench decided that in the absence of fraud and collusion the question should be answered in the affirmative. It should be noticed that in this case the grant was beyond doubt an alienation which was prohibited by S. 20 of Regulation XVI (16) of 1827, but even so the Full Bench decided that a stranger to the 'watan', who had got possession of service 'watan' lands by an absolute assignment to him by a grantor, could successfully defend a suit for possession of those lands by a subsequent 'watandar' by proving that after the death of the grantor he had been in undisturbed possession of the lands for a period of twelve years.

The principle has been similarly enunciated in 'GNANASAMBANDHA v. VELU PANDHARAM', 27 Ind App 69 (P C) in which the suit was brought by the respondent to establish his right to the management of a temple and to the possession of lands forming the endowment. It was proved that the hereditary trustees of the endowment had sold their hereditary right of management and transferred the endowed properties to the appellant. The High Court decreed the suit, but on appeal the Judicial Committee reversed the decree of the High Court, holding that the sales were null and void and that the possession taken by the purchaser was adverse to the vendors and those claiming under them, and that the suit was barred by limitation. At page 76, Sir Richard Couch states:

> "The law of limitation applicable to the case is Art. 124 of the 2nd Schedule to the Act XV (15) of 1877, which says that in a suit for possession of an hereditary office the period of limitation is twelve years, which begins to run when the defendant takes possession of the office adversely to the plaintiff or any person from or through whom he derives his right to sue. Chockalinga attained majority in 1880, and had by Art. 44 of the Act three years for suing to set aside the sale by his guardian. He did not do so, and by S. 20 of the Limitation Act his right became extinguished. Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is attached to the other; but if there is, Art. 144 of the same schedule is applicable to the property. That bars the suit after twelve years' adverse possession."

The law is similarly expounded in 'KAMAKHYA NARAIN SINGH v. RAM RAKSHNA SINGH', 7 Pat 649 in which the plaintiff had sued several defendants to recover possession of villages included in 'mukarrari istimrari' grants made by his predecessor-in-title. It was not contested before the Judicial Committee that the grants expired on the deaths of the respective grantees. The plaintiff alleged that after the grantees' deaths the defendants, who were heirs or assignees of the grantees and persons claiming under them, became yearly tenants, and that the tenancies had been determined by notice. The defendants denied that they were yearly tenants, and pleaded that they had acquired a permanent, heritable and transferable interest by adverse possession, and that the suits were barred under Art. 144 of the Indian Limitation Act.

The High Court dismissed the suits and in appeal the decision of the High Court was affirmed by the Judicial Committee who held that upon the death of the grantee of a 'mukarrari istimrari patta', which upon its true construction was for life only, his heirs or assignees who remained in possession claiming contrary to the contention of the grantor that the 'patta' is permanent and heritable, did not become tenants from year to year either under S. 116 of the Transfer of Property Act, or otherwise by operation of law. The possession of the heirs or assignees, and of those claiming from them, was adverse to the grantor for the purpose of the Indian Limitation Act, unless the grantor had recognised the existence of a tenancy so that the relationship of landlord and tenant was created. Upon the evidence in the case the Judicial Committee held that the plaintiff failed to prove that the relationship of landlord and tenant on which he relied was in existence within twelve years prior to the institution of the suit and therefore the plaintiff's suit for possession was barred by the Limitation Act.

(7) To a similar effect is the decision of a single Judge in 'ABDUL JABBAR KHAN v. GULAB KHAN', 14 Pat L T 294, in which there was a mortgage of a 'raiyati' holding in Chotanagpore for the maximum period of five years or until repayment of the advance. It was held that the mortgage was not valid to any extent and the "mortgagee" begins to prescribe from the date of the "mortgage" and if he held adverse possession as such for the statutory period, the 'raiyat' could only recover possession by redeeming him. The same view has been adopted in 'KALA DEVI v. KHELU RAI'. AIR 1949 Pat 124, in which the plaintiffs' predecessor granted a 'kurfa' settlement to the defendants of a holding in respect of which no right of transfer by lease was recorded in the record of rights. The defendants held the land in open assertion of permanent tenancy right therein for a period of more than twelve years and had been paying rent during this time.

The plaintiffs brought a suit for declaration of title to and recovery of possession of the holding. It was held by the High Court that the 'kurfa' lease was invalid under S. 27(1) of

the Santhal Parganas Settlement Regulation of 1872, which provided that no transfer by a 'raiyat' of his right in his holding or any portion thereof, by sale, gift, mortgage, lease or any other contract or agreement, shall be valid unless the right to transfer has been recorded in the record of rights and then only to the extent to which such right is so recorded. There was no evidence on the record as to whether there was any note of a right of transfer in the Settlement Record. The High Court held that the 'korfa' lease was invalid under S. 27(1), that the defendants were in the position of trespassers from the beginning and having held it for a period of twelve years in open assertion of permanent tenancy rights therein, had acquired those rights by prescription and could not be ejected.

(8) Applying the 'ratio' of these authorities it must be held in the present case that the defendants were in adverse possession of the land for more than twelve years and the suit instituted by the plaintiff is barred under Art. 144 of the Indian Limitation Act.

(9) Upon these grounds I should affirm the decree of the lower appellate Court and dismiss this appeal with costs.

(10) RAI, J.: I agree.

V.R.B. Appeal dismissed.

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RAMASWAMI AND SARJOO PROSAD JJ.

Fateh Chand Muralidhar, Petitioner v. The Province of Bihar, Opposite Party.

Misc. Judicial Case No. 149 of 1948, D/- 8-2-1952.

† (a) Sales-tax — Bihar Sales-tax Act (VI (6) of 1944), Ss. 7 (1), 4 — Grant of Registration. Certificate to dealer — Necessary conditions — Mere non-payment of tax no ground to refuse.

A dealer is entitled to be granted a registration certificate though he actually pays no tax on any part of his turnover, as S. 7 (1) read in context of S. 4 imposes only two conditions for the grant of a certificate, viz., (1) that the applicant must be a dealer within the meaning of S. 2 (c); and (2) that his gross turnover should exceed Rs. 5000/-. It is immaterial for the purpose of the grant of certificate that the dealer has not actually paid tax on any part of the gross turnover.

Thus where a wholesale dealer did not pay any tax for two quarters as the major portion of his turnover represented goods despatched outside Bihar & the other portion related to sales to registered dealers for re-sale and there was no finding that the return filed by him was false or fabricated:

Held that he was entitled to be registered as a dealer and to be granted a certificate. The question whether the sales in the Province were bona fide or not was irrelevant for grant of certificate. (Paras 4, 5)

† (b) Sales tax — Bihar Sales Tax Act (VI (6) of 1944), S. 2 (c) — Dealer — Sale of commodity both outside and inside State — Transactions forming single business — Person is dealer though major portion is exported outside.

Where the business of a person consists of selling or supplying shellac, major portion of which is exported outside the State but there are occasional sales within the State and the sales inside the State do not constitute a separate business; on the contrary, the whole business of sale of shellac inside and outside the State is a single composite business, a single course of dealing, the person must be held to be a dealer as defined in S. 2 (c) of the Act. (Para 5)

(c) Sales tax — Bihar Sales Tax Act (VI (6) of 1944), S. 20 (4) — Person found to be dealer within S. 2 (c) and entitled to be registered as such — Sales tax Officer cancelling his certificate on ground that he had not paid sales tax for two quarters — Held, he had no jurisdiction to cancel registration certificate under S. 20 (4). (Para 6)

B. C. Ghosh, for Petitioner; Government-Advocate, for Opposite Party.

ORDER: In this case two questions have been referred: (1) Whether the petitioner is entitled to be registered as a dealer within the meaning of S. 2(c) of the Bihar Sales-tax Act, 1944; & (2) whether the Sales-tax Officer has any jurisdiction under 20(4) of the Bihar Sales-tax Act, 1944, to cancel the petitioner's registration certificate after having obtained the previous sanction of the Deputy Commissioner and not of the Commissioner.

(2) The material facts are that on 29th September 1944 the petitioner had applied for registration of his name on the ground that his gross turnover was about 25 lacs for the year 1943-44. On further enquiry the petitioner said that out of the gross turnover a sum of Rs. 86,868/7/- represented the sale of shellac within the State of Bihar. On 1st October 1944, the Sales-tax Officer granted him certificate of registration and asked the petitioner to submit quarterly returns. For the quarter ending 31st December 1944 the petitioner made a return showing a gross turnover of Rs. 62,990-4-6. From the accounts produced and the statement made by the petitioner the Sales-tax Officer discovered that the petitioner was mainly engaged in selling and supplying goods outside the State of Bihar. After issuing notice under Section 20 (4) of the Act and after considering the objection made the Sales-tax Officer cancelled the registration certificate by his order dated 30th September 1945. The petitioner filed an application in revision before the Deputy Commissioner of Commercial Taxes, Bihar, but the petition was rejected and the order of the Sales-tax Officer was confirmed by the Deputy Commissioner. The petitioner then moved Board of Revenue, Bihar, but his application was rejected on the grounds that the petitioner by adopting a peculiar method of business was escaping payment of sales-tax in Bihar as well as in Bengal and the bulk of the business was not covered within the definition of 'dealer' under S. 2(c) of the Act.

(3) The first question in this case is whether upon the facts proved the petitioner is entitled to be registered as a dealer. S. 7(1) requires that no dealer shall, while being liable under S. 4, to pay tax under this Act, carry on business as a dealer unless he has been registered

under this Act and possesses a registration certificate. In order therefore to entitle the petitioner to be registered under the Act two conditions are requisite, namely, (1) that he must be a dealer and (2) that he must be liable under S. 4 to pay tax. A dealer is defined under S. 2(c) of the Act to be any person who carries on the business of selling or supplying goods in Bihar, whether for commission, remuneration or otherwise. As regards liability to pay tax S. 4 states that every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded Rs. 5000/- shall be liable to pay tax under this Act on sales effected after the date so notified. In the present case the taxing authorities have found that for the year 1943-44 the petitioner had a gross turnover of about 25 lacs and that of this gross turnover a sum of Rs. 86,868/- and odd represented the sale of shellac in Bihar. For the quarter ending 31st December 1944 the petitioner submitted a return showing a gross turnover of Rs. 4,62,000 and odd and taxable turnover to be nil. For the next quarter ending 31st March 1945 the petitioner submitted another return showing a gross turnover of Rs. 5,13,000/- and odd and taxable turnover to be nil. It was claimed on his behalf that shellac worth Rs. 5,02,782/- was despatched outside Bihar and the balance worth Rs. 10,324/- was sold to the registered dealers. It is evident that for the two quarters ending 31st December 1944 and 31st March 1945 the petitioner had sold goods worth Rs. 12,509/- and odd in Bihar, though the major part of his turnover represented sale or supply of goods outside Bihar. The Sales-tax Officer cancelled the certificate of the petitioner mainly on the ground that he did not pay any tax for the quarters ending 31st December 1944 and 31st March 1945. But on a proper construction of the material sections of the Act it is manifest that a dealer is entitled to be granted certificate though he actually pays no tax on any part of his turnover. As we have already said S. 7(1), if read in context of S. 4 imposes only two conditions for the grant of a certificate, viz., (1) that the applicant must be a dealer within the meaning of S. 2(c); and (2) that his gross turnover should exceed Rs. 5000. It is immaterial for the purpose of the grant of certificate that the petitioner has not actually paid tax on any part of the gross turnover.

(4) The position is made more clear by the proviso to S. 7(1), which states that for the purposes of this sub-section the gross turnover shall be calculated without making the deductions referred to in sub-section (2) of S. 5. In the present case the petitioner did not pay any tax for the quarters ending 31st December 1944 or 31st March 1945 since major part of the turnover represented goods despatched by the dealer to an address outside Bihar. As regards sale inside the State the petitioner did not pay tax since the sales were made to a registered dealer of goods and was intended for resale. There is no finding by the Sales-tax Officer that the figures in the return made by the petitioner were false or fabricated. In the absence of any such finding it is clear that the petitioner was entitled to be registered as a dealer and to be granted a certificate of registration as provided by S. 7(1) of the Act.

(5) In the statement of the case the Board of Revenue has observed that a dealer who is not to pay tax because he sells his goods outside the province is debarred from claiming registration in the same way as a dealer who deals in exempted goods. In our opinion this interpretation of law is erroneous for the reasons we have already stated. In the statement of the case the Board of Revenue has also said that the local sales of shellac shown in the return for the quarters ending 31st December 1944 or 31st March 1945 were made to exporters of shellac presumably to create evidence of sales in Bihar. In the order dated 10th December 1946 the Commissioner has said "The small alleged sales made to registered dealers in Bihar are not bona fide" and "if these sales were bona fide sales at least a small portion would have been taxable". There is no finding that the sale shown to have been taken place in Bihar did not actually take place or that the returns filed by the petitioner were not believed as correct. The question whether the sales in Bihar were bona fide or otherwise has no bearing on the question whether the petitioner is entitled to be granted registration certificate under S. 7(1). If the sales in Bihar did actually take place the petitioner is entitled to be granted certificate even though the motive of the petitioner might be to conduct a large part of his sale outside the State and which all is exempted from taxation under S. 5 of the Act. Another reason has also been given by the Board of Revenue for refusing to grant certificate to the petitioner. It is said that

> "the definition of a dealer clearly implied and excluded an isolated or occasional transaction"

and in any case

> "the occasional transaction did not alter the character of the business of the dealer who is exporting shellac to Calcutta."

This reasoning appears to be unsound since the business of the petitioner in the present case is to sell or supply shellac though major part of the business takes place in the shape of export of shellac outside the State. The circumstance that in the course of the same business the petitioner makes a few occasional sales inside the State does not alter the character of the business of the dealer. The sales which take place inside the State do not constitute a separate business of the petitioner; on the contrary, the whole business of sale of shellac inside and outside the State is a single composite business, a single course of dealing. The petitioner, therefore, must be held to be a dealer as defined in S. 2(c) of the Act.

(6) On the first question we are of opinion that the petitioner is entitled to be registered as a dealer within the meaning of S. 2(c) of the Bihar Sales-tax Act, 1944.

(7) The next question formulated is

> "Whether the Sales-tax Officer has any jurisdiction under S. 20(4) of the Bihar Sales-tax Act, 1944, to cancel the petitioner's registration certificate after having obtained the previous sanction of the Deputy Commissioner and not of the Commissioner."

Mr. B. C. Ghosh does not seriously dispute that the Deputy Commissioner had been duly empowered under R. 61 of the Sales-tax Rules and the Sales-tax Officer could act under

S. 20(4) after having obtained previous sanction of the Deputy Commissioner. But learned counsel stressed the point that even if the previous sanction of the Deputy Commissioner had been obtained the Sales-tax Officer had no jurisdiction under S. 20(4) to cancel the registration certificate in view of our answer to the first question. We therefore propose to answer the second question in a modified form "Whether the Sales-tax Officer had any jurisdiction under S. 20(4) of the Bihar Sales-tax Act, 1944, to cancel the petitioner's registration certificate". In view of our answer furnished to the first question it is sufficient to say that the Sales-tax Officer had no jurisdiction to cancel the petitioner's registration certificate and that the Sales-tax Officer assumed jurisdiction to do so upon a misconstruction of the material provisions of the Act for the reasons we have already indicated.

(8) The petitioner is entitled to the costs of this reference and also to withdraw the amount of deposit he had made. There will be one consolidated hearing fee of 10 gold mohars for this case and Miscellaneous Judicial Cases Nos. 148 and 150 of 1948.

D.R.R. Reference answered.

A. I. R. 1952 Patna 298

DAS AND NARAYAN, JJ.

Srilal Khowala, Petitioner v. State.

Criminal Misc. No. 671 of 1950, D/- 13-2-51.

(a) Essential Supplies (Temporary Powers) Act (1946), S. 1 (3) — Extension of period by Governor-General's notification in 1947 — Validity — Act held to be in force in 1950.

Though the Governor-General had no power to legislate under S. 4 of the India (Central Government and Legislature) Act, 1946, he had power to direct that the period mentioned in that section shall be two years instead of one year beginning with the date on which the proclamation of Emergency ceased to operate. The Governor-General did so direct by a public notification dated 3-3-1947 before the expiry of the period of one year from the date of the revocation of the Proclamation of Emergency. The effect of this notification was that the period mentioned in Section 4 of the India (Central Government and Legislature) Act, 1946, became two years instead of one year. Therefore, by reason of the very words used in Section 1 (3) of the Essential Supplies (Temporary Powers) Act, 1946, that Act remained in force till the 31st of March 1948; and it could not be said that the Governor-General legislated by notification or that it was a case of delegated legislation. (Para 7)

Held further that the Act was validly extended till 31st December 1952 and was thus in full force and full effect on the date of alleged offence in 1950. Case law referred. (Para 7)

(b) Essential Supplies (Temporary Powers) Act (1946), S. 1 (3) — Application to partially excluded areas by Governor's notification under Section 92(1), Government of India Act — Extension of period of Act by Governor-General — Fresh notification under S. 92 (1) not necessary — (Government of India Act (1935), Section 92(1)).

Once the Essential Supplies (Temporary Powers) Act, 1946 was applied to certain partially excluded areas by a notification under S. 92 (1), Government of India Act, 1935, issued by the Governor, fresh notifications under Sec. 92 (1) were not necessary when the period of the Act was extended to two years by the Governor-General's notification dated 3-3-1947 and further by the resolutions passed by the Constituent Assembly, as the notification and the resolutions did not amend the Act in any way but merely extended the period mentioned in Section 4 of the India (Central Government and Legislature) Act, 1946. (Para 11)

(c) Public Safety—Preventive Detention Act (1950), S. 1 (3) — Detention under — Application for writ of habeas corpus — Scope of proceedings in High Court — (Practice).

In an application for writ of habeas corpus in the cases of detention under the Preventive Detention Act, 1950, the High Court cannot treat the cases as though they were cases under trial before them so as to entitle them to consider the evidence and substitute their judgment for that of the State Government. It would be wrong on principle to do so as it is for the State Government to examine the materials and come to a judgment on the question. (Para 13)

Sultan Ahmed, Devendra Pd. and S. S. Ali, for Petitioner; Government Advocate with S. C. Chakravarty, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('49) AIR 1949 F C 175: (50 Cri L J 897) (Prs 9, 10)
('49) 53 Cal W N 728 (Pr 9)
('50) AIR 1950 Cal 202: (51 Cri L J 879) (Pr 9)
('50) AIR 1950 Lah 101: (51 Cri L J 712) (Pr 9)
('50) Cri. Revn. No. 8 of 1950, D/- 17-11-50 (Pat) (Prs 9, 10)
('50) Cri. Revn. No. 69 of 1950, D/- 24-2-50 (Pat) (Pr 9)
('50) Cri. Revn. No. 1314 of 1950, D/- 4-12-50 (Pat) (Pr 10)
('50) AIR 1950 Pat 50: (29 Pat 71 (FB)) (Pr 9)
('50) AIR 1950 Pat 200: (51 Cri L J 308) (Pr 9)
('51) Cri Misc. No. 590 of 1950: (AIR 1951 Pat 47: 52 Cri L J 406) (Prs 4, 12)
('51) Cri Misc. No. 623 of 1950: (AIR 1951 Pat 153: 52 Cri L J 1231) (Prs 4, 12)

DAS, J.: This is an application for a writ of habeas corpus under Article 226 of the Constitution of India and Section 491 of the Code of Criminal Procedure. We issued a rule on the 7th of December 1950, and the rule came on for final hearing on the 4th of January 1951, and the hearing was concluded on the 9th of January 1951.

(2) The petitioner is one Srilal Khowala one of the proprietors of the firm of Dattulal Panna Lal at Deoghar in the Santal Parganas, which firm held a licence under Section 3 of the Bihar Cotton

Cloth and Yarn Control Order, 1948. The firm was one of the cloth importers in Bihar, and had to maintain a register of daily transactions in compliance with the conditions of the licence granted under the Bihar Cotton Cloth and Yarn Control Order, 1948. On the 4th of October 1950, there was a search of the cloth shop of the petitioner, and one bale of mill-made "motia" cloth containing about 1514 yards and 60 thans of other cloth were recovered from a room. The allegation was that the cloth was concealed with motor parts in a room of the shop. It was further alleged that the petitioner failed to produce his stock register, that is, the register of daily transactions which had to be kept in accordance with the conditions of the licence granted to the petitioner. It appears that on these allegations a case was started against the petitioner under the provisions of the Essential Supplies (Temporary Powers) Act, 1946, and he was arrested on the 5th of October 1950. On the 7th of October 1950, the petitioner was released on bail by the learned Sessions Judge. On the 31st October 1950, the State Government passed an order of detention against the petitioner. The order is in the following terms:

"No. A/D/1302/50-SS-C-D, 351: Whereas the State Government is satisfied that with a view to preventing Sri Srilal Khowala, son of Sri Mohan Lal Khowala of Deoghar Town P. S. Deoghar, Santal Parganas, from acting in any manner prejudicial to the maintenance of supplies and services essential to the community, it is necessary so to do, the Governor of Bihar, in exercise of the powers conferred by sub-cl. (iii) of Cl. (a) of sub-s. (1) of S. 3 and by S. 4 of the Preventive Detention Act, 1950 (No. IV of 1950) is hereby pleased to direct that the said Sri Srilal Khowala be arrested by the police wherever found, be removed to the Bhagalpur Camp Jail, in the State of Bihar and be detained there. He shall be placed in Class Y and in Division I."

In pursuance of the order, the petitioner was re-arrested on the 4th of November, 1950. The grounds of his detention, dated the 15th November, 1950, were communicated to the petitioner on the 18th of November, 1950. The grounds were:

"No A/D/1302/50-SS-C-2938: In pursuance of S. 7 of the Preventive Detention Act, 1950 (IV of 1950), Sri Srilal Khowala, son of Sri Mohan Lal Khowala, of Deoghar town, P. S. Deoghar, Santal Parganas, is informed that he has been ordered to be detained by Government Order No. 351 C. D. dated the 31st October, 1950, on the following ground: 1. The firm of M/s Dattulal Pannalal of which Sri Khowala is one of the proprietors holds a license for wholesale dealer under S. 3 of the Bihar Cotton Cloth and Yarn (Control) Order, 1948, made under S. 3 of Essential Supplies (Temporary Powers) Act, 1946 (XXIV (24) of 1946) read with notification of the Government of India in the Department of Industries and Supplies No. 73(1)-D. A./46 dated the 28th December, 1946.

2. In the above capacity of a licensee, the firm of M/s. Dattulal Panna Lal have been appointed as one of the cloth importers in Bihar; two-thirds of the quota of mill-made cloth for the State of Bihar is distributed to importers through the State Government and one-third of the quota is released by the Textile Commissioner for being lifted directly by licensed dealers from the mill so that there may be a regular supply of cloth so essential to the community.

3. One of the conditions of the license granted under the Bihar Cotton Cloth and Yarn (Control) Order, 1948 is that every licensee shall maintain a register of daily transactions showing correctly the opening balance receipt, sale and closing balance of all cloth received by him whether from distribution of his quota or out of the released stock directly from the Mills. The register is to be maintained separately for

(a) dhoties and saris by numbers,

(b) cloth normally sold by yardage in yards and that by weight in pounds, and

(c) other materials sold e.g. chadars, towels etc. for each kind.

4. As the quota of mill-made cloth for the State of Bihar decreased during the past few months, the anti-social elements among the cloth dealers started creating artificial scarcity by withholding from sale the stock of the so-called popular variety of cloth, viz., saris, dhoties etc. Reports received by the State Government from various districts during the last few months indicated that with the approaching festivals of Dasahara and Muharram the bigger cloth dealers created a cloth famine in the market apparently to sell popular variety of cloth secretly and at exorbitant prices. The State Government, therefore, decided to organise simultaneous raids in all districts for discovery of such hoarded cloth.

5. Sri Srilal Khowala has the general reputation of being a black-marketeer, and the following would show that he has a bad record:

(a) In 1946, the proprietors of this firm surreptitiously obtained cloth licenses, both wholesale and retail, in different names, in addition to Sri Srilal Khowala's license. After detection, the wholesale and retail dealers' licences were cancelled.

(b) Immediately after de-control he was found removing two truck loads of cloths from the godown under suspicious circumstances.

(c) The same firm, M/s. Dattulal Panna Lal owns a rice mill at Deoghar known as the Bihar Industries Corporation. This mill was allotted Government paddy in 1947, for milling into rice. On the morning of the 1st July, 1947, two motor trucks of Bhagalpur were found loaded with paddy in the premises of the mill. On enquiry it was suspected to be an attempt by the said firm to smuggle Government paddy from the mill premises.

(d) In order to assist the retail dealers in obtaining their respective quotas without difficulty the Subdivisional Officer, Jamtara, deputed a Supply Officer to supervise distribution of quota but Srilal Khowala refused to show to the said Supply Inspector any account of the quota cloth received by him from mills, nor did he show him the allotment as well as arrival of his previous quota goods. He did so, obviously, with an ulterior motive to deprive the retail dealers of their proper quotas and to conceal such stocks for purposes of selling them at exorbitant rates in the black-market.

(e) In his memo. No. 24040 P. C. dated the 9th September, 1949 the Additional Under-Secretary to Government, Supply & Price Control Department directed the said Sri Srilal Khowala to open an office at the Jamtara Subdivision for the facility of the wholesalers, but in spite of several reminders from the Subdivisional Officer he failed to carry out the order. On the other hand, in his letter dated the 24th November, 1949, addressed to the Cloth Controller, the said Srilal Khowala reported that he had already opened an office at Jamtara which on verification was found to be false. Thereafter, the said Srilal

Khowala was directed by Government to open his godown at Jamtara by the 4th July, 1950, but he has not yet carried out this Government order as well.

(6) On 4-10-50, during the simultaneous raid on cloth shop one bale containing 1514½ yards of cloth in addition to other kinds of cloth was found concealed with motor parts in a room of the said Srilal Khowala who failed to produce his stock register on demand. This shows that he had secreted this huge quantity of cloths for disposing of the stock in the black-market during the puja and Bakrid.

In the circumstances, the State Government are satisfied that if he is allowed to remain at large, he will indulge in activities to the prejudice of maintenance of supplies and services essential to the community. For prevention of such activities, the State Government consider his detention necessary.

Sri Srilal Khowala is informed that he may make a representation in writing against the order under which he is detained; his representation, if any, may be addressed to the Under-Secretary to the Government of Bihar, Political Department, Special Section and forwarded through the Superintendent of the Jail as soon as possible."

(3) On the 6th of December, 1950, the petitioner made his application to this Court, and as already stated, we directed the issue of a rule on the 7th of December, 1950.

(4) Several questions of law and fact were raised before us in connection with similar petitions for writs of habeas corpus on behalf of persons detained on similar grounds by orders of State Government passed under sub-cl. (iii) of Cl. (a) of sub-s. (1) of S. 3 of the Preventive Detention Act, 1950. We dealt with those questions in our judgment dated the 5th January, 1951, in 'DAYANAND MODI v. THE STATE OF BIHAR', Cri Misc No. 590 of 1950 (Pat) and other cases. The extent to which we can investigate the allegations on the basis of which the orders of detention were made, was also considered by us in a second batch of cases dealt with in our judgment dated the 12th January, 1951, in 'MADAN LAL v. STATE OF BIHAR', Criminal Misc. No. 623 of 1950. The decisions given in those cases on questions which are common to the present case will apply to the present case also, and I do not think that any useful purpose will be served by re-stating the questions or the reasons which we gave for these decisions.

(5) Sir Sultan Ahmed appearing for the petitioner, has urged some new points of law before us which were not considered in the earlier cases. It is now necessary to deal with these new points of law. The points taken by Sir Sultan Ahmed are (1) that the Essential Supplies (Temporary Powers) Act 1946, expired and ceased to have any effect after the 31st of March 1947; and (2) that the said Act did not apply to the Santal Parganas. His contention is that the Essential Supplies (Temporary Powers) Act, 1946, having no effect on the relevant date (which was the 4th October, 1950), the grounds alleged against the petitioner that he did not produce the stcok register on that date or that he kept some cloth concealed in a room, even if true, would be no valid grounds for his detention. It is pointed out that the Bihar Cotton Cloth and Yarn Control Order, 1948, was made under the Essential Supplies (Temporary Powers) Act, 1946, and if the latter Act had ceased to have any effect, the Bihar Cotton Cloth and Yarn Control Order, 1948, would fall with it. The licence purported to have been granted under the Bihar Cotton Cloth and Yarn Control Order, 1948, would also have no validity and the conditions of that licence would be unenforceable. The learned Government Advocate, appearing for the State of Bihar, contended before us that the Essential Supplies (Temporary Powers) Act, 1946, was fully effective on the relevant date. He further contended that irrespective of the provisions of the Essential Supplies (Temporary Powers) Act, 1946, and the Bihar Cotton Cloth and Yarn Control Order, 1948, the petitioner could be detained by the State Government if the latter were satisfied that the petitioner was likely to indulge in activities prejudicial to the maintenance of supplies and services essential to the community, and that it was necessary to pass an order of detention with a view to preventing the petitioner from indulging in such activities. It seems to me that such grounds as have been stated to the petitioner, viz., the failure to produce the stock register or the keeping of some cloth concealed in a room etcetra, are directly related to the question of supplies and services essential to the community only on the basis of the system of controls which the Essential Supplies (Temporary Powers) Act, 1946, and the orders made thereunder, such as the Bihar Cotton Cloth and Yarn Control Order, 1948, establish. If the system of controls itself has no legal validity, I do not think that the non-production of a stock register or the keeping of some cloth in a room would, by itself, show that th petitioner was likely to indulge in activities prejudicial to the maintenance of supplies and services essential to the community. I think that the grounds are directly and intimately related to the system of controls on the basis of which the supply of an essential article like cloth depended, and it is in relation to this system of controls that the grounds have to be considered. Thus, it is necessary to decide if the Essential Supplies (Temporary Powers) Act, 1946, ceased to have any effect after the 31st of March, 1947, and whether it applied to the Santal Parganas on the relevant date.

(6) I take up first the question if the Essential Supplies (Temporary Powers) Act, 1946, ceased to have effect after the 31st of March, 1947. The Act was passed by the Indian Legislature, and received the assent of the Governor General on the 19th of November, 1946. Sub-s. (3) of S. 1 of the Act, as originally enacted, was in these terms:

> "It shall cease to have effect on the expiration of the period mentioned in S. 4 of the India (Central Government and Legislature) Act, 1946, except as respects things done or omitted to be done before the expiration thereof, and S. 6 of the General Clauses Act, 1897, shall apply upon the expiry of this Act as if it had been repealed by a Central Act."

It is clear from the sub-section that in order to determine if the Act ceased to have effect after the 31st of March, 1947, we must go to the provisions of the India (Central Government and Legislature) Act, 1946 (9 and 10 Geo. VI. c. 39). The latter Act was enacted by the British Parliament to amend the Government of India Act, 1935, in order to, amongst other things, extend temporarily the powers of the Indian Legislature to make laws. Sections 2 and 3 gave the power to make laws. Section 4 specified the duration of the period of legislative powers under the Act. It read as follows:

> "The period mentioned in the two last preceding sections is the period of one year beginning with the date on which the Proclamation of Emer-

gency in force at the passing of this Act ceases to operate or, if the Governor-General by public notification so directs, the period of two years beginning with that date:

Provided that if and so often as a resolution approving the extension of the said period is passed by both houses of Parliament, the said period shall be extended for a further period of twelve months from the date on which it would otherwise expire so, however, that it does not in any case continue for more than five years from the date on which the Proclamation of Emergency ceases to operate."

It is not in dispute that the Proclamation of Emergency referred to in S. 4 above ceased to be in force after the 31st of March, 1946. It is also not in dispute that the Governor General of India made a public notification on the 3rd of March, 1947, in which he directed that the period mentioned in Ss. 2 and 3 of the India (Central Government and Legislature) Act 1946, shall be the period of two years beginning with the 1st day of April, 1946, being the date on which the Proclamation of Emergency referred to in S. 4 ceased to operate. Now, the principal question for decision is if, by reason of the said notification of the Governor General, the Essential Supplies (Temporary Powers) Act, 1946, remained and continued in force till the 31st March, 1948. Learned counsel for the petitioner has contended that the notification of the Governor General did not, and could not, have the effect of extending the period of the life of the Essential Supplies (Temporary Powers) Act, 1946, beyond the 31st of March, 1947. This contention is urged on two grounds; firstly, it is urged that the notification of the Governor General merely affected the duration of the period during which the legislative powers under the India (Central Government and Legislature) Act, 1946 could be exercised; and a distinction must be made between the 'exercise' of the legislative power and the 'duration' of that power; secondly, it is urged that the Governor-General was not given any legislative power under S. 4, and if he purported to exercise any legislative power by extending the period of the duration of any Act passed by the Indian Legislature, it would be in excess of his powers under S. 4 of the India (Central Government and Legislature) Act, 1946. It was contended that this would be delegated legislation. It is pointed out that when on the 19th of November, 1946, the Essential Supplies (Temporary Powers) Act, 1946, became law, the period of duration of the legislative power was only one year from the 1st April, 1946. The Legislature which passed the legislation knew that, and therefore, Sub-section (3) of Section 1 of the Essential Supplies (Temporary Powers) Act, 1946, really meant that the Act would remain in force till the 31st March, 1947; and it was not open to the Governor-General to extend the duration of the Act by means of a notification; but the position might have been different if the Governor-General had made the notification before the law, i.e., the Essential Supplies (Temporary Powers) Act, 1946, was made.

(7) In my opinion, these arguments are not quite correct. When the Indian Legislature passed the Essential Supplies (Temporary Powers) Act, 1946, it knew that the period referred to in Section 4 of the India (Central Government and Legislature) Act, 1946, was liable to variation. Therefore, instead of mentioning a particular period in Sub-section (3) of Section 1 of the Act, it chose to say that:

"The Act shall cease to have effect on the expiration of the period mentioned in Section 4 of the India (Central Government and Legislature) Act, 1946."

Indeed, the Governor-General had no power to legislate under Section 4 of the India (Central Government and Legislature) Act, 1946; but he had power to direct that the period mentioned in that section shall be two years instead of one year beginning with the date on which the Proclamation of Emergency ceased to operate. The Governor-General did so direct by a public notification. He did so before the expiry of the period of one year from the date of the revocation of the Proclamation of Emergency. The effect of this notification was that the period mentioned in Section 4 of the India (Central Government and Legislature) Act, 1946, became two years instead of one year. Therefore, by reason of the very words used in Section 1 (3) of the Essential Supplies (Temporary Powers) Act, 1946, that Act remained in force till the 31st of March 1948, in other words, for the period mentioned in Section 4 of the India (Central Government and Legislature) Act, 1946. I think that it is wrong to say that the Governor-General legislated by notification or that this was a case of delegated legislation. The proper legislature legislated in the matter, and the period of the duration of the legislation was fixed by that legislature. That legislature said that the period was to be the same as the period mentioned in Section 4 of the Parliamentary legislation; if that period did not come to an end by reason of certain circumstances, the period of the Act passed by the Indian Legislature did not also come to an end. This, in my opinion, is the short effect of the notification of the Governor-General, and no question of exercise of legislative power by the Governor-General arises in this case; nor will it be right to say that the Governor-General 'extended' the period of the Essential Supplies (Temporary Powers) Act. 1946. The fact that the Governor-General issued the notification after the 19th of November 1946, does not, in my opinion, make any difference. The Essential Supplies (Temporary Powers) Act, 1946, was therefore in full force and effect till the 31st of March 1948.

(8) In the meantime, the constitutional position changed. On the 18th of July 1947 the British Parliament enacted the Indian Independence Act under which India became an independent Dominion as from the 15th of August 1947. Consequently, the British Parliament lost all legislative authority over India, so that the Houses of Parliament referred to in the proviso to Section 4 of the India (Central Government and Legislature) Act, 1946, could not pass the resolution referred to therein. On the 14th of August 1947, the Governor-General of India made an order in exercise of powers conferred by Section 9 read with Section 19, Sub-section (4), Indian Independence Act, by which, for "both Houses of Parliament", the words "the Dominion Legislature" were substituted. A new section, Section 4-A, was inserted which said that the powers of the Dominion Legislature shall, until other provision is made by or in accordance with a law made by the Constituent Assembly, be exercisable by that Assembly. The Constituent Assembly passed a resolution on the 25th February 1948, by which the period mentioned in Sections 2 and 3 of the India (Central Government and Legislature) Act, 1946, was further extended for a period of twelve months commencing on the 1st day of April 1948. A similar resolution was passed on the 23rd of March 1949, extending the period for twelve months commencing on the 1st day of April 1949. On the 26th of January 1950, the Indian Constitution came into

force, and the proper legislature amended Sub-section (3) of Section 1 of the Essential Supplies (Temporary Powers) Act, 1946, so as to continue the Act till the 31st of December 1952. For these reasons, it must be held that the Essential Supplies (Temporary Powers) Act, 1946 was in full force and effect on the relevant date of this case.

(9) I have given my decision on the question independent of the case law on the subject out of deference to the arguments of learned counsel for the petitioner, who contended that some of the reported decisions were wrong and required reconsideration. There are several decisions in support of the view which I have taken. See 'KHORSHED ALI v. THE KING', AIR 1950 Cal 202 and M. ABDUL WAHID v. THE CROWN', AIR 1950 Lah 101. In a decision of this Court 'JAGARNATH RAM v. THE KING', AIR 1950 Pat 200, the same view was expressed, though in the report there is no detailed discussion of the arguments urged. The matter was again considered by a Division Bench of this Court in 'Criminal Revn. No. 8 of 1950 disposed of on the 17th of November 1950 (Pat)', where the same view was expressed. Shearer, J., referred to his earlier decision in 'IMAM BUX v. THE STATE', Cri. Revn. No. 69 of 1950, decided on the 24th February 1950; and said that that case was decided under a misapprehension. Certain decisions relating to delegated legislation were also placed before us: 'JATINDRA NATH GUPTA v. THE PROVINCE OF BIHAR', AIR 1949 FC 175; 'BADAL BOSE v. CHIEF SECRETARY TO THE GOVT., OF WEST BENGAL', 53 Cal W N 728; and the Full Bench decision of this Court, KISHORI LAL v. DEBI PRASAD', AIR 1950 Pat 50. It is, I think, unnecessary to examine these decisions, as I am quite clear in my mind that no question of delegated legislation arises in this case.

(10) I now proceed to consider the second question, viz., if the Essential Supplies (Temporary Powers) Act, 1946, applied to the Santal Parganas. The question whether the Essential Supplies (Temporary Powers) Act, 1946, was extended to Chhota-Nagpur by a notification under Section 92 (1) of the Government of India Act, 1935, was considered by the Division Bench which decided 'Criminal Revn. No. 8 of 1950 (Pat)', referred to above. It was pointed out that by a notification dated the 13th December 1946, the Act was extended to the partially excluded areas, such as Chhota-Nagpur and the Santal Parganas. Our attention was drawn to a single Judge decision in 'Criminal Revn. No. 1314 of 1950, decided on the 4th of December 1950.' It appears from the judgment of that case that the notification of the 13th December 1946 was not brought to the notice of his Lordship. It has been contended before us on the basis of certain observations made by Patanjali Sastri J., in 'JATINDRA NATH GUPTA'S CASE', AIR 1949 FC 175 at p. 181, 'that at the time when the Governor-General made the notification on the 3rd March 1947, and the Constituent Assembly passed resolutions on the 25th February 1948, and the 23rd March 1949, fresh notifications should have been made by the Governor under Section 92 (1) of the Government of India Act, 1935. His Lordship Patanjali Sastri, J., made the observations with reference to the Bihar Maintenance of Public Order Act (V of 1947), which was effectually amended by the amending Act V of 1949. The Bihar Maintenance of Public Order Act (V of 1947) contained a provision by means of a proviso to Section 1 (3) of the Act, which was to the effect that:

> "the Provincial Government may, by notification on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification."

(11) The Governor of Bihar issued a public notification (No. 900 dated the 16th March 1947), in exercise of his powers under Section 92 (1) of the Government of India Act, 1935, directing that the Bihar Maintenance of Public Order Act, 1947, shall apply to the Chhota-Nagpur Division. His Lordship Patanjali Sastri, J., held that under Section 92, the Governor of Bihar was made the sole judge as to whether an Act of the Provincial Legislature was suitable for application to the partially excluded areas, and he could not divest himself of his personal responsibility and delegate in advance to the legislature the discretion as to whether or not to prolong the operation of the Act in those areas for another year. He then observed:

> "It follows that the application of proviso 1 to Section 1, Sub-section (3) of the Act to Chhota-Nagpur by the notification No. 900, dated the 16th March 1947, was unconstitutional and, assuming, without deciding, that the enactment of the proviso by the Provincial Legislature was 'intra vires', and the notification issued by the Provincial Government on 11th March 1948, under that proviso was effective to extend the duration of the Act for one more year, a fresh notification by the Governor was necessary to bring the extended Act into force in Chhota-Nagpur, and in the absence of such notification the arrest and detention of the appellants must be held to be unauthorised and illegal. In this view it is unnecessary to consider the other contentions raised on behalf of the appellants."

In my opinion, these observations have no application to the present case. In the present case, we are concerned with the duration of the period of the legislation, viz., the Essential Supplies (Temporary Powers) Act, 1946. The Act was applied to the partially excluded areas in 1946 by a valid notification under Section 92 (1) of the Government of India Act, 1935. If the Act continued in force by reason of the period mentioned in Section 4 of the India (Central Government and Legislature) Act, 1946, not having expired, I do not understand why it should have been necessary for the Governor to issue fresh notifications when the Governor-General made the public notification, or when the Constituent Assembly passed the resolutions. The notification and the resolutions did not amend the Act in any way. They merely extended the period mentioned in Section 4 of the India (Central Government and Legislature) Act, 1946. As long as the period mentioned in Section 4 of the said Act did not come to an end, the Essential Supplies (Temporary Powers) Act, 1946, also did not come to an end. If, therefore, the Act did not come to an end by reason of the notification and the resolutions referred to above, I do not see how or why a fresh notification under Section 92 (1) of the Government of India Act, 1935, should be necessary. Having thus dealt with the principal questions of law urged in this case, I now proceed to a consideration of the facts.

(12) Learned counsel for the petitioner has contended before us that the grounds of detention communicated to the petitioner had no existence in fact whatsoever, and this case comes within the rule which we laid down in the case of 'DAYANAND MODI v. STATE OF BIHAR', Cri. Misc. No. 590 of 1950 (Pat). The extent to which we

can consider and examine the grounds was dealt with by me very carefully in the case of 'MADANLAL v. THE STATE OF BIHAR', Cri. Misc. No. 623 of 1950 (Pat), and I do not wish to repeat what I said there. On behalf of the petitioner, several affidavits were filed. The first affidavit is that of Chedilal Khowala who supported the statements made in the petition itself. An additional affidavit was filed by the same person on the 8th of January 1951. These affidavits have been perused by us.

(13) It would, I think, be convenient to take the grounds as they have been stated in the communication made by the State Government which I have quoted in extenso at pages 3 to 7 of this judgment. The first four grounds merely state the existing facts as to the system of controls, etc., and require no consideration. In ground No. 5, it is stated that the petitioner has the general reputation of being a "black-marketeer." I agree with learned counsel for the petitioner that the statement as to reputation is of a general character and without any particulars would be vague and indefinite. But five particulars are mentioned in ground No. 5, under the headings (a) to (e). In the affidavits filed on behalf of the petitioner, an attempt has been made to challenge the accuracy of those particulars, and a reference has been made to a large number of documents in an annexure appended to the affidavit. In my opinion, it is impossible for us to examine the grounds in the way desired by learned counsel for the petitioner. We cannot treat these detention cases as though they were cases under trial before us, so that on a consideration of the evidence we shall be entitled to substitute our judgment for that of the State Government. Indeed, it would be wrong on principle to do so. It was for the State Government to examine the materials, and come to a judgment on the question. Perhaps, if and when the matter goes to the Advisory Board, that body may examine the materials afresh. I do not think that it is within the scope of our jurisdiction to examine the materials in the way desired on behalf of the petitioner. With regard to ground No. 6 which is an important ground, something must be said. This ground refers to two allegations: one is that the petitioner concealed some cloth with motor parts in a room; the second is that he failed to produce his register on demand. With regard to the first allegation, it has been stated on behalf of the petitioner that what happened was that one Ramdeo Ram Marwari of Mahagama had purchased some cloth, part of which had been taken away and part the purchaser could not take away. That part was kept in a separate room which was found on the 4th October 1950. It is stated that the counter-foil bill seized bears out the correctness of the aforesaid statement as also the original search list which was prepared at the time of the search and signed by the Sub-Inspector of Police. We have examined the original search list as well as the counterfoil of bill No. 152 dated the 19th July 1950. On the back of the bill, there is an endorsement to the effect that one bale of markin and 55 thans of markin of a particular variety and five thans of markin of another variety could not be taken away by the purchaser. The learned Government Advocate pointed out that the endorsement was not signed by the purchaser, the signature of the purchaser occurring only at the bottom of a certificate under the Bihar Sales Tax Act, 1944. Whether the endorsement was genuine or not is really a matter of evidence, and the believability of that evidence. Unless we convert ourselves into a Court of trial I do not see how we can pronounce on the question. As to the second allegation that the petitioner did not produce his stock register, the statement on behalf of the petitioner is that the stock book was sent to Jamtara. In the additional affidavit filed on behalf of the petitioner, some reasons have been given why the stock book was sent to Jamtara. It is stated therein that the petitioner deputed a representative of his to contact the Subdivisional Officer of Jamtara, but the said representative was not able to contact the officer at Jamtara. Whether these allegations are correct or not, it is impossible for us to say. The name of the representative, who took the stock book, has not been disclosed; nor is it very clear to us why it was necessary to take the stock book to Jamtara. Be that as it may, it is impossible for us to pronounce on the correctness or otherwise of the statements made on behalf of one party or the other, when the correctness depends on scrutiny of evidence.

(14) The grounds of detention communicated to the petitioner are sufficiently precise and definite, except the general statement as to reputation. It cannot be said that the grounds are imaginary, or have no existence in fact whatsoever. What is really being contended on behalf of the petitioner is that on a proper scrutiny of the evidence, the inference should be different from what has been drawn by the State Government. That is a matter, as I have already said, solely within the purview of the State Government. We cannot substitute our judgment for that of the State Government.

(15) It was also contended before us that the mere failure to produce the stock register, whether for good or bad reasons, cannot be a ground for detention. It is pointed out that the State Government itself connected the failure to produce the stock register with the secreting of some cloths in a separate room. It is contended that if the allegation as to secreting is found to be non-existent, then the mere failure to produce the stock register at a particular time has no relation to the purpose of detention. It is true that the State Government has connected the failure to produce the stock book with the secreting of a quantity of cloth in a separate room, but I think that the grounds communicated to the petitioner must be read as a whole. If on those grounds the State Government was satisfied that the petitioner was likely to indulge in activities prejudicial to the maintenance of supplies and services essential to the community and that it was necessary to prevent him from indulging in such activities, it would not be proper for this Court to interfere with the order of detention.

(16) For the reasons given above, I hold that the detention of the petitioner is legal, and we cannot interfere with the order of detention. The application fails, and is accordingly dismissed.

(17) NARAYAN, J.: I agree.

D.R.R. Application dismissed.

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NARAYAN J.

Dhani Jha and others. Appellants v. Ram Bahadur Sah and others. Respondents.

A. F. A. D. No. 889 of 1949, D/- 21-2-1952.

(a) Evidence Act (1872), S. 114 — Possession and dispossession — Owner of land alleging dispossession by defendant — Defendant claiming possession by exchange — Defendant's case not proved — Plaintiff's case weak — Probability is in favour of plaintiff's case.

Ordinarily an owner of a property is presumed to be in possession of it, this presumption being very strong in his favour when there is nothing to the contrary or when the defendant has miserably failed to establish the ground on which he claims to have come in possession. Where the defendants claimed that they came into possession of the plot of land by exchange with the predecessors of the plaintiff, but had miserably failed to prove their story of exchange the probability is that the defendants would never have come in possession of the land. Even if, in such a case therefore, the evidence adduced by the plaintiffs (owners) on the question of possession with regard to the plot was not sufficiently strong, the fact that the defendants had failed to prove that this plot had been the subject of exchange would raise a presumption in favour of the plaintiffs, and the probability certainly would be that the defendants had never come in possession of the land, and that it was highly probable that the plaintiffs had continued in possession of the plot and it was impossible that the defendants should have ever come in possession of this plot. AIR 1921 Pat 237 FB; AIR 1950 Pat 484; AIR 1922 Pat 432, Considered. (Para 6)
Anno: Evidence Act, S. 114 N. 26.

(b) Evidence Act (1872), S. 114 — Suit for possession — Plaintiffs 16 annas landlords of patti in which disputed plot lay — Defendants asserting only tenancy interest in land — Plaintiffs claiming possession on ground of exchange — Onus is not on defendant to show that they acquired title by adverse possession — Plaintiffs should prove title to remain in khas possession — No credible evidence on either side regarding possession for twelve years — Where truth lay difficult to determine — Probabilities of case to determine question of fact has to be considered — Question of onus is academic — Possession found with defendant and claim of plaintiffs dismissed. (Limitation Act (1908), Arts. 142 and 144). AIR 1921 Pat 237 FB, Foll.; AIR 1950 Pat 484, Not followed. Case law considered. (Para 7)

Anno: Evidence Act, S. 114 N. 26; Limitation Act, Arts. 142 & 144 N. 87, 89.

Lalnarain Sinha and Sreenath Singh, for Appellants; B. C. De and A. N. Chatterji, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

(1859-61) 8 Moo Ind App 199 (PC) (Pr 7)
('88) 16 Cal 473 :(16 Ind App 23 PC) (Pr 7)
('94) 10 Cal W N 630: (16 Mad L J 272 PC) (Pr 7)
('16) 25 Cal L J 69: (AIR 1916 PC 21: 39 Mad 617 PC) (Pr 7)
('35) 57 All 278: (AIR 1934 All 993 FB) (Pr 7)
('83) 9 Cal 744: (12 Cal LR 257 FB) (Pr 7)
('89) 17 Cal 137 (Pr 7)
('13) 17 Cal W N 389: (18 Ind Cas 17) (Pr 7)
('21) 6 Pat LJ 478: (AIR 1921 Pat 237 FB) (Prs 6, 7)
('23) 2 Pat 1: (AIR 1922 Pat 432) (Pr 6)
('50) AIR 1950 Pat 484 (Prs 6, 7)

JUDGMENT: This is a plaintiffs' appeal and it arises out of a suit for declaration of title and recovery of possession with regard to two plots of land recorded in the Survey as plots Nos. 43 and 44. Plot No. 43 is a part of holding No. 493 and has got an area of 1.14 acres, and plot No. 44 is a part of holding No. 482 and has got an area of 1.11 acres. The plaintiffs are the 16 annas proprietors of the patti in which these two plots lie. With regard to plot No. 43 the case which the plaintiffs had set up was that the Belsand Kothi which had lease of the milkiat interest under which plot No. 43 lies had made a temporary transfer of this plot to Aklu Sah, the ancestor of the defendants, in exchange for plots Nos. 171 and 506 of khata No. 320 and that after the expiry of the lease the patti came under the khas possession of the plaintiffs and the exchange terminated with the result that the plaintiffs obtained possession of plot No. 43, and plots Nos. 171 and 506 were returned to the ancestor of the defendants.

In respect of plot No. 44 the plaintiffs' case was that it was not in possession of the Kothi and had not been transferred by the Kothi to Aklu Sah and that it had all along been in their possession. The trouble arose in 1944, and according to the plaintiffs' allegation the defendants had lodged a false information at the Belsand police station as to the apprehension of a breach of peace and had also filed certain criminal cases against the plaintiffs Nos. 1, 2, 3 and others alleging loot of paddy crops. These cases ended in the conviction of the plaintiffs, and it is said that after the plaintiffs had been convicted the defendants began to interfere with their possession. The plaintiffs therefore instituted this present suit in which the prayer was that their title be declared and their possession confirmed. There was, however, a proceeding under S. 144 of the Code of Criminal Procedure after the institution of the suit, and the plaintiffs filed a petition for the amendment of the plaint in which they alleged that they had been dispossessed from the two plots about 1½ months after the institution of the suit. The amendment prayed for was allowed, and the prayer for recovery of possession was substituted in place of the prayer for confirmation of possession, and the plaintiffs further claimed a sum of Rs. 185/4/- as the price of paddy crops alleged to have been forcibly cut and removed by the defendants from an area of 1 bigha 6 kathas out of the land in suit.

(2) The defendants contended that both the plots had been in possession of the Belsand Kothi as thicadars and that their ancestor Aklu Sah had exchanged his plots Nos. 133, 143, 424, 441 and 442 with these two plots, and that by virtue of the exchange which was of a permanent nature these two plots had all along been in their possession. The story of possession and dispossession as put forward by the plaintiffs was challenged as absolutely incorrect.

(3) The Court of first instance decreed the suit on the finding that plot No. 44 had never come in possession of the Kothi and had never been the subject of exchange and that plot No. 43 had only been temporarily exchanged. The evidence of possession adduced by the plaintiffs was accepted by the learned Munsif, and he accordingly held that the plaintiffs were entitled to a decree. On appeal by the defendants, the learned 1st Additional Subordinate Judge of Muzaffapore decreed the plaintiffs' claim in respect of plot No. 44 but dismissed their claim with regard to the other plot. The finding of the learned Subordinate Judge is that the title of the plaintiffs with regard to plot No. 44 has been established but that they have failed to prove their title with regard to plot No. 43. On

the question of possession the learned Subordinate Judge held that the plaintiffs had failed to establish their possession over any of these two plots within the period of twelve years preceding the institution of the suit, but in spite of such a finding on the question of possession he was of opinion that the plaintiffs were entitled to a decree with regard to plot No. 44, inasmuch as the defendants had failed to show that they had any title over this plot or had adversely been in possession of it for the statutory period.

(4) The plaintiffs have come up in second appeal and their contention is that the learned Subordinate Judge should have upheld the decision of the learned Munsiff, and should not have dismissed their claim with regard to plot No. 43. The defendants-respondents have filed a cross-objection which is directed against the decision of the learned Subordinate Judge with regard to plot No. 44.

(5) As already pointed out, the plaintiffs had pleaded that the Kothi was never in possession of plot No. 44 and that plot No. 43 which had been in its possession as a thicadar had only been temporarily exchanged. According to the plaintiffs' version Aklu Sah, the ancestor of the defendants, had made over plots 171 and 506 which had been recorded in the survey as his kaemi kasht to the Belsand Kothi and in lieu of them the disputed plot No. 43 had been made over to him by the Kothi, but with the expiry of the thica the exchange became inoperative with the result that plot No. 43 was restored to the plaintiffs and plots Nos. 171 and 506 were restored to Aklu Sah. With regard to plot No. 44 the definite case made out by the plaintiffs was that it was never in possession of the Kothi and had never been exchanged by the Kothi with Aklu Sah. The defendants' version, however, was that both the plots were included in the thica of the Belsand Kothi and that they had been exchanged with plots 133, 143, 424, 441 and 442 of Aklu Sah. This exchange, according to the defendants, was intended to be a permanent one, and they do not admit that after the expiry of the thica the plots in suit came in possession of the plaintiffs as proprietors.

(6) The finding of the learned Subordinate Judge on the question of title appears to me to be unassailable, the learned Subordinate Judge having given very good reasons in support of his view that while the plaintiffs have been able to prove their title with regard to plot No. 44, they have failed to prove their title with regard to the other plot. Plot No. 44 was recorded in the survey as the bakasht of the plaintiff Dhani Jha and it was shown as appertaining to khewat No. 28. The survey entry indicated that neither khata No. 482 under which this plot lies nor khewat No. 28 under which khata No. 482 lies was in the thica of Belsand Kothi. The presumption arising from the entry in the record of rights was not rebutted and the learned Subordinate Judge says that no reliable evidence was adduced on behalf of the defendants for proving that plot No. 44 had been in possession of the Belsand Kothi as thicadars. If the evidence did not show that the Belsand Kothi had anything to do with this plot, then the story of exchange so far as this plot is concerned could not be accepted. It is certainly very significant that while there is a clear note of exchange in the Survey khatian with regard to plot No. 43, there is not such note with regard to plot No. 44, and there was no other reliable evidence for proving an exchange of this plot or the fact of this plot having been included within the thica.

The learned Subordinate Judge was perfectly justified in holding that the plaintiffs had been able to prove their title with regard to this plot. The defendants' case of possession so far as this plot is concerned rested only on the plea of exchange. and when the plea of exchange failed the learned Subordinate Judge was right in his view that though the evidence adduced by the plaintiffs on the question of possession was not quite satisfactory, that could not stand in the way of the plaintiffs' obtaining a decree with regard to this plot. When the 'plea of exchange and also the plea that this plot had been given in thica to the Belsand Kothi could not be accepted there was nothing to show that the defendants ever got possession of this plot, and therefore the irresistible conclusion was that the plaintiffs had been able to prove their antecedent title and continued possession over this plot. So far as plot No. 44 is concerned, the question of onus of proof appears to be wholly academic, inasmuch as there is a definite finding of the Court below that this plot was never given in thica and was never the subject of exchange. There is therefore no reason why the defendants should have come in possession of this plot, and even the weak evidence of possession adduced by the plaintiffs so far as this plot is concerned was bound to be accepted by the Courts below.

There is undoubtedly some distinction between the mere dispossession or discontinuance of possession of the plaintiffs and the adverse possession of the defendants, and ordinarily an owner of a property is presumed to be in possession of it, this presumption being very strong in his favour when there is nothing to the contrary or when the defendant has miserably failed to establish the ground on which he claims to have come in possession. This, I may respectfully point out, is exactly what Dawson-Miller, C. J. meant to say while explaining his decision in the well-known case 'SHIVA PRASAD SINGH v. HIRA SINGH', 6 Pat L J 478. Ramaswami, J., who delivered the judgment of the Division Bench case reported in 'M. A. RAUF v. BODHI SINGH', AIR 1950 Pat 484; a decision which has been strongly relied on by Mr. Lal Narain Sinha for the appellants has referred to the explanation which is to be found in the judgment of Dawson-Miller, C. J. in 'MATUK SINGH v. TIAN SAHU', 2 Pat 1 with regard to the dictum laid down by him in 'SHIVA PRASAD SINGH'S case. Fortunately, in the case of Matuk Singh as well the defendant had pleaded that he had got the land from the predecessor or the vendor of the plaintiff, who was claiming it by way of exchange. The exchange transaction set up by the defendant was completely discredited, and a single Judge of this Court relying on the Full Bench decision in 'SHIVA PRASAD SINGH'S case' held that though the fact of exchange had not been established the plaintiff, as he had not adduced satisfactory evidence on the question of possession, was not entitled to a decree. This decision was reversed in Letters Patent Appeal, and the judgment in the Letters Patent Appeal was delivered by Dawson-Miller, C. J. who had also delivered the leading judgment in 'SHIVA PRASAD SINGH'S CASE'. I should like to quote the following passage from his Lordship's judgment in 'MATUK SINGH'S CASE', for two reasons, the first being that those who might be inclined to think that Dawson-Miller C. J. later on modified his view as it had been put forward in 'SHIVA PRASAD SINGH'S CASE' have to remember in what context the learned Chief Justice had to make this observation, and the second being that in this particular case, in so far as it relates to plot No. 44 the view of the learned Subordinate Judge can easily be supported on the basis of this observation.

"The reason why the learned Judge of this Court came to that conclusion was because the District Judge had held that the oral evidence of possession was not satisfactory on either side and he appears to have thought that in such a case it was not open to the learned District Judge, who was the ultimate Judge of fact, to take into account either the probabilities of the case or any presumption that might arise in favour of possession remaining in the person who had proved his title. The Full Bench case to which I have referred did not lay down the proposition that in no case could the probabilities and presumptions be taken into account. The rule there laid down was that it is only in cases where there is no evidence of the plaintiff as to dispossession or, what amounted in the opinion of the Full Bench to the same thing, where the evidence is valueless, that the plaintiff fails to make out his case by merely proving that he had an antecedent title and possession, but it must not be considered, merely because, where evidence was given by both sides, the learned Judge who had to determine the case had a difficulty upon that evidence or even considered that evidence not altogether satisfactory, that in such circumstances he was not entitled to give weight to the probabilities of the case or to any presumption which might properly arise from the fact that the plaintiff had previously been in possession and had title. I think it would be extending the doctrine laid down in that case too far if we were to say that merely because the Judge had some difficulty in arriving at a conclusion upon the evidence of possession or because he did not consider the evidence altogether satisfactory, he was thereby precluded from looking either at the probabilities of the case as disclosed by other parts of the evidence or from the presumptions which might arise from the plaintiff's title."

The probabilities are bound to be considered, and the Full Bench case did never lay down the proposition that in no case can the probabilities and the presumptions be taken into account. His Lordship has more than once used the word 'probabilities' in the above quoted passage, and undoubtedly the probability in this case is, as the probability in that case ('MATUK SINGH S CASE') was, that the defendants who had miserably failed to prove their story of exchange would never have come in possession of the land (plot No. 44 in this case). Even if, therefore, the evidence adduced by the plaintiffs on the question of possession with regard to the plot No. 44 was not sufficiently strong, the fact that the defendants had failed to prove that this plot had been the subject of exchange raised a presumption in favour of the plaintiffs, and the probability certainly is that the defendants had never come in possession of the land. According to their own case they came in possession only because of an exchange and when this plot was not even included within the thica of the thicadar with whom the exchange is said to have taken place, then certainly it is highly probable that the plaintiffs had continued in possession of the plot and it seems impossible that the defendants should have ever come in possession of this plot. In this view of the matter, I think the conclusion of the learned Subordinate Judge that the plaintiffs are entitled to a decree so far as plot No. 44 is concerned even though their evidence on the question of possession is not as strong as that of the defendants is easily sustainable. The cross-objection therefore is not fit to succeed.

(7) The appeal is, however, directed as against the finding of the learned Subordinate Judge so far as plot No. 43 is concerned, and it has been strenuously contended on behalf of the plaintiffs-appellants before me that Article 144 of the Limitation Act should have been applied in this case and that if this Article is held applicable, then the plaintiffs' claim with regard to plot No. 43 should be held fit to succeed. In my opinion, the question of onus of proof even with regard to plot No. 43 as raised by the learned Government Pleader on behalf of the plaintiffs-appellants is entirely academic.

The learned Subordinate Judge has given very cogent reasons for holding that the plaintiffs had failed to prove their title to plot No. 43. The plaintiffs' case that plot No. 43 had been exchanged for plots Nos. 171 and 506 was not supported by the survey entry in respect of plots Nos. 171 and 506, and there was no reason for supposing that the entry with regard to the exchange in the Survey record should be taken to be an entry indicating an exchange on a temporary basis. It would appear from the judgment of the learned Munsiff that the thica or the lease expired in the year 1307 Fasli, and I have been referred to the statement of P. W. 6 in his deposition that the thica expired in 1307 or 1308. Thus, it would be manifest that the thica expired quite long before the institution of this present suit. For determining the question as to whether the exchange was a temporary exchange or a permanent exchange sanctioned by the proprietors it was simply reasonable to look to the evidence on the question of possession ever since the termination of the lease in 1307 or 1308. This suit came to be instituted in the year 1946 and if the plaintiffs had failed to prove their possession over this plot from the year 1307 Fs., till the year of the institution of the suit, then certainly that was a circumstance to indicate that the exchange had been made on a permanent basis and that it had the sanction, express or implied of the proprietors. It is impossible that the plaintiffs, if they thought that they had a valid title to plot No. 43 would have slept over their rights for such a long period and if they never attempted to take khas possession of this plot for such a long period, it is an extreme probability, that they were satisfied that they had no valid claim to this plot.

The learned Subordinate Judge has considered the evidence adduced by both parties on the question of possession and after a consideration of the evidence he has come to the conclusion that the oral evidence adduced by the defendants is superior to the oral evidence adduced by the plaintiffs, though it is insufficient to establish a case of adverse possession so far as plot No. 44 is concerned. He even says that so far as plot No. 43 is concerned "the defendants have established a title to remain in possession over it", and does not this conclusion of his indicate that even taking the onus to be on the defendants he felt satisfied that they had been able to prove their possession over this plot? And again I should like to point out that if the plaintiffs' case that there had been an exchange of plot No. 43 with plots Nos. 171 and 506 on a temporary basis was not correct then certainly the probability is that the defendants had been allowed to remain in possession of this plot ever since the time of exchange. The factual distinction has to be remembered that while there was a clear entry — an entry unrebutted — indicating the exchange of plot No. 43 there was no such entry with regard to plot No. 44, and therefore, just as it is probable and believable that plot No. 44 never came in possession of the defendants it is probable and believable that plot No. 43 never came in possession of the plaintiffs after the ex-

change. In this view of the matter, I do not think it is necessary in this case to enter into a discussion as to whether the case of 'M. A. RAUF v. BODHI SINGH', AIR 1950 Pat 484 so strongly relied on by the learned Government pleader was rightly or wrongly decided. But in view of the submissions made by the learned Government pleader it is necessary for me to consider as to whether the Full Bench decision in 'SHIVA PRASAD v. HIRA SINGH', 6 Pat L J 478 applies to the facts of this case or not. It is certainly common ground that the plaintiffs are the 16 annas landlords of the patti in which the disputed plot No. 43 lies, and on the strength of the recent decision of this Court in 'M. A. RAUF v. BODHI SINGH', AIR 1950 Pat 484, the learned Government pleader submitted that because the plaintiffs were admittedly the 16 annas proprietors, the onus was on the defendants to show that they had acquired a title to this land by adverse possession. The learned Government pleader thus raised the ancient controversy regarding the effect of presumption of continuous possession, but I think, in view of the propositions laid down by this Court in 'R. SHIVA PRASAD SINGH'S CASE and by the Judicial Committee in several cases, the onus is on the plaintiffs to prove their title to remain in khas possession of this land even though the defendants are asserting only a tenancy interest in the land. His Lordship Sir Dawson-Miller C. J. who had referred the case to a Full Bench had observed in his order of reference that in the absence of any evidence of the plaintiff's possession within 12 years he failed to prove a subsisting title because he might have lost by lapse of time his right to recover, and the onus of proving that he was dispossessed within that time was upon him. His Lordship further observed that where there was evidence equally strong on both sides as to possession within 12 years so that it was difficult to determine where the truth lay the probabilities might be sufficient to determine the question of fact in favour of one side or the other. In this case, as I have already pointed out, the probabilities are that plot No. 44 has remained in possession of the plaintiffs and plot No. 43 has remained in possession of the defendants ever since the time of exchange. In his leading judgment of the Full Bench his Lordship observed as follows :

> "Assuming that there was no evidence worthy of credit on behalf of either party as to possession, which is what the District Judge found, and assuming, as it is assumed, and I think properly assumed in the judgment now under appeal, that the plaintiff in a suit, for ejectment, must prove not only his antecedent title but also his possession within 12 years of the suit, then in the absence of any credible evidence as to possession I consider that the plaintiff must fail and that the presumption arising from title cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given. In the order of reference I have given at length my reasons for arriving at this conclusion and have referred to the authorities which in my opinion support it. After further argument I see no reason to modify the view there expressed and it is unnecessary to repeat what I then said. It has been argued, however, that in all cases where the defendant sets up a title by adverse possession, whether the suit is one based upon dispossession or not, the onus lies upon the defendant to prove his adverse possession for 12 years before the suit. In my view this is stating the legal proposition too broadly."

This Full Bench decision has to be followed by us, and even if a somewhat contrary view was expressed in any other case by a Division Bench, that cannot be followed if it in any way conflicts with the view taken by the Full Bench. Dawson-Miller C. J. referred to the Privy Council decisions in 'MAHARAJAH KOOMAR BABOO NITRASUR SINGH v. BABOO NUNDO LALL SINGH', 8 Moo Ind App 199 (P C) and 'MOHIMA CHANDER v. MOHESH CHUNDER', 16 Cal 473 (P C). In the former case it has been decided that in a suit for ejectment based upon possession or dispossession within 12 years, the onus lay upon the plaintiffs to prove that the dispossession took place within 12 years and that he did not discharge his burden by merely proving title coupled with enjoyment at some earlier period. In the latter case the following important observation was made:

> "This is in reality what in England would be called an action for ejectment, and in all actions for ejectment where the defendants are admittedly in possession, and 'a fortiori' where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that, in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within twelve years before the commencement of the suit."

This was approved by the Judicial Committee in 'RANI HEMANTA KUMARI DEBI v. JAGADINDRA NATH', 10 Cal W N 630 (PC) in which also the principle was reiterated that it was for the plaintiff in a suit for ejectment to prove possession prior to the alleged dispossession. Their Lordships further observed in this case that in the question of evidence the initial fact of the plaintiff's title comes to his aid with greater or less force according to the circumstances established in evidence. This is, I may respectfully add, again relying on the probabilities, and I need not repeat that the probability in this case is that plot No. 43 has remained in the possession of the defendants ever since the exchange.

In 'MAHAMMUD AMANULLA KHAN v. BADAN SINGH', 17 Cal 137 the Judicial Committee observed as follows:

> "The Chief Court in their judgment say also 'All this shows that in 1838 plaintiffs were undoubtedly proprietors; but the land is now, and has been since 1842, equally undoubtedly in the possession of the defendants, who have exercised over it all the rights of proprietors.' There has been no possession of any description in the plaintiffs or their ancestors since the period of the engagement with the defendants; and whether any proprietary right may have existed is not the question: it is whether there has been a dispossession or discontinuance, which there clearly was. No doubt the proprietary right would continue to exist until by the operation of the law of limitation it had been extinguished; but upon the question whether the law of limitation applies, it appears to be clear that it comes within the terms of the Art. 142, and if there has been any doubt in the minds of the Courts in the Punjab as to what was the effect of the law of limitation in cases of this description, it seems to have arisen from the introduction of some opinion that there must be what is called adverse possession. It is unnecessary to enter upon that enquiry. Article 144, as to adverse possession, only applies where there is no other article which specially provides for the case."

I can draw out a parallel by saying that in this case also there has been no possession of any des-

cription in the plaintiffs or their ancestor since the time of the exchange, and therefore the proprietary title claimed by them does not go to establish their title in the limited sense of title to khas possession. The decision of the Judicial Committee in 'DHARANI KANTA v. GABAR ALI KHAN', 17 Cal W N 389 also appears to me to be laying down the same principle. As against all this Ramaswami J. in 'M. A. RAUF v. BODHI SINGH', AIR 1950 Pat 484 has relied on a decision of the Judicial Committee in 'SECRETARY OF STATE v. CHELLIKANI RAMARAO', 25 CLJ 69: AIR 1916 P C 21 and has quoted a passage from their Lordship's judgment. But I have to say with the greatest respect that we are bound to consider the context in which such an observation was made. The subject of that suit were lands and islands which had been formed in the bed of the sea near the mouth or delta of the river Godavari, and the islands and lands 'were mostly jungle lands.' Dawson-Miller C. J. in his order of reference said that possession was not always capable of proof by acts of actual use, and the absence of evidence of user in the case of submerged or jungle waste lands did not necessarily raise a presumption against the plaintiff's continued possession where antecedent title and possession were proved, and in such cases, it had been held that the continuance of possession might be presumed if antecedent title and possession were proved. His Lordship referred to the observation of Sir Arthur Wilson who had delivered the judgment of the majority of the Full Bench in 'MOHAMMAD ALI KHAN v. KHAJA ABDUL GUNNY', 9 Cal 744, and I should like to quote the following passage from the judgment of Wilson J.:

"The nature of possession to be looked for, and the evidence of its continuance, must depend upon the character and condition of the land in dispute. Land is often either permanently or temporarily incapable of actual enjoyment in any of the customary modes as by residence or tillage or receipts of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by inundation; it may produce some profit, but trifling in amount, and only of occasional occurrence as is often the case with jungle land. In such cases it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such cases, when he has done this, his possession is presumed to continue as long as the state of the land remains unchanged, unless he is shown to have been dispossessed."

The fact, therefore, that the land which was the subject of litigation in 'SECRETARY OF STATE v. CHELLIKANI RAMARAO', AIR 1916 P C 21, was a jungle land makes the whole difference, and it is certainly now very well-established that in the case of jungle or waste lands the presumption of title would lead to a presumption of continued possession. It cannot be said that in 'CHELLIKANI RAMARAO'S CASE', the Judicial Committee in any way modified the principles which had been laid down in the several other cases.

A Full Bench of the Allahabad High Court in 'BINDHYACHAL CHAND v. RAM GHARIB CHAND', 57 All 278 had to consider all these decisions, and while referring to the case of 'CHELLIKANI RAMA RAO', their Lordships observed as follows:

"In 'SECRETARY OF STATE v. CHELLIKANI RAMA RAO', 39 Mad 617 the question of limitation arose in connection with the claim of the objectors who claimed title under the Madras Forest Act. They were admittedly in possession at the time, and their claim could not be regarded as one brought by persons for recovery of possession on the ground of dispossession. Their Lordships of the Privy Council accordingly held that the only question was whether they had established their case of acquisition of title by adverse possession for over twelve years within the meaning of Art. 144. That case obviously is no authority for the proposition that where the suit is for possession on the ground of dispossession, Art. 144 nevertheless applies."

I can say with respect that in this ruling their Lordships of the Allahabad High Court have taken great pains to explain the distinction between Art. 142 and Art. 144 of the Limitation Act.

As pointed out by their Lordships Art. 144 is a residuary article applicable to suits for possession of immovable property not otherwise specially provided for in the Act. It is only when there is no other special article applicable, that the omnibus Art. 144 applies, and twelve years will be computed from the date when the possession of the defendants became adverse to the plaintiffs. Article 144 has to be excluded whenever there is a special article applicable. In order to apply Art. 144 the suit must be a suit for possession of immovable property not specially provided for in any other article of the Act and then on proof of title the plaintiff's suit cannot be dismissed until the defendant further establishes his adverse possession for more than twelve years. Their Lordships did recognise that it would in every case be a question of fact whether the plaintiff had proved his possession, actual or constructive, within the period of twelve years, and Sulaiman C. J. says that after considering all the evidence and circumstances, if a Court were to record a finding that the plaintiff had failed to prove his possession, constructive or actual, within twelve years, then the suit must fail, even though the Court does not record a definite finding that the defendant had established his adverse possession for more than twelve years. His Lordship further says that no doubt in many cases the distinction is very fine, and the line of demarcation between dispossession and adverse possession is thin, but that the question in each case is one of burden of proof, and that it is incumbent on the plaintiff, when he admits his dispossession, to establish his possession within twelve years. What their Lordships say is in perfect accord with the principles laid down by the Judicial Committee in several cases some of which have been referred to above.

I think I ought to mention here that though the plaintiffs had, by an amendment petition, added a prayer for recovery of possession in the suit and had alleged that they had been dispossessed after the institution of the suit, the clear finding of the learned Subordinate Judge is that the "plaintiffs' allegation about this dispossession during the pendency of the suit is nothing but a false and concocted story as is proved by the evidence on the record and the circumstances of the case". The story of possession and dispossession put forward by the plaintiffs therefore stood thoroughly discredited, and in such circumstance the onus was on them to show that in spite of the admitted exchange which had happened long ago and after the termination of lease in 1307 or 1308 they had come in khas possession of this plot. It is probably also necessary for me to refer to a somewhat objectionable observation of the learned Subordinate Judge to the effect that the "question of possession has got to be judged in the light of certain criminal proceedings and cases which preceded the institution of the present suit". But even if an excep-

tion can be taken to this observation, it cannot reasonably be urged in this case that the learned Subordinate Judge has not considered the evidence as to possession. He has entered into an elaborate discussion of the evidence and after having fully considered the evidence he has come to the conclusion that the evidence adduced by the defendants is superior to the evidence adduced by the plaintiffs.

(8) In the result, therefore, this appeal fails and is dismissed with costs. The cross-objection is also dismissed but without costs.

R.G.D. Appeal dismissed.

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* A. I. R. 1952 Patna 309

(FULL BENCH)

REUBEN, RAMASWAMI AND SINHA JJ.

In re Babul Chandra Mitra, Petitioner.

Misc. Judicial Case No. 165 of 1951, D/- 25-3-1952.

✠ Constitution of India, Art. 226 — 'Any person or authority' — High Court cannot issue writ or order directly to itself to quash order made by itself on administrative side — Application for enrolment as advocate rejected by High Court — No writ to quash order against High Court or Assistant Registrar.

Where an application of the petitioner for enrolment as an advocate has been rejected by the High Court on its administrative side, a Bench has no jurisdiction to issue any writ or direction or order to the High Court requiring it to enrol the petitioner as advocate or even to reconsider his application for enrolment. (1925) 2 KB 43; (1898) 2 QB 680, Relied on. (Para 6)

Nor can the writ or direction be issued to the Assistant Registrar of the High Court who in the discharge of his duties had only communicated to the petitioner the decision of the Full Court that his application has been rejected. On principle, it is difficult to hold that a writ of mandamus can be granted against one who is an inferior or ministerial officer bound to obey the orders of the higher authority to compel him to do something which is part of his duties in that capacity. (1795) 6 Term Rep 169 and (1835) 3 Ad & El 416, Rel. on. (Para 9)

Per Ramaswami J.: It cannot be right to say that High Court can issue a writ or order directly to itself to quash an order made by itself. It is immaterial whether in making the order the High Court acts in a judicial or administrative role. Under Art. 226 (1), the High Court shall have power to issue to any person or authority directions, orders or writs. It is apparent that a writ cannot be issued by the High Court to itself for the process involves rather the absurd position that it calls upon the Judges to show cause to themselves, why they should not be directed to quash something they themselves have determined. It is also manifest on principle that a Judge is without jurisdiction to issue a writ or order to another Judge of co-ordinate jurisdiction and power to compel performance of duties. The very nomenclature of the writs — "Mandamus, certiorari, prohibition" implies superior power — the power of a superior authority to compel an official or an inferior tribunal to act in a certain manner. The same reason which prohibits an inferior Court from controlling the conduct of a superior tribunal applies in equally cogent manner to the effort of one Judge to compel the action of another Judge of co-ordinate jurisdiction and power. (Para 6)

Per Sinha J.: The High Court cannot issue any of these prerogative writs on the Judges of the High Court on its administrative side as they are not inferior to the High Court sitting on the judicial side. (Para 14)

B. C. Ghosh, for Petitioner; Advocate General, Amicus Curiae.

REFERENCES: Courtwar/Chronological/ Paras.

('52) 56 Cal WN 145: (AIR 1952 Cal 178 FB) 9
(1835) 3 Ad and El 416: (111 ER 471) 9
(1925) 2 KB 43: (94 LJKB 479) 7
(1898) 1 QB 669 8
(1898) 2 QB 680: (68 LJQB 24) 8
(1795) 6 Term Rep 168 9

RAMASWAMI, J.: In this case the petitioner Babul Chandra Mitra has asked for a rule calling upon the High Court on the administrative side to show cause why a writ or direction under Article 226 of the Constitution should not be issued commanding that the petitioner should be enrolled as an Advocate.

(2) The application is founded upon the following facts. Babul Chandra Mitra obtained the degree of Bachelor of Law from Patna University in the year 1937. Next year he applied for being enrolled as a Pleader to practise at Mozaffarpore. The application was rejected by the High Court. In 1939 and again in 1943 the applicant asked for reconsideration of his case. But the High Court considered that there was no reason to alter the previous decision and that the enrolment was properly refused. In 1945 the applicant joined the chambers of the late Srinarain Bose, Advocate, and pursued studies for a period of one year. On 9th October 1950 he applied to the High Court for being enrolled as an Advocate and attached to his application three certificates of good conduct. On 8th January 1951 the application was rejected by the High Court without giving notice of the application to the Bar Council. The petitioner contends that in making this order the High Court has acted contrary to law and that the fundamental right of the petitioner to practice a profession has been violated.

(3) In this proceeding the validity of the order of the High Court is challenged on the grounds: (1) that the application for enrolment could not lawfully be rejected without making a reference to the Bar Council under Rule 9 of the Bar Council Rules; (2) that in any case the proviso to Section 9 (1) of the Bar Councils Act was constitutionally invalid since the High Court was granted power to refuse admission to any person in its unfettered discretion and so violated the guarantee under Article 19 (1) (g) of the Constitution.

(4) The preliminary question which arises is whether in the present case this Bench has jurisdiction to issue a writ or order to the High Court on its administrative side.

(5) In the approach to this question it is necessary to consider the relevant provisions of the Indian Bar Councils Act and Letters Patent of the Patna High Court. Under Section 8 of the Indian Bar Councils Act no person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the Advocates of the High Court maintained under the Act. Section 8 (2) requires that the High Court shall prepare and maintain a roll of Advocates of the High Court in which shall be entered the names of ....(b) all ....persons who have been admitted to be Advocates of the High Court under this Act. Under Section 9 the Bar Council may, with the previous sanction of the High Court, make rules to regulate the admission of persons to be Advocates of the High Court. But there is an important proviso that such rules shall not limit or in any way affect the power of the High Court to refuse admission to any person at its discretion. Clause (7) of the Letters Patent is also material in this context:

> "And we do hereby authorise and empower the High Court of Judicature at Patna to approve, admit and enrol such and so many Advocates, Vakils and Attorneys, as to the said High Court may seem meet, and such Advocates, Vakils and Attorneys shall be and are hereby authorised to appear for the suitors of the said High Court and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions."

(6) The question at issue is whether this Bench has jurisdiction in the present case to issue a writ or direction to the High Court in its performance of functions under the Par Councils Act or under the Letters Patent. It was argued by Mr. B. C. Ghosh on behalf of the petitioner that Article 226 of the Constitution is couched in wide terms and the High Court has jurisdiction to issue to 'any person or authority' direction or order or writ for the enforcement of any fundamental right. In support of his argument counsel laid much stress upon the phrase 'any person or authority' in the Article. In my opinion the argument proceeds upon a misconception, and there is no warrant for construing Article 226 in the manner suggested by the learned counsel. It cannot surely be right to say that High Court can issue a writ or order directly to itself to quash an order made by itself. It is immaterial whether in making the order, the High Court acts in a judicial or administrative role. Under Article 226 (1) the High Court shall have power to 'issue' to any person or authority directions. orders or writs. It is apparent that a writ cannot be issued by the High Court to itself for the process involves rather the absurd position that it calls upon the Judges to show cause to themselves why they should not be directed to quash something they themselves have determined. It is also manifest on principle that a Judge is without jurisdiction to issue a writ or order to another Judge of co-ordinate jurisdiction and power to compel performance of duties. The very nomenclature of the writs — "mandamus, certiorari, prohibition" implies superior power — the power of a superior authority to compel an official or an inferior tribunal to act in a certain manner. The same reason which prohibits an inferior Court from controlling the conduct of a superior tribunal applies in equally cogent manner to the effort of one Judge to compel the action of another Judge of co-ordinate jurisdiction and power. It is manifest in the present case that this Bench has no jurisdiction to issue any writ or direction or order to the High Court requiring it to enrol the petitioner as advocate or even to reconsider his application for enrolment.

(7) This opinion is supported by authorities. In 'REX v. JUSTICES OF THE CENTRAL CRIMINAL COURT', (1925) 2 K B 43, the question arose whether the King's Bench Division of the High Court of Justice had jurisdiction to issue a writ of certiorari for the purpose of removing into that Court an order of the Central Criminal Court with a view to its being quashed. The order in question was made under Section 20 of the Central Criminal Court Act of 1834 which empowered the Central Criminal Court to settle the fees and allowances or salaries to be paid to its officers. In consequence of the passing of the Local Government Act, 1888, it became necessary to determine by whom and in what proportion and manner the said salaries and expenses should be paid. The Judges of the Central Criminal Court ordered that the salaries and expenses should be paid by the treasurers of the counties of London, Middlesex, Surrey and Essex in certain proportions. By another order the Central Criminal Court directed that a sum of £1,000 due to Herbert Austin, clerk of the Court, as an honorarium for certain services should be paid forthwith by the treasurers of the said counties in the same proportions. Against this order of the Central Criminal Court the London County Council asked for a writ calling upon the Central Criminal Court to show cause why a writ of certiorari should not be issued.

The Attorney-General objected at the hearing that the King's Bench Division had no jurisdiction to issue a writ of certiorari since the Court of Assize was a superior Court. But it was contended on behalf of the London County Council that the Central Criminal Court when acting under Section 20 was not exercising the powers of a Court of Oyer and Terminer, but powers of a purely statutory and administrative character as an inferior Court. The argument was rejected by the King's Bench and it was held that there was no jurisdiction to issue a writ of certiorari to bring up an order of the Central Criminal Court so that it might be quashed. At page 60, Avory, J., states:

> "That proposition, I understand, is not disputed by Sir Leslie Scott, but he says either that the Central Criminal Court is an inferior Court within the meaning of that rule, or, if it is not for all purposes an inferior Court that for the purpose of exercising its jurisdiction under Section 20 of the Act of 1834 it is an inferior Court, which is subject to the overriding jurisdiction of this Court. At first sight one would say that it cannot be correct to assert that any Court can issue a writ of certiorari directed to itself to quash an order made by itself. That, however, is what the proposition advanced in support of this motion comes to. All the Judges of this Court are Judges of the Central Criminal Court, who by Section 2 of the Act of 1834 are to use and exercise all powers and authorities belonging to Justices of oyer and terminer and gaol delivery.' The order in question, because it is an order of the Central Criminal Court, must, therefore, be presumed to be made by Judges of this Court. It matters not by which two particular Judges the order is signed, for being an order of the Central Criminal Court it is in effect an order of the Judges of this Court."

(8) Reference should also be made to 'SKINNER v. NORTHALLERTON COUNTY COURT

JUDGE', (1898) 2 Q B 680, in which a similar question arose. In that case the Queen's Bench Division had discharged a rule nisi for the issue of a writ of certiorari to bring up an order of the County Court Judge at Northallerton sitting in Bankruptcy, and on appeal, Vaughan Williams, L. J., said:

"The cases in which a certiorari has gone to bring up the order of an inferior Court exceeding its jurisdiction even where a certiorari has been taken away by statute, do not seem to me to touch the present case, because the basis of the decision in 'In re NEW PAR CONSOLS (No. 2), (1898) 1 Q B 669, was that the Judge of the County Court exercising jurisdiction in a matter in which the statute gave him seisin was not an inferior Court, because in such a matter the statute gave him all the powers of a Judge of the High Court: 'SKINNER v. COUNTY COURT JUDGE OF NORTHALLERTON', (1898) 2 Q B 680 at p. 686."

A little later on he said:

"A judge of the High Court in the exercise of his jurisdiction cannot be controlled by writs of prohibition or certiorari, but only by appeal; and if the County Court Judge in the exercise of bankruptcy jurisdiction is, as would seem to be the case from the decision in 'In re NEW PAR CONSOLS (No. 2), placed on an equal footing, he is Judge of law and fact, and his judgments are subject to appeal only, and cannot be reviewed by certiorari."

(9) It was contended by Mr. Ghosh in the alternative that a writ or direction may be issued or directed to the Assistant Registrar of the High Court. It was pointed out by the learned counsel that the Assistant Registrar had by his letter dated 8th January 1951, communicated to the petitioner the order that his application has been rejected. It was argued that the Court has jurisdiction to issue a writ to the Assistant Registrar. Learned counsel relied upon 'ASWINI KUMAR GHOSH v. ARABINDO BOSE', 56 Cal W N 145, but the material facts of that case were wholly different. On principle, it is difficult to hold that a writ of mandamus could be granted against one who is an inferior or ministerial officer bound to obey the orders of the higher authority to compel him to do something which is part of his duties in that capacity. The principle is sustained by authorities.

In 'KING v. BRISTOW', (1795) 6 Term Rep 168, the Court of the King's Bench refused to grant a mandamus to a ministerial officer, such as the treasurer of a county, to obey an order of the Court of Quarter Sessions; holding the proper remedy in case of his refusal to obey such order was by indictment. Lord Kenyon, Ch. J., said:

"It has been often said by Lord Mansfield that a mandamus was a very beneficial writ, and that the best method of preserving it was to be sparing in the use of it. That caution cannot be more properly applied to any case than the present; though there does not appear to me to be any great difficulty in it. This Court has no difficulty upon a proper case laid before them in granting a mandamus to justices to make an order, when they refuse to do their duty. But it would be descending too low to grant a mandamus to inferior officers to obey that order; we might as well issue such a writ to a constable, or other ministerial officer, to compel him to execute a warrant directed to him, as to grant this application to the treasurer to obey the order in question."

To a similar effect is 'KING v. JEYES' (1835) 3 Ad & El 416 in which the Court refused to grant a mandamus to compel the treasurer of a district to pay the expenses of a prosecution for misdemeanor, in obedience to the order of the Court of Assize. Lord Denman, C. J., observed that "the defendant was servant of the magistrate and the Court refused to place itself in the situation of the magistrate to make their officer perform his duties."

(10) In view of these considerations I am of opinion that this application must be dismissed.

(11) It is right to add that in the course of argument we suggested to Mr. B. C. Ghosh that the present application may be presented to the High Court on its administrative side under Rule 9 of the Bar Councils Rules for reconsideration of its order. But learned counsel insisted that the matter should be considered and dealt with by the High Court in exercise of its jurisdiction under Article 226 of the Constitution.

(12) REUBEN, J.: I agree, but wish to add a few words explaining a matter on which Mr. Basanta Chandra Ghosh has laid some stress. On the 8th January 1951 the Assistant Registrar of the High Court wrote to Mr. Babul Chandra Mitra informing him that his application had been rejected (page 14 of the paper-book). On applying for a copy of the order of the High Court Mr. Mitra was given a copy of a minute dated the 3rd January (1951) signed by the Hon'ble the Chief Justice: "I see no reason to modify the previous decisions." (Page 10 of the paper-book). On a further application being made by him the office of the High Court reported "that there was no previous decision under the Bar Councils Act." (Page 15 of the paper-book). From these facts Mr. Ghosh has argued that there was no order by the High Court rejecting the application of his client, and that the Assistant Registrar acted without authority in issuing his letter of the 8th January 1951. It was for this reason that Mr. Ghosh suggested the issue of a direction under Artice 226 against the Assistant Registrar.

(13) The argument is based on a misconception. The application of Mr. Mitra was circulated to the Full Court, that is to say, to all the Judges, and each Judge recorded in a separate minute his opinion as to the proper order to be passed on the application. What the office in granting a copy has treated as the order of the Court is the minute recorded by the Hon'ble the Chief Justice. This is not necessarily the decision of the Court. According to the practice of the Court, the decision is the opinion of the majority of the Judges as recorded in their minutes, and this is the decision which has been communicated by the Assistant Registrar in his letter of the 8th January 1951. In view of the office note at page 15 of the paper-book some clarification of the minute of the Hon'be the Chief Justice is called for. Several applications were filed by Mr. Mitra. There were three applications first of all for enrolment as a Pleader. They were all rejected by the Court. Then there were two applications for enrolment as an Advocate of the High Court. The first was withdrawn by him in February 1947. The second was the one to which the minute relates. When the second application was circulated to the Full Court references were given to the minutes dealing with the previous applications. It was with reference to these minutes the majority of which were against Mr. Mitra's enrolment that the Hon'ble the Chief Justice observed that he saw "no reason to modify the previous decisions."

Though strictly speaking there was no previous decision under the Bar Councils Act, the previous application for enrolment as an advocate having been withdrawn, what the Hon'ble the Chief Justice meant is clear and his opinion was in agreement with the majority of the Full Court.

(14) SINHA, J.: I agree that the application should be dismissed on the ground that this Court cannot issue any of these prerogative writs on the Judges of the High Court on its administrative side as they are not inferior to this Court sitting on the judicial side. Almost all the Judges of this Court had expressed themselves one way or the other when the application of the applicant for enrolment as an Advocate was being circulated to the members of this Court, and the issue of any one of these writs will amount to issuing these writs against our ownselves; that would be a ridiculous position indeed. Mr. Ghosh having realised this difficulty contended that the writ asked for be issued against the Assistant Registrar of this Court who should be commanded to withdraw the communication of the decision of this Court made to the petitioner. The Assistant Registrar, acting in discharge of his duties, had only communicated the decision of the Full Court to the petitioner and for obvious reasons no such writ could be issued to the Assistant Registrar.

V.B.B. *Application dismissed.*

A I. R. 1952 Patna 312

RAI J.

Ramautar Mahton and others, Appellants v. Latak Bihari Singh and others, Respondents.

A. F. A. D. Nos. 1997-99 and 2141 of 1948, D/-5-4-51.

(a) Tenancy Laws—Bihar Tenancy Act (VIII (8) of 1885), Ss. 1(3), 19(1) and (2), 25 and 155 — Tenant in cultivating possession of land for more than twelve years — Land within municipality — Acquisition of status of occupancy 'raiyat.'

The notification mentioned under Section 1(3) of the Act really means a notification regarding the exclusion of an area within municipality from the purview of the Act. Therefore, unless the whole or portion of an area comprised within a municipality is noticed to have been exempted from the operation of the Act, the provisions of the Act will apply to the lands within a municipality also. A tenant, therefore, who remains in cultivating possession of a land within a municipality for more than twelve years will be deemed to have acquired the status of an occupancy raiyat and as such he cannot be ejected unless the case is brought within the four corners of Sections 25 and 155 of the Act. AIR 1942 Pat 325, Not foll. (Paras 5, 6)

(b) Transfer of Property Act (1882), S. 58 — 'Zarpeshgi' lease — Lessee is not mortgagee.

A mortgage deed is always executed by a mortgagor. Where therefore a person on payment of a 'Zarpeshgi' amount takes settlement of a land by a registered Kabuliyat and agrees to pay annual rent, the Kabuliyat does not confer on such person the status of a mortgagee and the landlord cannot get possession of the land on paying the 'zarpeshgi' amount to him. (Para 15)

Anno: T. P. Act, S. 58 N. 36.

Thakur Prasad, Shivanandan Prasad and A. N. Chakravarty, for Appellants; Rajkishore Prasad and Shivanugrah Narain, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras.

('42) AIR 1942 Pat 325: (199 Ind Cas 421) 5, 13

('48) 27 Pat 194: (AIR 1949 Pat 444) 5

JUDGMENT: In all these appeals the defendants are the appellants. As one of the matters under consideration is common to all these appeals, they have been made analogous in this Court. The suit and the appeals before the lower appellate Court also had been heard together and they are governed by the same judgment.

(2) I propose to deal, first with S. A. 1997-99 of 1948. These three appeals arise out of three title suits filed for realization of arrears of rent for the years 1349 to 1352 'Fasli' and for ejectment of the defendants-appellants. The case of the plaintiffs was that the area concerned in each of the three suits was included within the Patna City Municipality. The lands had been settled with the ancestors of the defendants for cultivation sometimes before the year 1900, on annual rentals. The plaintiffs alleged that the defendants were merely tenants at will and they were liable to be ejected whenever the plaintiffs chose to do so.

(3) The suits were contested by the defendants. Their plea was that they had acquired a right of occupancy in the lands in suits from which they could not be ejected. They further pleaded that the plaintiffs had given in their plaint false rentals for the holdings in suits.

(4) The tral Court allowed the claim of the plaintiffs for ejectment and for arrears of rent at the rate admitted by the defendants. On appeal by the defendants the judgment and the decree of the trial Court were confirmed. Both the Courts below held that as the lands in suit lie within the Patna City Municipality the provisions of Bihar Tenancy Act do not apply to these cases. The defendants have come in second appeal before this Court.

(5) In this Court the learned Counsel for the appellants contended that the Courts below were wrong in holding that the provisions of the Bihar Tenancy Act do not apply to this case. He urged that the decision of a single Judge of this Court in the case of 'PHULCHAND v. MRS. NATEE MIRZA', AIR 1942 Pat 325 relied upon by both the Courts below has been overruled in the case of 'SHRIKISHUN LAL v. HARIHARSAB', 27 Pat 194. He further contended that the provisions of sub-s. (3) of S. 1 Bihar Tenancy Act make it clear that unless the whole or portion of an area comprised within a municipality is notified to have been exempted from the operation of the Bihar Tenancy Act, the provisions of the Act will apply to the lands within a municipality also. Section 1 sub-s. (3) of the Bihar Tenancy Act runs thus:

"1(3). It shall extend to the districts of Patna, Gaya, Shahabad, Mizaffarpur, Saran, Champaran, Darbhanga, Bhagalpur, Monghyr and Purnea. except an area constituted, or deemed to have been constituted, a municipality, under the provisions of the Bihar & Orissa Municipal Act, 1922, or 'part thereof', if such area is specified in a notification issued in this behalf by the Provincial Government."

(6) According to this submission, therefore, the defendants having remained in cultivating possession of the lands in suit for more than twelve years, will be deemed to have acquired the status of an occupancy 'raiyat' and as such they cannot be ejected unless the case is brought within the four corners of Ss. 25 and 155 of the Bihar Tenancy Act which run thus:

"25. An occupancy raiyat shall not be ejected by his landlord from his holding, except in execution of a decree for ejectment passed on the ground

(a) that he used the land comprised in his holding in a manner which renders it unfit for the purposes of the tenancy, or

(b) that he has broken a condition consistent with the provisions of this Act, and on breach of which is, under the terms of a contract between himself and his landlord, liable to be ejected."

"155(1) A suit for the ejectment of a tenant, on the ground

(a) that he has used the land in a manner which renders it unfit for the purposes of the tenancy, or

(b) that he has broken a condition on breach of which he is under the terms of a contract between him and the landlord, liable to ejectment, shall not be entertained unless the landlord has served, in the prescribed manner, a notice on the tenant specifying the particular misuse or breach complained of, and, where the misuse or breach is capable of remedy, requiring the tenant to remedy the same, and, in any case, to pay, reasonable compensation for the misuse or breach, and the tenant has failed to comply within a reasonable time with that request.

2. A decree passed in favour of landlord in any such suit shall declare the amount of compensation which would reasonably be payable to the plaintiff for the misuse or breach and whether, in the opinion of the Court, the misuse or breach is capable of remedy, and shall fix a period during which it shall be open to the defendant to pay that amount to the plaintiff, and where the misuse or breach is declared to be capable of remedy, to remedy the same.

3. The Court may, from time to time, for special reasons, extend a period fixed by it under sub-s. (2).

4. If the defendant, within the period or extended period (as the case may be) fixed by the Court under this section, pays the compensation mentioned in the decree, and where the misuse or breach is declared by the Court to be capable of remedy, remedies the misuse on breach to the satisfaction of the Court, the decree shall not be executed."

(7) In my opinion, this contention appears to be well founded in law.

(8) Mr. Raj Kishore Prasad, the learned Counsel for the plaintiffs-respondents, however, contended that the notification contemplated by S. 1(3) of the Bihar Tenancy Act meant only a notification issued for including a particular area within a municipality and not a notification excluding any area within a municipality from the operations of the Bihar Tenancy Act. According to him on this interpretation of the sub-section, as the Patna City Municipality had been coming in existence since before the passing of the Bengal Tenancy Act of 1885 it would not apply to any area within that municipality because there will arise no occasion after the passing of the Act to issue a notification constituting that Municipality. In my opinion there is no force in this argument. What notification was contemplated to be issued in accordance with the provisions of sub-s. (3) of S. 1 of the Act is further clarified by the provisions of S. 19, sub-s. (1) and (2) of the Bihar Tenancy Act which run as follows:

"19(1) Every raiyat, who, immediately before the commencement of this Act or the Bengal Tenancy (Amendment) Act, 1907, has, by the operation of any enactment, by custom or otherwise, a right of the occupancy in any land, shall, when this Act or the Bengal Tenancy (Amendment) Act, 1907 comes into force, have a right of occupancy in that land.

2. The exclusion from the operation of this Act, by a notification under sub-s. (3) of S. 1 of any area constituted or deemed to have been constituted a municipality under the provisions of the Bihar and Orissa Municipal Act, 1922, or of any part of such area, shall not affect any right, obligation or liability previously acquired, incurred or accrued in reference to such area."

From the wordings of sub-s. (2) quoted above, it is clear that the notification mentioned under S. 1(3) of the Act really meant a notification regarding the exclusion of an area within a municipality from the purview of the Bihar Tenancy Act. Besides this, if the intention of the legislature would have been to exclude the entire municipal area from the purview of the Bihar Tenancy Act, then it was not necessary to use the words "or part thereof" in that sub-section. The use of these words clearly indicate that a portion of the area included within a municipality can be excluded by a notification. In this view of the matter, in my opinion, the Courts below were wrong in holding that the provisions of the Bihar Tenancy Act do not apply to the present case. The defendants appellants have admittedly been in cultivating possession of the lands in suit for more than twelve years and as such they will be deemed to have acquired the right of occupancy in them. The claim for ejectment should have, therefore been disallowed. The defendants do not challenge the decrees of the Courts below concerning the arrears of rent decreed by them.

(9) The result is that the judgments and decrees of the Courts below are modified, the claim for ejectment is disallowed and these appeals are allowed with costs throughout.

(10) 'Second Appeal 2141 of 1948', has been preferred by the heirs and legal representatives of the defendant of Title suit No. 158 of 1945 which had been instituted for realization of the arrears of rent from 1347 to 1352 'Fasli' and also for ejectment of the defendant.

(11) The case of the plaintiffs was that on the 25th of June, 1923 the defendant Narain Mahto, on payment of a 'zarpeshgi' amount of Rs. 43/- took settlement of 2 'bighas' 8 'kathas' of land by a registered 'kabuliat' agreeing to pay an annual rental of Rs. 57. After sometime Narain Mahto took settlement of a further area of 3½ 'kathas' on an annual 'jama' of Rs. 7. Thus, the total 'jama' payable by him came to Rs. 64 per year.

(12) The defence, 'inter alia', was that the defendant could not be ejected, as he had acquired the right of occupancy in the lands in suit.

(13) The trial Court decreed the suit holding that the defendant had not acquired any right of occupancy in the lands in suit, which lies within the Patna City Municipality. Relying on the

decision in the case of 'PHULCHAND v. MRS. NATEE MIRZA', AIR 1942 Pat 325 supra it held that the provisions of the Bihar Tenancy Act do not apply to this case. The judgment and the decree of the trial Court were affirmed on appeal.

(14) I have already held above that the view of the Courts below on this point was wrong. As the defendant had been in cultivating possession of the lands in suit for more than twelve years, he will be deemed to have acquired right of occupancy in the lands and he cannot be ejected in the present action.

(15) On the strength of an observation made in the judgment of the trial Court that the possession of the defendant might be that of a mortgagee, the learned counsel for the plaintiffs-respondents submitted that the defendant will have to vacate the lands after the 'zarpeshgi' amount of Rs. 43 is paid to him. But, I fail to understand how the registered 'kabuliat' dated the 25th of June, 1923, executed by Narain Mahton will confer on him the status of a mortgagee. A mortgage deed is always executed by the mortgagor. In this view of the matter, it cannot, for a moment, be urged that the plaintiffs can get possession after paying Rs. 43 to the defendant.

(16) The Courts below have further committed an error of law in decreeing the claim for arrears of rent for six years under the impression that the claim of the plaintiffs to realise the arrears was based on the registered 'kabuliat' dated the 25th of June 1923. But really it is not so. According to the case of the plaintiffs themselves the 'jama' claimed had been arrived at by amalgamating the area originally settled with another area of 3½ 'kathas' taken on a rental of Rs. 7 per year. This amalgamated holding is a new holding and the claim for arrears of rent of this new holding cannot be referable to the registered 'kabuliat' dated the 25th of June, 1923. In this view of the matter the claim for arrears of rent should have been decreed only for four years.

(17) The result is that the judgment and the decree of the Courts below are modified. The claim for ejectment of the defendant is hereby disallowed. The plaintiffs are not entitled to get a decree for the arrears for the years 1347 to 1348 'Fasli'.

(18) The suit is decreed in part for the arrears of rent for four years only. This appeal is thus allowed in part. The defendant will get costs of all the Courts.

(19) The plaintiffs-respondents have filed cross-objections in second appeal 1997 and 1999 of 1948. These cross-objections relate to the rate of rent. In Second Appeal 1999 of 1948 which arises out of Title suit No. 157 of 1945 the plaintiffs had claimed the annual 'jama' of 196/3/6. According to the defendants, the annual 'jama' was Rs. 72 and odd only. Both the Courts below have decreed the suit on the 'jama' admitted by the defendants.

(20) Mr. Rajkishore Prasad, the learned Counsel for the plaintiffs submitted that his clients had filed several papers to show that other tenants in the locality pay a rent of Rs. 2 per 'katha' according to the custom prevalent in the locality. But in spite of such papers both the Courts below have accepted the rate of rent admitted by the defendant. There is no error of law in the view taken by the Courts below. This cross-objection, therefore, must fail.

(21) The other cross-objection relates to S. A. 1997 of 1948, which arises out of Title suit No. 160 of 1945. In this case the 'jama' claimed by the plaintiffs was Rs. 32/2/6, while, according to the defendant, the 'jama' for the holding was only Rs. 6/8/-. Both the Courts below have accepted the 'jama' admitted by the defendant.

(22) In this Court Mr. Rajkishore Prasad relied upon Ex. 7, a copy of an application under S. 112A of the Bihar Tenancy Act said to have been served on his clients. In that paper Rs. 18 is mentioned as the 'jama' payable. He submitted that the suit should have been decreed at least at the rate of Rs. 18 per year as mentioned in Ex. 7. Both the Courts below have rightly not relied upon this document. After examination, I find that Ex. 7 relates to plot No. 2200 while title suit No. 160 of 1945 is in respect of plot No. 2201. In this view of the matter, the Courts below were right in not relying upon Ex. 7.

(23) The result is that both the cross-objections are dismissed with costs.

V.R.B. Order accordingly.

A. I. R. 1952 Patna 314

RAMASWAMI AND SARJOO PROSAD JJ.

Govind Dutta, Appellant v. Jagnarain Dutta and others, Respondents.

A. F. O. D. No. 398 of 1946, D/- 2-3-51.

Limitation Act (1908), Arts. 142 and 144 — Suit on possessory title.

Possession is good title against all but the true owner and a person in peaceable possession of land has, as against every one but the true owner, an interest capable of being inherited, devised or conveyed. 20 Cal 834 (PC); 12 All 51 (PC); (1865) 1 QB 1, Foll. (Para 4)

Anno: Lim. Act, Arts. 142 and 144 N. 4.

Lalnarain Sinha and L. S. Sinha, for Appellant; B. C. De and R. K. Sinha, for Respondents.

REFERENCES: Courtwar/Chronological/	Paras.
('90) 12 All 51: (16 Ind App 186 PC)	4
('93) 20 Cal 834: (20 Ind App 99 PC)	5
(1865) 1 QB 1: (35 LJQB 17)	4

RAMASWAMI, J.: In the suit which is the subject of this appeal the plaintiff claimed that he was entitled to 16 annas share of Jagir of village Mardua, tauzi No. 2671. The plaintiff alleged that he was grandson of Bhikhari Missir, the previous Raj Purohit, that after the death of Bhikhari Missir his widow Mt. Tota Kuer inherited all his properties. The relationship of the parties will appear from the following pedigree:

BHIKHARI MISSIR = MT. TOTA KUER

Sunderbaso Kuer | Sita Kuer | Sonjhari Kuer = Rewa Dutt

Govind Dutt (Plff). | Gangadutt.

On 8th June 1901, a deed of agreement was executed between Govinddutt and Rewadutt and Mt. Sundarbaso as a result of which Rewadutt was given 4 annas share in properties belonging to Bhikhari Missir. In Aghan 1334 Fs. Ambika Singh father of Kumar Gopal Saran Narain Singh died. The plaintiff officiated as priest at the sradh and defendant No. 5 the Kumar granted to the plaintiff 16 annas proprietary share in village Mardua, tauzi No. 2671, as jagir by making sankalp and samarpan. Rewadutt had no title over any share of Mardua jagir but nevertheless

he created a lease in favour of defendant No. 3 with respect to 8 annas share of the jagir. Rewadutt died in Katick 1349 Fs. and after his death defendants 1 and 2 who are his heirs interfered with the possession of the plaintiff. Plaintiff further alleged that defendants 1 and 2 had executed a fraudulent kebala in favour of defendant No. 4 with respect to 3 annas share. The plaintiff hence brought the suit for declaration of his title to eight annas share of the jagir of village Mardua and for recovery of possession thereof.

The main ground of defence was that Kumar Gopal Saran Singh had given village Mardua as jagir in equal shares to plaintiff and Rewadutt. After the death of Rewadutt defendants 1 and 2 had been in possession of 8 annas share either direct or through thicadars. It was asserted that the lease executed in favour of defendant No. 3 and the kebala executed in favour of defendant No. 4 were genuine and valid. The learned Subordinate Judge accepted the case of the defendants holding that at the time of the sradh, the Kumar had granted Jagir of village Mardua to the plaintiff and Rewadutt in equal shares. that the plaintiff was not entitled to a declaration of his right with respect to 8 annas share granted to Rewadutt. The learned Subordinate Judge accordingly dismissed the suit.

(2) On behalf of the plaintiff who has preferred this appeal Mr. Lalnarain Sinha conceded 'in limine' that upon the state of the evidence the plaintiff was entitled to claim only 12 annas share of the jagir of village Mardua and that the plaintiff would not press his claim for 16 annas share as stated in the plaint. Learned counsel conceded that upon the proper construction of the deed of agreement dated 28th June 1901 (Ex. 4) Rewadutt had 4 annas share and Govinddutt 12 annas share in the jajmanika birit. Learned counsel stressed the argument that at the time of the sradh the Kumar had made gift of the jagir to the Raj Purohit without specifying the exact share of Rewadutt or Govinddutt. It was contended that the learned Subordinate Judge ought to have accepted the plaintiff's evidence and held that village Mardua was granted in jagir to the Raj Purohit and in consequence the plaintiff had 12 annas share in village Mardua and Rewadutt had the remaining 4 annas share. In my opinion, the argument addressed by the learned counsel is well-founded and must succeed. (After discussion of the evidence the Judgment proceeded:) In my opinion, the evidence adduced on behalf of the plaintiff is much superior to that given on behalf of the defendants and the finding of the learned Subordinate Judge that Rewadutt was given eight annas share of Mardua at the time of the Saradh cannot stand. I would accept the evidence adduced on behalf of the plaintiff and hold that at the time of the saradh Maharaj Kumar Gopal Saran Singh made a gift of village Mardua to the Raj Purohit without specifying what share Govinddutt or Rewadutt ought to enjoy therein.

(3) But there is sufficient evidence on the record to suggest that after the gift was made, Govinddutt and Rewadutt jointly entered into possession of village Mardua, Govinddutt appropriating 12 annas share of the income and Rewadutt the remaining 4 annas share. (After discussion of the evidence the judgment proceeded:)

(4) Upon this finding the question arises whether the plaintiff is entitled to a decree in ejectment. Mr. B. C. De pointed out on behalf of the respondents that the gift made by Maharaj Kumar Gopal Saran Singh ought to have been made by registered document under S. 123 of the T. P. Act, that since the gift was oral neither the plaintiff nor the defendants acquired any title to the property in dispute. Learned counsel therefore contended that the plaintiff not having proved his title ought not to be granted a decree in ejectment. Learned counsel urged that even with respect to the 12 annas share of village Mardua plaintiff cannot be granted a decree for joint possession with the defendants since no title by adverse possession has been specifically raised in the pleadings and no issue has been framed in the trial court. Learned counsel stated that there was no evidence to show that the plaintiff had asserted hostile title to 12 annas share of village Mardua openly and to the knowledge of Maharaj Kumar of Tikari Raj. In my opinion the argument of the learned counsel is misconceived and untenable. The question in this case is not whether plaintiff had established any title by 'adverse' possession to twelve annas share of Mardua jagir. The question is whether the plaintiff had a possessory title or interest in the estate of 12 annas share for which he ought to be granted a decree for joint possession with the defendants. The principle applicable is that possession is good title against all but the true owner and a person in peaceable possession of land has, as against every one but the true owner, an interest capable of being inherited, devised or conveyed; see 'ASHER v. WHITLOCK', (1865) 1 QB 1 at p. 6.

The rule of English law that possession is good title against all but the true owner was adopted and enforced by the Judicial Committee in 'SUNDAR v. PARBATI'. 12 All 51 (PC). The question in that case was as to the right to possession and partition between the plaintiff and defendant, of two widows of Baldeo Sahay, who having no child by either wife, adopted in 1875 his sister's son, Premsukh, to whom he also bequeathed his estate. Baldeo died in 1878, the widows taking the management of his property and maintaining the minor adopted son, who died in the following year 1879. The widows' names were entered as joint proprietors of the village lands which had been Baldeo's by orders of the revenue authorities in April 1880. On 15th May 1883, Sundar, the junior widow, sued the elder, Parbati, for a decree for partition, and complete possession, of a half share of the estate. The elder widow denied the plaintiff's right to separate possession, alleging that she herself, as the elder, was entitled to be manager of the whole estate. The Subordinate Judge decreed the claim directing partition but on appeal to the High Court the plaintiff's suit was dismissed on the ground that the widows could not maintain a suit founded on their possessory right to the property since they had not obtained any possession in their own right as widows of Baldeo Sahai. The Judicial Committee reversed the judgment of the High Court holding that the plaintiff was entitled to partition on the ground that the widows had a possessory title or interest in the estate, notwithstanding that a preferable title might exist in others through the deceased devisee; that the estate being jointly held by them was partible, and that either widow might maintain a suit for partition. Lord Watson observed at page 57:

> "If it were necessary to determine the point, their Lordships would probably have little difficulty in accepting the opinion of the High Court that a Hindu Brahman cannot lawfully adopt his own sister's son. But apart from that question and also from any question touching the legal effect of Baldeo Sahai's will, the fact of joint possession by the two widows of the estates which belonged to the testator, ever since the death of Premsukh in 1879,

appears to them to be sufficient for disposing of this suit in favour of the appellant. Their Lordships are at a loss to understand, at all events to appreciate the grounds upon which the Chief Justice endeavours to differentiate between the authorities which he cites, the import of which he correctly states, and the position of the parties to this action. Their possession was lawfully attained, in the sense, that it was not procured by force or fraud, but peaceably, no one interested opposing. In these circumstances, it does not admit of doubt that they are entitled to maintain their possession against all comers except the heirs of Premsukh or of Baldeo Sahai, one or other of whom (it is unnecessary to say which) is the only person who can plead a preferable title. But neither of those possible claimants is in the field, and the widows have therefore, each of them, an estate or interest in respect of her possession, which cannot be impaired by the circumstance that they may have ascribed their possession to one or more other titles which do not belong to them. It is impossible to hold that a joint estate is not also partible; and their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court ought to be reversed and that of the Subordinate Judge restored.'

(5) In 'ISMAIL ARIFF v. MAHOMED GHOUS', 20 Cal 834 (PC) the Judicial Committee reiterated the principle that lawful possession of land was sufficient evidence of right as owner, as against a person who has no title whatever, and that the plaintiff was entitled to a declaratory decree and an injunction restraining the wrong-doer from interfering with his possession.

(6) The position is extremely well put in the following passage in Pollock and Wright on Possession, page 95:

"It would be possible at first sight to suppose that, as between a succession of independent occupiers who were all wrongdoers as against the true owner, the law must be indifferent, with the result of conferring an absolute title upon the person who happens to be in possession when the time of limitation expires. Reflection, however, shews this to be contrary to the reason and principles of the law. Possession being once admitted to be a root of title, every possession must create a title which, as against all subsequent intruders, has all the incidents and advantages of a true title. William is the possessor and apparent owner of a house; in that house he dies; we will suppose him to die intestate. John, wrongly supposing himself to be entitled as the heir of William, enters and occupies the house. Peter is really William's heir, but ignorant of the facts; in course of time, having obtained information and advice, he sues John. It turns out that William had disseized Giles the true owner, by mere encroachment or in some other way, and would have had no answer to an action brought by Giles or his assigns to recover the land. But since William's death the period of limitation has expired, and the right of Giles is extinguished. Can John use this as a defence against Peter? No, for the statute has nothing to say, for better or worse, about the person in actual possession, or the relative worth of the qualified rights to possess which may have arisen while time was running against the true owner. It says that Giles, and those who have or would have had his estate, shall not from henceforth sue anyone. It does not say that Peter shall not sue John. Whether some one else has a higher title or not, Peter has a better title than John, as he would have had though the true owner's claim were still enforceable. In the language of the modern authorities, 'possession is good title' — nothing less 'against all but the true owner' ".

(7) In view of the principle established by the authorities I am of opinion that the plaintiff ought to be granted a decree to the effect that he is entitled to 12 annas share of the jagir of village Mardua and that he should be put in joint possession of this share along with the defendants 1 to 4 who are entitled to 4 annas share.

(8) Upon these grounds I would allow this appeal, set aside the decree of the lower Court and order that the plaintiff should be granted a decree as stated in the last paragraph. Since the plaintiff had instituted the suit with an exaggerated claim he will be granted only half the costs in both Courts. The suit will be dismissed against defendant No. 5, ex parte.

(9) SARJOO PROSAD, J.: I agree.

K.S. *Appeal allowed.*

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DAS AND SINHA J.

Indrasan Rai, Petitioner v. Enayat Khan and another, Opposite Party.

Criminal Revn. No. 1222 of 1951, D/- 21-12-1951.

(a) Criminal P. C. (1898), S. 144 — Powers under—Power to decide question of possession and title—Authority to take property from 'A' and make it over to 'B.'

Under Section 144, a merely summary power is given to prevent breach of the peace and it is never meant to give jurisdiction to a criminal Court to decide finally even the question of possession and much less to decide questions of title and ownership of a property. The provisions of the section do not entitle the Court to take a particular piece of property from the custody of 'A' and make it over to 'B'.

(Paras 5, 6, 14)

Anno: Cr. P. C., S. 144 N. 1 and 7.

(b) Criminal P. C. (1898), S. 561-A —Powers of High Court under — Scope — Power to order restitution.

The provisions of Section 561-A do not confer any inherent power which the Court did not possess before the section was enacted. All these powers mentioned in that section were possessed by the High Court, and this section merely embodies the inherent powers which the High Court used to exercise before this section was enacted. The High Court possesses the inherent power to right the wrong occasioned to any party by an act of the Court and to prevent abuse of the process of any Court and to act in a manner to secure the ends of justice. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved.

The High Court, acting under S. 561A, possesses the power to order restoration of property. This power must, however, be exercised in a case where there is no doubt left in the mind of the Court upon the materials placed before it about the right of the party seeking restitution. If this power is exercised in a doubtful case, instead of doing justice between the parties the Court will be acting unjustly with one of the parties if ultimately it is found by a competent Court of law that the property did belong to that party. In a straight case where there are no conflicting claims to the possession and ownership of the property, the High Court would be acting within its inherent power to restore that property if that has been removed from the possession of the owner under illegal and wrong orders of the Court. (Para 7)

Anno: Cr. P. C., S. 561A N. 1, 5.

(c) Criminal P. C. (1898), Ss. 517, 4 (1) (k) and 144 — "Inquiry" whether a proceeding under Section 144 can be called an "inquiry." (Quaere). (Para 9)

Anno: Cr. P. C., S. 517 N. 2; S. 4(1)(k) N. 2.

Baldeva Sahai and B. K. Sharma, for Petitioner; Sri Narain Sahai and Janeshwar Singh, for Opposite Party.

REFERENCES: Courtwar/Chronological/	Paras.
('23) 2 Pat 10: (AIR 1922 PC 269)	7
('45) AIR 1945 PC 18: (46 Cri LJ 413)	7
('08) 12 Cal WN 1044	8
('17) AIR 1917 Mad 629: (17 Cri LJ 190)	8
('27) 5 Rang 553: (AIR 1927 Rang 322: 28 Cri LJ 932)	8
(1871) LR 3 PC 465: (40 LJPC 1)	7

SINHA, J.: This is an application for setting aside the order of the Sub-divisional Officer of Buxar, dated the 6th/7th October, 1951, and for restoration of a truck numbered BRA 4720 which was seized by the police of Buxar under orders of the Sub-divisional Officer and made over to the opposite party in the circumstances to be presently mentioned.

(2) The petitioner Indrasan Rai of village Arjunpore, police station Buxar, claims to be the owner of the truck mentioned above which, according to him he had purchased from the Liberty and Company, Patna, sometime in the month of March 1951. It is alleged that Enayat and Ayub, son of Enayat, the opposite party, were the two 'karpardazs' of the petitioner looking after the affairs of the petitioner at home including the construction of a pucca house. The truck was employed in carrying bricks, sand, etc., to the petitioner's house and was always in his possession. The petitioner discovered on the 15th September 1951, that the opposite party had practised fraud upon the petitioner and had without his knowledge dishonestly got the truck registered in Ayub's name (one of the opposite party) and that the opposite party had a sinister design to misappropriate the truck. After the petitioner came to know of the dishonest design of the opposite party, the opposite party, to advance their fraudulent purpose, lodged a saneha at the Buxar police station on the 17th September 1951, to the effect that there was a quarrel between Indrasan Rai on the one hand and one Abdul Wahid Khan, the driver of the truck, on the other, for arrears of hire and thereupon the petitioner grew angry and was ready to create trouble and that, out of fear, Wahid Khan, left the truck with some papers concerning the truck near the house of Indrasan Rai. In the saneha the opposite party claimed to be the ower of the truck. On the 19th September, 1951, Ayub Khan filed a petition before the Sub-divisional Officer under Section 144, Criminal Procedure Code, and therein referred to the contents of the saneha lodged on the 17th September. One of the paragraphs in the said petition runs as follows:

> "That the S.I., Buxar after lodging saneha went to the spot and made enquiry but the said Indrasan Rai and his son Ramakant Rai have not allowed the truck to be taken to the P. S., and is even ready to commit breach of peace."

And the prayer portion ran as follows:

> "It is, therefore, requested that your honour would be pleased to kindly direct the S. I., to take the truck into his custody at once and be further pleased to release the same to the petitioner and for this the petitioner shall ever pray."

(3) On the 19th September 1951, the order-sheet shows: "To local police for enquiry and report by 25-9-1951." On the 22nd September time till 1-10-1951, was allowed to the petitioner, who was the opposite party to the application under Section 144, for production of documents relating to the truck. On the 1st October 1951, the report of the Police was not received, but the parties were heard, and the learned Sub-divisional Officer made the following order:

> "Ask the S.I., Police to send the truck subject-matter of dispute — to the Fort for custody till such time as the matter is disposed of. Put up on 6-10-1951 or earlier if the S.I. submits report."

According to the order-sheet, on 6th/7th October 1951, the learned Sub-divisional Officer, Mr. Saran Singh, passed the following order:

> "Action of the second party (viz., the petitioner before this Court) in wrongfully detaining the truck speaks of utter disregard of law. The first party is the real owner and is allowed to take the vehicle. Further interference by second party will be visited with stern action."

and later on the same date the second party was directed to deliver the key of the truck for its being handed over to the first party. On the very day on which this order was passed, an application was made by the petitioner to the learned Sub-divisional Officer for staying delivery of the truck to the opposite party as the petitioner was moving the higher Court, and the learned Sub-divisional Officer was pleased to pass the following order:

> "He should obtain a stay order from the appellate Court. The truck meanwhile will be handed over to the 1st party. It is fantastic to suggest that the latter will be damaging the truck. File with the record."

(4) The petitioner thereupon moved the learned District Magistrate of Shahabad. This application in revision before the District Magistrate was admitted on the 11th October 1951, and on that day the learned District Magistrate ordered: "Ask S.D.O., Magistrate to stay execution of orders until this application is disposed of." It appears that the petitioner had also filed a complaint against

Mr. Saran Singh, I.A.S., the Sub-Divisional Officer, Buxar, Mr. F. Ahmad, I.P.S., Assistant Superintendent of Police, Buxar, a Sub-Inspector of Police and some constables for making over illegally the truck to Ayub Khan and Enayat Khan and thus causing wrongful loss to the petitioner, and the learned District Magistrate by his order dated the 15th October 1951, held that no cognizance of the offence could be taken without the previous sanction of the Government, and against that order of the District Magistrate the petitioner had moved this Court where the Criminal Revision was pending. On the 29th October 1951, the District Magistrate said:

> "This case has arisen out of the same incident for which the petitioner brought a case against the Sub-divisional Magistrate, Buxar, and others. That matter is now before the Hon'ble High Court. A formal rule will issue. I do not think fit to proceed until the Hon'ble High Court has passed orders. This will be reported to the Hon'ble High Court when the rule is received."

And later the learned District Magistrate passed another order:

> "Indrasan Rai has filed a petition for seizure of the truck from Ayub Khan who has prayed that this should not be done. As the case against the S.D.O., is before the Hon'ble High Court, I think that the present status quo should be maintained. Inform Sub-Divisional Magistrate."

It is not understood why the learned District Magistrate could not have passed orders on that date upon the application of the petitioner as the other matter pending before this Court had nothing to do with the matter before him. The matter before him was whether or not the learned Sub-divisional Officer had jurisdiction to pass the order which he did and making over the truck to the other side, and the matter pending before this Court was in regard to the sanction of the Government before cognizance could be taken of the offence alleged against Mr. Saran Singh and others upon the complaint of the petitioner. The two matters were entirely different. It is regretted that the learned District Magistrate should have thought fit to postpone passing proper orders on that date. It is against the order of the learned Sub-divisional Officer dated the 6th/7th October 1951, that the petitioner has come up to this Court, and against the order of the District Magistrate, dated the 29th October 1951, in Criminal Revision No. 63 of 1951.

(5) It is a peculiar case of its kind where under Section 144, Criminal Procedure Code, a moveable property has been seized by the police under the orders of the Sub-divisional Officer and the same has been made over to one of the contesting parties. The provisions of Section 144 of the Criminal Procedure Code had absolutely no application to the facts of the present case. This section empowers the Magistrates mentioned in Sub-section (1) to act under this section to prevent apprehension of a breach of the peace where there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable. Upon the facts mentioned, there was no occasion for any apprehension of a breach of the peace between the parties and the application on which a proceeding under Section 144, Criminal Procedure Code, was started, only mentioned that the petitioner and his son "did not allow the truck to be taken to the P.S., and is even ready to commit breach of peace." The truck, at the time when the application under Section 144, Criminal Procecure Code, had been made to the Sub-divisional Officer. was in the custody of the petitioner and the opposite party were not residents of that village and, therefore, there was possibly no apprehension of a breach of the peace.

But the Sub-divisional Officer, being in charge of law and order in his sub-division, was the best Judge to find out whether there was or was not an apprehension of a breach of the peace. Conceding for a moment that there was an apprehension of breach of the peace and the Sub-divisional Officer had sufficient ground for proceeding under that section what he actually did could never have been contemplated by the provisions of the section. If he was of the opinion that there was sufficient ground for proceeding under this section and that immediate prevention or speedy remedy was desirable, he should have proceeded in the manner indicated in the section itself:

> "direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management."

The Magistrate, acting under Section 144, had no authority to seize the truck in question and take away the truck from the custody of the petitioner to the police station and thence to the Fort at Buxar or to anywhere else. No person can be deprived of the possession of his property except in accordance with law, and there was no provision contained in Section 144, Criminal Procedure Code, or in any other law, authorising the learned Sub-divisional Officer to act in the manner he did on the facts before him. To say the least, it was the most high-handed action of the Sub-divisional Officer which had no foundation in law. It was argued before us on behalf of the opposite party that, law or no law, the learned Sub-divisional Officer in charge of law and order in his Sub-division was in the right in seizing the truck and removing it from the custody of the petitioner to prevent breach of the peace. I really felt surprised when this sort of argument was addressed to us, and, if the learned Magistrate also harbours any such notion of his powers as the executive head of the sub-division he should disabuse himself of that notion and the sooner the better. If he was acting or purporting to act under the provisions of Section 144, he should have taken care to frame his order in the manner indicated in the section itself.

(6) His action in removing the truck in question from the custody of the petitioner, first to the police station and then to the Fort, was bad enough, but what was still worse, was to have decided the question of title by holding in express terms that the truck belonged to the opposite party and then delivering the vehicle to the opposite party. This amounts to an usurpation of jurisdiction which did not exist and the learned Magistrate should have known before long that under Section 144, Criminal Procedure Code, a merely summary power is given to prevent breach of the peace and it is never meant to give jurisdiction to a criminal Court to decide finally even the question of possession and much less to decide questions of title and ownership of a property. I do not like to waste any more time over the consideration of the question whether the Magistrate acted within jurisdiction, suffice it to say that the action of the learned Magistrate in starting the proceeding under Section 144, on the facts of this case, seizing the truck, taking it from the custody

of the petitioner, deciding the question of title as to the ownership of the truck, and then making it over to the opposite party, was wholly without jurisdiction, illegal and uncalled for and the order of the learned Sub-divisional Officer dated the 6th/7th October 1951, must be vacated and set aside.

(7) The next question is as to the powers of this Court under Section 561-A of the Code of Criminal Procedure. It is argued that under this section the High Court has inherent power:

> "to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

The provisions of Section 561-A do not confer any inherent power which the Court did not possess before the section was enacted. All these powers mentioned in that section were possessed by the High Court, and this section merely embodies the inherent powers which the High Court used to exercise before this section was enacted. There is no doubt in my mind that this Court possesses the inherent power to right the wrong occasioned to any party by an act of the Court and to prevent abuse of the process of any Court and to act in a manner to secure the ends of justice. It is inherent in the general jurisdiction of the Court "to act rightly and fairly according to the circumstances towards all parties involved" 'JAI BERHMA v. KEDAR NATH', 2 Pat 10. Cairns, L. C. in 'RODGER v. COMPTOIR d' ESCOMPTE De PARIS (1871) L R 3 P C 465, has expressed himself in regard to the inherent rights of the Court as follows:

> "One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression 'the act of the Court' is used, it does not mean merely the act of the primary Court, or of any intermediate Court of Appeal but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case."

In the case of 'EMPEROR v. NAZIR AHMAD', AIR 1945 P C 18, their Lordships have laid down that Section 561-A:

> "gives no new powers, it only provides that those which the Court already inherently possess shall be preserved and is inserted, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code and that no inherent power had survived the passing of that Act."

I, therefore, hold that this Court, acting under Section 561-A, possesses the power to order restoration of the truck in question to the petitioner. The question then is whether, in the circumstances of this case, the Court will exercise the power of restitution which is implicit in the inherent power of this Court. The inherent power of the Court to order restitution under Section 561-A, in my opinion, must, however, be exercised in a case where there is no doubt left in the mind of the Court upon the materials placed before it about the right of the party seeking restitution. If this power is exercised in a doubtful case, instead of doing justice between the parties the Court will be acting unjustly with one of the parties if ultimately it is found by a competent Court of law that the property did belong to that party. I am, therefore, firmly of the opinion that in a straight case where there are no conflicting claims to the possession and ownership of the property, this Court would be acting within its inherent power to restore that property if that has been removed from the possession of the owner under illegal and wrong orders of the Court.

In the present case both the parties claim ownership of the property, and both of them claim possession of the same. The matter of ownership, however, must be decided by the Civil Court, and I do not like to express any opinion about the ownership or even the possession of this property. In my judgment, on the facts of this case, it would not be right for this Court to order restoration of the truck in question to the petitioner.

(8) Mr. Baldeva Sahay, learned Counsel on behalf of the petitioner, cited several cases to support his contention that this Court should order restoration of the truck by ordering restitution to the petitioner. In the case of 'LEONGMOW v. TCHUN CHUN', 12 Cal WN 1044 it was held that under S. 144, Criminal P. C., the Court's custody of the articles in question was wholly without jurisdiction and that the High Court had the power to order that matters should be restored to exactly the same condition as the Magistrate found them in before he had passed the order for bringing the articles to the possession of the criminal Court. The facts in that case were entirely different. A dispute had arisen between the Secretary and members of a certain Church in Calcutta in regard to the money and properties belonging to that Church. With the consent of the parties, under S. 144, Criminal P. C., the contents of the safe and the account books were removed to the custody of the Court, and the High Court held that the custody of the Court was wholly without jurisdiction and ordered the contents of the iron safe and the account books to be placed in the same position in which they were before the order was passed. The contents of the iron safe and the account books undisputedly belonged to the Church and there were no counter claims in regard to the same. In the case of 'BHAGANATHI SERVAI v. VALAYEE', AIR 1917 Mad 629 the facts are not quite clearly stated. In this case the case reported in '12 Cal WN 1044', was followed, and it was held that the order of the Magistrate under S. 144, Criminal P. C., directing the village Munsif to be in possession of the property was without jurisdiction, and the High Court asked the Magistrate to direct the village Munsif to restore the properties to the parties from whom he or the police took possession. In the case of 'SHWE WA v. C. I. MEHTA', 5 Rang 553, also the facts were quite different. In that case the respondent had entrusted certain articles of jewellery with the one 'M' who had committed criminal breach of trust in respect of them and had pawned the articles in dispute at the pawn shop of appellant. These articles were seized by the police and produced before the Court in the trial under S. 406 against 'M'. 'M' was convicted and at the time of passing judgment the Magistrate directed that the articles in question should be returned to the complainant respondent. After the articles were made over to the respondent, the appellant, the owner of the pawn shop, applied for return of the articles and his application was rejected on the ground that the articles had already been returned to the complainant, and he appealed against that order to the High Court. The High Court directed the return of those articles made over to the complainant

respondent to the appellant. Their Lordships observed that

> "it is unjust to the appellant that he should be deprived of the possession to which he is entitled and should be placed in such a position that he must himself institute the civil proceedings or else suffer the loss of his money. Section 561A of the Code supports the view that this Court has the power to order restitution and I have no hesitation in holding that it has such power."

Undisputedly in this case also the appellant who was the owner of the pawn shop, had been admittedly in possession of the articles on the date when those articles were brought in Court under the direction of the Court. I hold, therefore, that these authorities are of no help to the petitioner as in this case, in my view, neither the ownership nor the possession of the truck was beyond doubt.

(9) It may be mentioned that Mr. Sahay contended that under S. 517, of the Criminal P. C. also the Court had the power to pass orders regarding the disposal of the property. That section refers to the power of the Court in an enquiry or a trial in any criminal Court. The word "inquiry" has been defined in S. 4(1)(k) and according to that definition "inquiry" includes every inquiry other than a trial conducted under this Code by a Magistrate or Court. The question is whether a proceeding under S. 144 can be called an "inquiry". In the view which I have taken of the powers of this Court under S. 561A of the Code, it is not at all necessary to decide this question, and I must leave it open.

(10) I omitted to mention that the learned Subdivisional Officer committed an error of record in holding that, when the petitioner appeared on the 22nd of September, 1951, and prayed for time, he did not lay claim to the truck's ownership. I find from the petition filed on that date that in para. 2 of that petition the petitioner had made the following statement: "That this petitioner has got his title deeds etc. in his head office at Calcutta". The statement in this paragraph conveys to me only one meaning and it is that he did claim title to this truck, otherwise he would not have asked for time to get his title deeds etc.

(11) The learned Subdivisional Officer should also have stayed the execution of his order dated the 6th / 7th October, 1951, and should have waited for at least a few days to enable the petitioner to get the order of the District Magistrate upon the motion to be filed by the petitioner. The petitioner had clearly stated that he was going up to the District Magistrate against his order and in all fairness the learned Subdivisional Officer should have given some time before actually delivering the truck to the other side, and I do not understand what he meant when he passed the order upon the application of the petitioner dated the 7th of October to the effect that the petitioner should obtain a stay order from the appellate Court and at the same time ordering the delivery of the truck to the opposite party in the meanwhile. If the truck was to be delivered immediately, there was no question of obtaining a stay order because before the order could be stayed, it had already been executed. Courts must act in a manner so that justice must not only be done but justice must also 'seem' to be done.

(12) In the result, I would content myself by merely setting aside the order of the learned Subdivisional Officer dated the 6th/7th October, 1951.

(13) DAS, J.: I agree with my learned brother. The Sub-divisional Magistrate of Buxar showed I think, regrettable ignorance of the relevant provisions of the Code of Criminal Procedure.

(14) On the petition which was filed before the learned Subdivisional Magistrate on the 19th September, 1951, by Ayub Khan, the learned Subdivisional Magistrate had to decide if it disclosed the commission of any offence with regard to the truck, as a result of which the truck was detained or its possession changed by force or show of force. If that was what the learned Sub-divisional Magistrate thought, he should have treated the petition as a complaint and proceeded in accordance with the provisions of Ss. 516A and 517, Code of Criminal Procedure. If, on the contrary, the learned Subdivisional Magistrate thought that the petition did not disclose the commission of any offence, but merely a dispute with regard to title and possession, he should have referred the parties to the Civil Court for the determination of the question of title; because the Civil Court is the only proper forum for deciding the question of title. The learned Subdivisional Magistrate wrongly applied S. 144 of the Code of Criminal Procedure. It is clear that the provisions of that section did not entitle the Subdivisional Magistrate to take a particular piece of property from the custody of 'A' and make it over to 'B'. This is exactly what the learned Subdivisional Magistrate did. There was an attempt before us to support the action of the learned Subdivisional Magistrate on the ground that it was an executive or administrative act, though purporting to be one under S. 144, Code of Criminal Procedure. I must make it clear that no public officer is above the law, and an act which is neither sanctioned nor authorised by law, cannot be justified on the ground that it is an administrative or executive act. It would be dangerous in the extreme if it were to be held that a public officer can take possession of property from one person and make it over to another by an administrative or executive act.

(15) I would have had no hesitation in ordering restitution of the truck in this case, but for my considered opinion that this is really a case of disputed title and possession, and the parties must go to the Civil Court for a determination of the question of title. The application for restitution is really meant for the purpose of gaining a tactical advantage, viz., as to who should be forced to go to the Civil Court as the plaintiff. I do not think that this Court should encourage such tactics. This Court may have the jurisdiction to pass such orders as would prevent abuse of any process of the Court or secure the ends of justice; I do not think that this is a fit case in which such an order should be passed. Nor do I think that it is necessary in this case to pass an order of restitution in order to give effect to any order passed under the Code. The order under S. 144, Code of Criminal Procedure, was a bad order, but it no longer subsists. I think that it is enough to say that the order was without jurisdiction.

G.M.J. Order set aside.

A. I. R. (39) 1952 PATNA 321 (C. N.56)

AGARWALA C. J. AND NARAYAN J.

Abdul Gafoor, Appellant v. Sagun Choudhary, and others, Respondents.

A. F. A. D. No. 586 of 1946, D/- 16-2-1948.

T. P. Act (1882), Ss. 60, 78, 92 and 94 — Suit by prior mortgagee — Puisne mortgagee not impleaded — Execution of decree — Prior mortgagee purchasing property — Suit by subsequent mortgagee to enforce his mortgage — Prior mortgagee made party — Prior mortgagee if can redeem subsequent mortgagee.

If the auction purchaser in execution of a decree obtained on the foot of a prior mortgage without impleading the subsequent mortgagee acquires at least the rights of the mortgagor, who was a party to his action, then certainly he has got the right to redeem the puisne mortgagee. There can be no doubt that the auction purchaser in execution of the decree based on the prior mortgage occupies the double capacity of a first mortgagee as well as the owner of the equity of redemption, and while in his first capacity he can use the prior mortgage as a shield against the puisne mortgage in his second capacity he can redeem all subsequent mortgages. (Para 5)

Anno: T. P. Act, S. 60 N. 41; S. 92 N. 24; S. 94 N. 2.

S. N. Bose and Anwar Ahmad, for Appellant — L. K. Jha and Rajeshwari Prasad, for Respondents.

Cases referred to:

('22) 48 I A 465: (A I R (9) 1922 P C 11) (Pr 5)

('31) 53 All 334: (A I R (18) 1931 All 277 F B) (Pr 5)

('31) 53 All 1023: (A I R (18) 1931 All 466 F B) (Pr 5)

('24) 3 Pat 435: (A I R (11) 1924 Pat 484) (Pr 5)

('30) 9 Pat 930: (A I R (17) 1930 Pat 579) (Pr 5)

('32) 11 Pat 415: (A I R (19) 1932 Pat 270) (Prs 6, 7)

('44) 22 Pat 761: (A I R (31) 1944 Pat 119) (Pr 8)

NARAYAN J.: The suit out of which this second appeal arises was a suit to enforce a simple mortgage bond dated 18-8-1934 which had been executed by the defts. first party in favour of the deft. third party & which was later assigned by the deft. third party to the plff. The properties mortgaged under this bond are seven annas & odd share in a particular tauzi & three bighas of kast land. The deft. second party was the prior mortgagee of four annas share out of this tauzi & of one bigha of kasht land. He had instituted a suit on the foot of his mortgage, & in execution of his decree purchased the mortgaged property himself. To that suit the subsequent mortgagee was not made a party & on 2-2-1939 the deft. second party as the auction purchaser was given possession over the property sold in execution of his decree. The present suit was instituted by the plff. on 2-7-1943, & the plff's contention in this suit is that he is entitled to redeem the mortgage of the deft. second party & after redemption to put the properties to sale. The suit was contested by the deft. second party whose contention, as appears from the judgment of the trial Court, was that the mortgage bond propounded by the plff., was not a genuine document & that if it be genuine he was entitled to redeem the plff.

(2) The Court of first instance, the Munsif of Darbhanga, held that the deft. second party had a right to redeem the subsequent mortgage of the plff. & he ordered that the plff. would at first put to sale that portion of the mortgaged property which was outside the mortgage of the deft. second party & that if the sale proceeds of that property were not sufficient to satisfy his decree, he would, after depositing the amount payable to the deft. second party "under this mortgage & purchase", put the remaining property to sale, & that only in case the deft. second party as the purchaser of the equity of redemption does not redeem him.

(3) An appeal was preferred by the plff. against this decision of the learned Munsif, & it was directed only against this decision of the learned Munsif, & it was directed only against the order of the learned Munsif allowing redemption by the deft. second party. The appeal was allowed in part by the fourth Additional Subordinate Judge of Darbhanga, who set aside that portion of the order of the learned Munsif by which the deft. second party had been given the right to redeem the plff. The order portion of the learned Subordinate Judge shows that the defts. first party alone were directed to pay off the decretal amount within three months from the date of his order failing which the plff. could sell such portion of the mortgaged property as could satisfy his mortgage decree.

(4) This second appeal has been preferred by the deft. second party whose contention is that the decision of the trial Court should be restored.

(5) The only point which we have to determine in this appeal is whether the deft. second party can be regarded as a purchaser of the equity of redemption & can therefore be allowed to redeem the plff's mortgage. This gives rise to the question as to what is the position of a prior mortgagee who without impleading the subsequent mortgagee has purchased the property mortgaged to him in execution of his decree, & whether he is entitled to redeem the subsequent mortgagee after the sale in execution of his decree. There was a lot of discussion at the Bar over this question, but to my mind there should be no difficulty now in deciding this point. If the auction purchaser in execution of a decree obtained on the foot of a prior mortgage without impleading the subsequent mortgagee acquires at least the rights of the mortgagor, who was a party to his action, then certainly he has got the right to redeem the puisne mortgagee. There can be no doubt that the auction-purchaser in execution of the decree based on the prior mortgage occupies the double capacity of a first mortgagee as well as the owner of the equity of redemption, & while in his first capacity he can use the prior mortgage as a shield against the puisne mortgagee, in his second capacity he can redeem all subsequent mortgages. Such an opinion was expressed by this Court in the case of 'Mt. Dhanwanti v. Hargovind Prasad', 3 Pat 435, & 'Kulwant Sahay, J. in this case relied on the view which had been expressed by Sir Rashbehari Ghosh in his famous book on mortgage. But it can be argued that whatever has been observed in this con-

nection by Kulwant Sahay, J. should be regarded as obiter dictum inasmuch as the decision was also made on the basis that the rights put forward in that case had been determined by a decree which was binding on both the parties. But in 'Mt. Azizunnissa v. Komal Singh', 9 Pat 930, it was distinctly pointed out that the purchaser of the mortgaged properties in execution of a mortgage decree acquires not only the interest of the mortgagee but also the equity of redemption of the mortgagor & that he is entitled to redeem other mortgages on the same property created by the mortgagor. The view taken in this case & certain cases of the Allahabad High Court is amply supported by the Privy Council decision in 'Sukhi v. Gulam Safdar Khan', 48 I A 465, in which their Lordships held that the owner of a property who is in the rights of a first mortgagee & of the original mortgagor acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee, who is not bound by the sale or the decree on which it proceeded, to set up the first mortgage as a shield. The use of the word 'shield' by their Lordships in this case has got great significance, & it indicates that the first mortgagee has a right to redeem the second mortgage in such circumstance & that the other advantage he can have is that because of his purchase in execution of the decree based on the prior mortgage he can use the prior mortgage as a shield against the subsequent mortgagee. Their Lordships in this case approved of the general principle as it had been enunciated by the High Court. The High Court had observed as follows:

"The plff. is a puisne mortgagee seeking to enforce her mortgage, the prior mortgagee in his suit having failed to make her a party, it is the duty of the Court to give the plff. an opportunity of occupying the position which she would have occupied, if she had been a party to the former suit."

After quoting this observation of the High Ct. their Lordships of the Judicial Committee remarked that the original mortgagee having brought the estate at the sale in the suit was the owner of both the mortgage & the equity of redemption merged in one by the decree of the Court. This is precisely the point before us. As soon as it is held that the deft. second party has got a double capacity, it follows as a corollary that he has a right to redeem the puisne mortgagee. It is true that the puisne mortgagee has also got the right to redeem the prior mortgage, but this right has a corresponding obligation too, & the puisne mortgagee cannot prevent the prior mortgagee, who has stepped into the shoes of the mortgagor, from redeeming his own mortgage. The lien of the puisne mortgagee subsists because he was not made a party to the suit of the prior mortgagee, & this position was not disputed before us by Mr. Jha, who appeared for the respondents, & if the lien of the puisne mortgagee subsists, it follows that the purchaser of the equity of redemption has the right to redeem him. This question has been discussed at very great length by the Full Bench of the Allahabad High Court in the case of 'Ram Sanehi Lal v. Janki Prasad', 53 All 1023. One of the questions that had been referred to the Full Bench was whether an auction-purchaser in execution of a decree obtained on a prior mortgage without impleading the subsequent mortgagee acquires at least the rights of the mortgagor, who was a party, including his rights of possession in cases where both the mortgages were simple. The answer of the Full Bench was in the affirmative. The following observation of his Lordship the Chief Justice appears to be important for our purposes in this case:

"I adhere to the opinion expressed by me in 'Nannu Mal v. Ram Chander', 53 All 334 at p. 352; 'No doubt the decree on the previous mortgage is not binding on the subsequent mortgagees, who had not been impleaded, to this extent that their rights under their mortgage have not been extinguished, as would have been the case if they had been impleaded & had not redeemed the prior mortgage. But it is not correct to say that the previous proceedings are totally a nullity. As between the prior mortgagee & the subsequent mortgagees the previous proceedings are ineffective, but that does not imply that the mortgagor's interest could not have been sold by the prior mortgagee behind the back of the subsequent mortgagees but subject to their subsequent mortgage. The mortgagor's interest in the property validly passed to the auction purchasers, no matter whether the subsequent mortgagees were parties to the suit or not. The auction purchasers cannot be in a worse position than a private transferee from the mortgagor."

(6) In my opinion, this observation of his Lordship the Chief Justice sets at rest the controversy which has been raised before us, & it has not been shown to us that this Court has ever taken any contrary view. It is inconceivable that the auction-purchaser in execution of the decree passed on the prior mortgage would be in a worse position than a private transferee from the mortgagor, & if his position is not worse than that of a private transferee from the mortgagor, then he has certainly the right to redeem the subsequent mortgages. Mr. Jha, who appeared for the respondents, relied on two cases of this Court in support of his contention that the deft. second party had no right to redeem the plff's mortgage, & those cases are 'Mt. Sheoratan Kuer v. Kamta Prasad', 11 Pat 415 and 'Ganga Prasad v. Mt. Ganeshi Kuer', 22 Pat 761. The facts of both these cases are clearly distinguishable from the facts of the case before us.

(7) In 'Sheoratan Kuer's case', 11 Pat 415, the plff. was the assignee from a subsequent mortgagee who had not been impleaded in the action on the foot of the prior mortgage until a certain date & from whom the assignment had been taken before he could be impleaded in the action. The main question which arose was whether the assignment was affected by the doctrine of lis pendens & this question was answered in the negative. It was held that the assignee was entitled to redeem the prior mortgage, but that the prior mortgagee had no right "to redeem over" against him. I do not think it can be asserted that the view taken in this case in any way conflicts with the view which I have taken in the present case, or which was taken by the Full Bench of the Allahabad High Court. On the other hand, Wort, J. referred to the Privy Council case of Sukhi v. Gulam Safdar Khan & observed that the law is now as it was prior to the passing of the T. P. Act & that the deft. in the case before him could use his prior mortgage as a shield against the subsequent mortgagee with

the result that the plff. in the action must redeem his mortgage before he could bring the property to sale.

(8) The decision that was arrived at in the case of 'Ganga Prasad v. Mt. Ganeshi Kuer', 22 Pat 761, was that where an equity of redemption is wholly or in part unrepresented, the sale in execution of a decree on such mortgage suit cannot affect the right of the owner of the equity of redemption who is in possession either on a transfer from the mortgagor or as an auction purchaser in the sale in execution of a decree against the mortgagor, & that he cannot be forced to redeem. In order to understand the nature of the decision arrived at in this case, on which so much reliance was placed by Mr. Jha, I should like to quote the following passage from the judgment of Manohar Lall, J.:

"The apparently contradictory decisions may be reconciled if it is kept in view that where an equity of redemption is wholly or in part unrepresented the sale in execution of a decree on such mortgage suit cannot affect the rights of the owner of the equity of redemption who is in possession either on a transfer from the mortgagor or as an auction-purchaser in the sale in execution of a decree against the mortgagor. But where all that had been left out is a simple encumbrancer who at the date of the mortgage suit was not in, or entitled to, possession then only the right of redemption must be given to him. Where an auction-purchaser in such a mortgage decree sale is the plff & has failed to obtain possession no difficulty in law or in equity can ever arise because it is he who is to blame himself if he has slept over his rights for a long time & has not enforced his possession on the foot of such a sale. He cannot complain if his suit for possession is converted into a suit for sale on the foot of the mortgage bond."

I fail to understand how this decision can be of any help to the respondents in this case.

(9) This appeal is, therefore, fit to succeed & is allowed with costs. The judgment & the decree of the lower appellate Court are set aside & that of the trial Court restored.

(10) AGARWALA, C. J.: I agree.

R.G.D. *Appeal allowed.*

A. I R. (39) 1952 PATNA 323 (C. N. 57)

DAS AND MAHABIR PRASAD JJ.

Basistha Narayan and others, Appellants v. Sankar Dayal and others, Respondents.

A. F. O. D. No. 137 of 1945, D/- 24-11-1949.

(a) *Civil P. C. (1908), S. 146 — Partition suit — Appeal by purchaser pendente lite against final decree — Maintainability.*

It is competent to the purchasers pendente lite of some of the properties involved in the partition suit, u/s. 146, Civ. P. C., to prefer an appeal against the final decree for partition. (*Para 3*)

Anno: C. P. C., S. 146 N. 8.

(b) *Civil P. C. (1908), O. 22, R. 10, O. 1, R. 10 and O. 43, R. 1 (l) — Devolution of part of interest — Application for being added as party by person on whom interest devolved — Rejection of — Appeal.*

A person on whom only a part of the interest involved in the suit devolves is certainly entitled under O. 22, R. 10 to make an application to be substituted for the purpose of representing the part of the interest devolved upon him. In such a case his application must obviously be for being added as a party to the suit. Such an application cannot be deemed to be one under O. 1, R. 10 and if it is rejected the order rejecting it will be appealable under O. 43, R. 1 (1). (*Para 5*)

Anno: C. P. C., O. 22 R. 10 N. 20.

(c) *Civil P. C. (1908), O. 22, R. 10 — Limitation — No period of limitation is prescribed for filing applications under R. 10.* (*Para 6*)

Anno: C. P. C., O. 22 R. 10 N. 20.

(d) *Civil P. C. (1908), O. 41, R. 22 — Cross-objections against co-respondent.*

Although as a rule a respondent has to urge the cross-objections against the appellant, there is no bar to his urging cross-objections against a co-respondent. In suits for partition, for dissolution of partnership and for accounts the matters to be decided are not only between the plff., on the one hand, and the defts., on the other, but between all the parties, and it is open to any respondent to prefer cross-objections against a co-respondent on any item in dispute between them. (*Para 9*)

Anno: C. P. C., O. 41, R. 22 N. 14.

Tarkeshwar Nath, for Appellants — D. N. Varma, A. B. N. Sinha, Shyam Bihari Prasad, C. S. Prasad, Gorakh Nath Singh, Kanhaiyajee and K. D. Chatterji, for Respondents.

Cases referred to:

('38) 42 C W N 1183 (Pr 5)

('19) 41 Mad 510: (A I R (6) 1919 Mad 755) (Pr 3)

('22) 1 Pat 581: (A I R (9) 1922 P C 304) (Pr 5)

MAHABIR PRASAD, J.: Mr. D. N. Varma for the respondents raises a preliminary objection to the maintainability of this appeal. He contends that the appellants were no parties to the partition suit nor to the final decree passed in that suit which is under appeal. No appeal against the decree is entertainable at their instance.

(2) The facts are these. On 6-8-1926, two members of a joint Hindu family, Raghunandan Lal & his son Sankar, instituted a suit for partition of the joint family properties impleading five persons, other members of the family, as defts. A preliminary decree for partition was passed in 1929. There was an appeal against the preliminary decree to this Court. The decree was confirmed by this Court in 1932. It appears that during the pendency of the appeal one Lalmohar Lal came to be a purchaser of the interest of the plff. Raghunandan Lall to the extent of 4 annas in the joint family properties, & he was substituted in the place of Raghunandan Lal. One Raghuraj Dubey was also substituted as a party to the suit as having purchased 4 annas interest of Kedar Lal, one of the defts. in the suit. In the year 1943 a pleader-commissioner was appointed to partition the properties & to carve out separate takha to Lalmohar Lal as representing the interest of Raghunandan, the plff. & Raghuraj Dubey as representing the interest of Kedar Lal, the deft. The pleader-commissioner made necessary allotments & submitted his report on 4-4-1944. It appears that before the Commissioner had made the allotments, three persons, who are the appellants before us, Basistha Lal, Banarsi Lal & Ramjanam Lal filed petitions before the Commissioner alleging that some of the properties which under the preliminary decree were to be partitioned had been purchased by them in execution of rent decrees against the joint family & were no longer

divisible amongst the parties to the decree. On failing to get any relief from the commissioner, these persons filed petitions on 27-5-1944, before the Court, making the same allegations regarding purchase by them of some of the properties sought to be partitioned, & praying that those properties might be excluded from partition. The learned Subordinate Judge summarily rejected their applications as not being entertainable, & passed the final decree.

(3) The appellants have filed this appeal against the final decree. They have also along with the memo. of appeal filed an application under O. 41 R. 20 & S. 151, Civil P. C. praying that they may be added as parties & be permitted to prosecute the appeal filed by them against the respondents. Mr. Tarkeshwar Nath appearing for the appellants contends that it was competent to the purchasers of some of the properties involved in the partition suit, u/s. 146, Civil P. C., to prefer this appeal against the final decree, passed by the Subordinate Judge. Reliance is placed on a decision of the Madras H. C. in the case of 'Sitaramaswami v. Lakshmi Narasamma', 41 Mad 510, which certainly supports the contention. S. 146 of the Code provides:

"Where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

In the Madras case, while the suit was pending in the District Munsif's Court, the suit property was mortgaged by the deft. to the appellant. On the suit being decreed by the Subordinate Judge in favour of the plff., the deft. did not prefer an appeal. The appellant, as the mortgagee of the suit property pending suit, alleging collusion between the plff. & the deft., filed an application in the District Court under O. 22, R. 10, for an order allowing him to prefer an appeal, & also preferred an appeal against the decree. The District Judge dismissed both the petition & the appeal as incompetent. The appellant preferred to the High Court a civil Misc. Appeal & a Second Appeal against the decision respectively. It was held that while an application under O. 22 R 10 could not be entertained by the appellate Court of the District Judge as the suit had ended, & there was no appeal pending before the District J., it was competent to the mortgagee u/s. 146 of the Code to prefer the appeal to the District Court against the decree of the Subordinate Judge. It is clear, therefore, that the appellants before us are entitled to take the proceeding by way of filing this appeal as being persons claiming under the parties to the partition suit. The preliminary objection raised by Mr. Varma, therefore, fails.

(4) Mr. Tarkeshwar Nath appearing for the appellants next contends that apart from the fact that these appellants are entitled to appear against the final decree passed in the suit under S. 146, there is no bar to this Court dealing with this matter as an appeal against the order of the Court refusing to add them as parties to the suit. Their applications dated 27-5-1944, although did not contain in so many words a prayer that they be added as parties, were in effect applications under O. 22 R. 10, Civil P. C. for being made parties to the suit on the ground that some of the properties which were sought to be partitioned had come to be vested in them by reason of their purchase 'pendente lite', & the order rejecting their application is appealable.

(5) Mr. K. D. Chatterji appearing for one of the respondents meets this contention by raising the question that the applications filed by the appellants before the Court below for excluding the properties purchased by them from partition could not be construed as applications made by them under O. 22 R. 10. These appellants, he submits, did not apply & could not have applied for being substituted in the place of any of the parties to the suit. Their application in question can, if at all, be deemed to be an application for being added as parties to the suit. An application for addition of parties is provided for by O. 1 R. 10, Civil P. C. Rejection of such an application is not appealable under the Code. This appeal, therefore, cannot be dealt with on the footing of being a Misc. Appeal against the order refusing to give leave under R. 10 of O. 22 as provided for in Cl. (l) of R. 1 of O. 43, Civ. P. C. In support reliance has been placed on the case of 'Jitendra Nath v. Harindra Nath', 42 C W N 1183, & the decision of their Lordships of the Judicial Committee in the case of 'Manindra Chandra v. Ram Kumar Lal', 1 Pat 581. It will appear that none of these cases is an authority for the proposition contended for. In the Calcutta case what was held was that O. 22 R. 10, Civ. P. C. can only apply before a final decree or order has been passed or made in the suit. It appears that in the Calcutta case subsequent to the final decree being passed, the property was sold. An application to substitute under O. 22 R. 10 & for leave to be added as a party to the suit was made after the passing of the final decree. It is clear that in the circumstances of that case, the Court before which the application for leave to be added as a party was made did not have the seisin of the case, & the application was clearly not entertainable. In the case before us the applications in question were made while the suit was still pending, & the proceeding for passing a final decree was going on. In the case of 'Manindra Chandra Nandi', 1 Pat 581, the question was entirely different. What was attempted to be done was to join as a deft. to the suit a tenant to whom during the pendency of the suit the deft. had left the property so as to compel the tenant to account for profits which he had received from the land after a decree for possession & mesne profits had been obtained against the defts. Their Lordships of the Judicial Committee differing from the High Court held that in an action to recover possession of land where the deft., while he is in possession, has granted leases, but the persons to whom such leases are alleged to have been granted do not assert to be in possession under the leases, are not assignees within the meaning of O. 22 R. 10, Civ. P. C. No such question arises in the present case, & the decision has no application to the facts of the present case. The appellants in the present case are purchasers of some of the properties involved in the action. An interest in the properties alleged to have been purchased by them has devolved upon them. If the facts constituting devolution of the interest claimed by them are contested by any of the parties to the suit, they have to be investigated. Such an investigation can only be done on an application made by the person on whom such interest has de-

volved, under O. 22 R. 10. The rule in question by its language, does not require assignment, creation or devolution of the whole of the interest involved in the suit on the person entitled to make an application for substitution. A person on whom only a part of the interest involved in the suit devolves is certainly entitled, to make an application to be substituted for the purpose of representing the part of the interest devolved upon him. In such a case his application must obviously be for being added as a party to the suit. The contention raised by Mr. Chatterji that an application for being added as a party to the suit cannot be made under O. 22 R. 10 is not well founded. There seems no difficulty in acceding to the contention raised by Mr. Tarkeshwar Nath that it is possible to deal with the present appeal as a Misc. Appeal under O. 43 R. 1 Cl. (1), Civil P. C. against an order refusing leave to the appellants to be added as parties to the suit. This appeal can, therefore, be dealt with on the footing as if it is an appeal against an order & not against the final decree.

(6) Coming to the merits of the appeal, it is clear that the learned Subordinate Judge did not apply his mind to the merits of the application filed by the appellants, & without investigating into the facts alleged by them, he rejected their applications, as not being entertainable because he thought that the applications were not made in due time. The learned Subordinate Judge says this:

"The Commissioner was appointed for partition long after these alleged purchases, but these persons viz Bashist Lal, Benarsi Lal & Ramjanam Lal having made no application in due time to the Court for being made parties on the ground of their having purchased certain properties sought to be partitioned, their applications after the submission of the Commissioner's report are not entertainable. I, therefore, reject their applications."

There is no limitation prescribed for filing applications under O. 22 R. 10 for being added as parties to the suit on the ground of the devolution of an interest during the pendency of a suit, & the learned Subordinate Judge was certainly in error in not considering these applications on merits on the ground of their being not filed in due time. In the circumstances the order of the learned Subordinate Judge refusing to entertain these applications cannot stand & has to be set aside. It has to be ordered that these appellants be added as defts. to the suit, & the facts alleged by them for excluding the properties purchased by them from partition be investigated.

(7) In the circumstances, the final decree passed by the Court below cannot be allowed to stand. If these appellants were wrongly denied the right of being made parties to the suit before it was finally concluded by passing of the final decree in question, & the order refusing to make them parties is set aside, the final decree to which they could not be parties on account of the erroneous order of the learned Subordinate Judge, has to be set aside. It is clear that if, as a result of these appellants being made parties to the proceedings, & their allegations regarding their purchase of some of the properties under partition being found correct, the properties purchased by them have to be excluded from partition, the allotments made by the commissioner on which the final decree is based will have to be disturbed & reallotment will have to be made. It is, however, to be observed that in the event of these appellants failing to make good their case regarding their purchase of some of the properties in question, the allotments made by the Commissioner & now forming part of the final decree need not be disturbed, & the learned Subordinate Judge will be perfectly entitled to pass the final decree in the same terms & containing the same allotments as at present.

(8) It is ordered accordingly that the final decree under appeal be set aside, that the appellants be added as party defts. to the suit, & the case be remanded to the learned Subordinate Judge, for the application dated 27-5-1944 being reheard & decided in the presence of the appellants as parties to the proceeding pending before him. The parties will be entitled to adduce evidence for & against the facts alleged in the application dated 27-5-1944 & required to be investigated.

(9) What remains to consider now is the cross objection filed by Hira Lal, one of the defts. to the partition suit. The cross objection it is contended, by the other respondents is not entertainable, in so far as the grounds taken are not against the appellants but against the decree passed in favour of the co-respondents Although as a rule a respondent has to urge the cross-objections against the appellant, there is no bar to his urging cross-objections against a co-respondent. In suits for partition, for dissolution of partnership & for accounts the matters to be decided are not only between the plff. on the one hand, & the defts., on the other, but between all the parties, & it is open to any respondent to prefer cross-objections against a co-respondent on any item in dispute between them. There is ample authority in support of this view. Nor there is anything in the language of R. 22 of O. 41, Civil P. C., to militate against this view. The cross-objection, therefore, must be held to be maintainable. The cross-objection, however, has no merits. None of the grounds, except the one which is covered by the appeal, is of any substance. The objection regarding some of the properties having gone out of possession of the joint family by purchase made by the appellants will certainly be heard by the learned Subordinate Judge at the instance of the appellants who have been ordered to be impleaded as parties to the proceedings. The cross objection is accordingly dismissed.

(10) In the circumstances, the application filed by the appellants for being added as parties in this Court need no consideration & is dismissed.

(11) The appeal is allowed. In the circumstances of the case, there will be no order as to costs.

(12) DAS J.: I agree.

G.M.J. *Appeal allowed.*

A. I. R. (39) 1952 PATNA 325 (C. N. 58)

AGARWALA C. J. AND MEREDITH J.

Tribeni Tewari and another, Appellants v. Sheo Singh and others, Respondents.

Letters Patent Appeal No. 48 of 1947, D/- 22-9-1948.

Landlord and tenant — Suspension of rent — Tenant evicted from portion of tenancy land — Tenancy Laws — Bihar Tenancy Act (VIII (8) of 1885), S. 52 B (inserted by Bihar Act XXIII (23) of 1947).

Where a landlord wrongfully evicts his tenant from a part of the tenancy land the tenant is entitled to suspension of payment of the entire rent till the land is restored to him. There cannot be any difference in such a case between land leased at an entire rent and land leased at so much per acre or bigha, and it makes no difference whether the rent be cash rent or produce rent. 'Case law discussed'.

(*Paras 5, 7*)

Brahmadeva Narain, for Appellants — S. C. Misra, for Respondents.

Cases referred to:

('25) 52 I A 160: (A I R (12) 1925 P C 97) (Pr 1)
('69) 12 W R 109 (Cal) (Pr 2)
('28) 55 Cal 464: (A I R (15) 1928 Cal 479) (Pr 6)
('43) I L R (1943) 1 Cal 372: (A I R (30) 1943 P C 24) (Pr 4)
('17) 36 I C 528: (A I R (4) 1917 Pat 34) (Prs 1, 5)
('34) 15 P L T 21: (A I R (21) 1934 Pat 75) (Pr 5)
('35) 14 Pat 323: (A I R (22) 1935 Pat 38) (Pr 5)
('37) 17 P L T 356 (Prs 1, 5)
('37) 15 Pat 443: (A I R (24) 1937 Pat 200) (Pr 5)
('38) 17 Pat 451: (A I R (25) 1938 Pat 306 F B) (Prs 5, 7)
('38) A I R (25) 1938 Pat 305: (177 I C 529) (Pr 7)
('39) 20 P L T 378: (A I R (26) 1939 Pat 356) (Pr 5)
('48) 26 Pat 66: (A I R (35) 1948 Pat 223) (Pr 7)
(1836) 1 M & W 747: (6 L J (N S) Ex 263) (Pr 3)
(1844) 1 Car & K 341: (70 R R 800) (Pr 3)
(1853) 8 Ex 335: (22 L J Ex 161) (Pr 3)

AGARWALA C. J.: This appeal under the Letters Patent is by the defts. & arises out of a suit for recovery of produce rent for the years 1350-1351 fasli, in respect of plots 327 & 328. The defence was that the defts' holding consisted of three plots 326, 327, & 328, but that the plffs. had dispossessed the defts. from plot 326 by executing a patta in favour of defts' under-raiyat & realising rent from the latter. The first Court found that plot 326 formed no part of the defts' holding, &, alternatively, that the defts. were not entitled to suspension of the rent because the rent was not indivisible. The suit was, therefore, decreed, but not at the rate claimed by the plffs. In appeal by the defts. the appellate Court admitted additional evidence in the form of the survey khatian & held that plot 326 is a part of the defts' holding. The appellate Court dismissed the suit holding that the defts. since they were dispossessed from plot 326 were entitled to suspension of rent. The plffs. appealed to this Court. The appeal was heard by Ray J. who set aside the decision of the appellate Court & restored that of the Munsif. Ray, J. accepted the finding of the appellate Court that the defts. had been dispossessed from plot No. 326, but held that in the case of a holding held on produce rent, the deft. is not entitled to suspension of rent if he is dispossessed from a part of the holding. The learned Judge was of opinion that the question had been set at rest by the decision of the Privy Council in 'Katyayani Debi v. Udoy Kumar Das', 52 I A 160 & that the decisions of this Court in 'Sham Narayan Singh v. Chandra Sekhar Prasad', 36 I C 528, & 'Bhuneshwar Nath v. Gudar Nath', 17 P L T 356, were not applicable as in those cases the holdings were held on a lump sum cash rental.

(2) The right of a tenant to suspension of rent in certain circumstances, when his landlord has failed to deliver to him possession of the entirety of the demised land, or dispossessed him from a portion of it, has been recognised & enforced in Bengal & Bihar for almost eighty years since the decision of Sir Barnes Peacock, C. J., in 'Gopanund Jha v. Lalla Gobind Pershad', 12 W R 109.

(3) In England the rule appears to be well established that, where lands are let at an entire rent, & the lessee has been unable to obtain possession of some part of the land demised owing to the lessor's default, the lessee is entitled to suspension of payment of the whole rent, See 'Neale v. Mackenzie', (1836) 1 M & W 747; 'Holgate v. Kay', (1844) 1 Car & K. 341; and 'Watson v. Ward', (1853) 8 Ex. 335. Where, however, land is let at so much per acre, & the lessee is able to obtain possession of only a portion of it, he is not entitled to total suspension of rent but to an apportionment. With regard to eviction of the lessee by the lessor from a portion of the land, the English Common Law appears to make no distinction between a case where the rent is a lump sum & a case where it is at a certain rate per acre or bigha, the principle being in such cases that the rent issues from every part of the land demised & that the landlord cannot apportion his own wrong. I have been unable to find any statement of the reason for this difference between the failure of the landlord to deliver possession to the lessee of a part of the demised lands & eviction of the lessee by a lessor from a part of the demised lands after the lessee has entered into possession. There is, however this difference between the two cases which is noticeable. In a case where the lessee is unable to obtain possession of the entirety of the lands demised, it is open to him to refuse to take possession of the remainder & avail himself of other remedies which the law provides, such as, repudiation of the contract & damages for its breach or specific performance of it. In a case, however, where he has been evicted by the lessor from a part of the demised land after taking possession, the circumstances may be such as to render it impracticable for him to repudiate the contract altogether, for he may have effected improvements & spent money on the property. If this be the reason why a lessee is entitled to suspension of rent in a case where he has been evicted by the landlord after obtaining possession of the demised land, it is obvious that there is no justification for drawing any distinction between land leased at an entire rent & land leased at so much per acre or bigha.

(4) The decision of the Privy Council referred to by Ray, J. is no authority for the proposition for which the learned Judge has relied on it as will be apparent from an examination of the facts of that case. On 27-11-1878 the proprietor granted a reclamation lease of waste lands at the rate of 13 annas per bigha of the area included in the lease, which included 61 acres, to which a third party had established a paramount title against the lessor in 1875, that is to say, prior to the execution

of the lease. The lessee's rights under the lease were sold in execution of a decree for arrears of rent obtained against him in 1894. The purchaser obtained possession of all the lands included within the lease, except the 61 acres already referred to, & a larger area of which the purchaser's husband had taken possession about 1888 & of which he was still in possession at the date of the auction sale despite the original lessee's efforts to eject him. From the date of the purchase until 1917 the purchaser paid without objection the entire rent of Rs. 4,300 per annum, which was the amount fixed as between the lessor & the original lessee. In 1917, in defence to a suit for rent by the lessor, the purchaser pleaded that she was entitled to an abatement of rent in respect of such portions of the demised lands of which she was not actually in possession. It was conceded that with regard to the 61 bighas, to which her husband had established a paramount title prior to the execution of the lease, she was entitled to abatement. The question on which the parties were at issue, therefore, was confined to the area of which the deft's husband had taken possession in 1884 & to which she had obtained a title by adverse possession prior to the institution of the suit for rent in 1917. It was contended by the purchaser that the lessor had a title to eject the trespasser, & that if he did not do so, the trespasser obtained a title by limitation against him as well as against the lessee, & that as the latter was deprived of the possession of the lands, she was entitled, in a suit by the lessor, to an abatement of rent. It was held that in the case of a permanent lease, such as the one in question in that instance, it was the duty of the lessee to protect herself against illegal encroachment by others on the lands of which she had the exclusive possession, & that her failure to do so could not prejudice the lessor's claim for rent. This, therefore, was not a case of an eviction by the landlord during the pendency of the lease, but a case of eviction by a third party. There was, however, an observation that

"The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha."

That observation, however does not refer to a case where the lessee has been put in possession of the entire demised lands, but has been subsequently evicted from a part of it. It has since been held by the Privy Council that in India even in the case of a lump sum rent, a lessee who has been unable to obtain possession of the entirety of the demised lands is entitled only to abatement & not total suspension of the rent; 'Ram Lal Dutt v. Dhirendra Nath', I L R (1943) 1 Cal 372. On the question before us there is no decision of the Privy Council.

(5) On the other hand, there are a series of decisions of this Court by which we are bound, that where a landlord wrongfully evicts his tenants from a part of the tenancy lands the tenant is entitled to suspension of payment of the entire rent. The earliest of these cases is 'Sham Narayan Singh v. Chandra Sekhar Prasad', 36 I C 528, where it was held that if a landlord evicts his tenant from a portion of his holding, he shall recover no rent for any part of the holding until he has restored to him the land which he has forcibly taken. In other words, where there has been diminution of the holding by dispossession by a landlord, there can be no apportionment of rent. This rule was held to apply to all classes of tenancies. That view has been consistently followed in this Court, see 'Hira Lal v. Rinkauri Singh', 15 P L T 21; 'Dalip Narayan Singh v. Suraj Narayan', 14 Pat 323; 'Khub lal v. Ishri Prasad', 15 Pat 443; 'Buneshwar Nath v. Gudar Nath', 17 P L T 356; & 'Mt. Deoki Kuer v. Shiva Prasad Singh', 20 P L T 378. The rule is also supported by an observation of the Full Bench in 'Jeonandan Singh v. Janki Singh', 17 Pat 451 at p. 459, although the point does not appear to have arisen directly for decision in that case. It is also interesting to observe that in 1947 the Legislature adopted this view in the Bihar Tenancy Amendment Act of that year by introducing into the Tenancy Act S. 52 B which provides:

"where a landlord dispossesses a tenant from his holding or part thereof, the landlord shall not be entitled to any rent in respect of the holding or any part thereof, for the period of such dispossession."

This section, however, does not govern the present case as it was not enacted until after this litigation had been instituted.

(6) It has been contended, however, that in all the Patna decisions the lands were held on a lump sum rental & are not authorities in a case where the land is held at so much per acre or bigha. Reliance was placed on a decision of the Calcutta High Court in 'Sajjad Ahmad v. Trailakhya Nath', 55 Cal 464, which however is not an authority for the proposition contended for. In that case the landlord sued for recovery of rent for the years 1325 to 1328 B. S. at the rate of Rs. 18/5/9 pies a year. The defence was that the plff. had dispossessed the defts. from 5 bighas & 8 kathas of their holding, which consisted of 25 bighas at a rental of Rs. 15/6/11 gandas, & the defts. were, therefore, entitled to a suspension of the payment of rent. It appeared that after the final publication of the record of rights the landlords initiated a proceeding under S. 105, Tenancy Act, & the settlement officer settled Rs. 18/5/9 pies as a fair rent of the lands as from the beginning of the year 1326. The order of the Revenue officer, which had the force of a decree, showed that the tenants were in possession of only 21 bighas & 5 kathas, & that the fair rent assessed on this area was Rs. 18/5/9 pies. It was held that the order of the Revenue officer was conclusive between the parties, both as to the area of the holding & the rent of the holding, & that so long as that order stood, the tenants were bound to pay the rent fixed by the Revenue officer in respect of the area found in their possession by him. In other words, it was held that the effect of the decision was to determine that the defts. were tenants of the plff. in respect of only 21 & odd bighas of land, for which they were liable to pay Rs. 18/5/9 as fair & equitable rent.

(7) I have already indicated above that I can see no reason in principle why, if a tenant is entitled to suspension of rent on eviction from a part of the land by the landlord, there should be any difference between land held on a lump sum rental & land held at a rate of

so much per bigha or acre. The rule of suspension of payment of rent in such cases was stated in Bacon's Abridgment, Tit. Rent (M)

"Where a lessor enters forcibly into part of the land, there are variety of opinions whether the entire rent shall not be suspended during the continuance of such tortious entry, & it seems to be the better opinion, & the settled law at this day, that the tenant is discharged from the payment of the whole rent till he be restored to the whole possession, that no man may be encouraged to injure or disturb his tenant in his possession, whom by the policy of the law he ought to protect & defend."

It is true that that observation was made in respect of a rule of law which prevails in a country whose land laws originated in feudalism. But it seems to me that it is equally applicable elsewhere, for it must always be the duty of a landlord to abstain from a tortious eviction of his tenant to whom he has contracted to let his land. It will be observed too that the abridgment makes no mention of any distinction between land held on a lump sum rental & land held otherwise. This view is supported by the observation in Gilbert on Rents, page 178:

"If it (eviction by the landlord from a part of the demised lands) were not attended with a total suspension of the rent until he makes restitution of the land, it would be in the power of the lord or lessor to resume any part of the land against his own engagement & contract, & so, by taking that which lies most commodious for the tenant, render the remainder in effect useless, or put him to expense & trouble to restore himself to such part by course of law." In that view of the matter, it makes no difference whether the rent be cash rent or produce rent. The principle is the same. The unjustness of holding otherwise is made obvious by a simple example. A person may be induced to take a tenancy on produce rent of a holding including both good agricultural land & land of such poor quality that to cultivate the latter by itself would be uneconomical. If in such a case he were not to be entitled to suspension of the whole rent on his eviction by the landlord from the good agricultural land he would be left with the liability to hand over to the landlord the latter's share of the produce of land which could not be cultivated except at a loss. On the basis of the F. B. decision in 'Jeonandan Singh v. Janki Singh', 17 Pat 451, it was contended that the plaintiff was entitled at least to a decree at the rate admitted by the defts. The facts of that case were that the landlords instituted a suit for rent which was resisted by the defts. on the ground that a part of the holding had not been included in the suit, although they admitted that the rent was due from them. In those circumstances it was held that, although the landlord was not entitled to a rent decree he was entitled to a money decree for the amount admitted by the defts. to be due. In that case, however, it was not alleged by the tenant that he had been dispossessed from any part of the holding. In fact their Lordships observed:

"If the finding should be that the tenant has been ejected by the landlord from a portion of his holding, the tenant would be entitled to suspension of the rent until the whole of his holding should be restored to him, but where the finding is that the tenant is in possession of the area which he claims & that there has been no ejectment by the landlord the landlord ought not to be deprived of the rent which the tenant, by his defence admits to be payable."

The decision of the F. B. that the landlord was entitled to recover at the rate admitted to be due by the tenant even in a suit in which the landlord has omitted to include the entire holding was explained in 'Ambika v. Laxmi', 26 Pat 66, where it was pointed out that in 'Ramchandra v. Ramgulam', A I R (25) 1938 Pat 305 it had been held that a suit for rent of a part of holding was not maintainable, & that this view had not been dissented from by the F. B. whose decision was confined to an entirely different class of cases namely where there are bona fide errors & omissions in the description of the holding or some dispute as to its exact area. In 'Ambika v. Laxmi', A I R (25) 1938 Pat 305, the suit was based on an allegation that the tenant's holding had been split into two separate holdings & it had been found that the allegation was incorrect. The Division Bench held that a suit for rent of part of a holding is not maintainable, & the plff. was not entitled even to a money decree because in such a case the suit is not really brought in respect of the holding at all, but in respect of an alleged different holding which does not in fact exist.

(8) In my view this appeal should be allowed, the decree of this Court set aside, & that of the lower appellate Court restored. The defts.-appellants are entitled to their costs throughout.

(9) MEREDITH J: I agree.

D. H. *Appeal allowed.*

A. I. R. (39) 1952 PATNA 328 (C. N. 59)

B.P. SINHA AND REUBEN JJ.

Posan Singh and others, Appellants. v. Inderdeo Singh and others, Respondents.

A.F.A.D. No. 1621 of 1947, D/- 22-11-1949.

Civil P. C. (1908) Ss. 9, 24 — Absence of order of transfer.

The record of a Civ. suit was sent from the Second Additional Munsif to that of the Third Additional Munsif who had jurisdiction to entertain the suit as to place, valuation, subject matter and person, but there was no order of the Dist. J. sanctioning the transfer of the suit.

'Held' that the failure to obtain the order from the Dist. J. was a defect of procedure which had been cured by waiver. 'Case law discussed'. (Para 9)

Anno: C. P. C., S. 9 N. 3,4, 5. S. 24 N.14.

Lal Narayan Sinha and Lakshman Saran Sinha, for Appellants — B. N. Rai, Raghosaran Lall and Lakshmi Narayan Sinha, for Respondents.

Cases referred to:

('87) 13 I A 134: (9 All 191 P C) (Prs. 5, 8)
('88) 11 Mad 26: (14 I A 160 P C) (Pr 5)
('25) A I R (12) 1925 P C 155: (87 I C 313) (Pr 5)
('28) 55 I A 227: (A I R (15) 1928 P C 162) (Pr 6)
('25) A I R (12) 1925 Mad 117: (87 I C 152) (Pr 4)
('21) 5 Pat L J 304: (A I R (8) 1921 Pat 152) (Pr 4)
('33) 12 Pat 117: (A I R (20) 1933 Pat 104) (Pr 8)
('46) 25 Pat 50: (A I R (33) 1946 Pat 301) (Pr 4)

(1874) L R 5 P C 516: (22 W R 900) (Pr 7)
(1884) 12 Q B D 497: (53 L J Q B 571) (Pr 7 a)
(1884) 12 Q B D 334: (53 L J Ch 613) (Pr 7 a)

REUBEN, J.: This appeal by the defts. is directed against a decision of the Additional Dist. J. of Monghyr, confirming the decree of the Additional Munsif, Third Court, Monghyr, dismissing Title Suit No. 161/822 of 1945/1946.

(2) The facts of the suit need not be stated as Mr. Lal Narayan Sinha for the appellants, frankly admits that in second appeal he cannot challenge the decision on the merits. The point he raises is one relating to jurisdiction. The suit was instituted on 7-12-1945 in the court of the Munsif, Second Court, Monghyr. On 16-8-1946 by an order of the Dist. J., it was transferred to the Addl. Munsif, Second Court, Monghyr. On 20-9-1946, the record of the case was sent to the Additional Munsif, Third Court, Monghyr, with an endorsement of the Additional Munsif, Second Court, on the order-sheet:

"Transferred to the file of 3rd Additional Munsif in anticipation of Dist. J's order."

The hearing of the suit was taken up by the Additional, Munsif, Third Court that very day, & judgment was delivered on 12-11-1946. The appeal against this decision was disposed of by the Additional Dist. J. on 12-5-1947. In neither Court was the question of jurisdiction raised. It was raised for the first time in second appeal, & on a reference from this Court, the Dist. J. has reported that there is no trace of any order of the Dist. J. as contemplated by the endorsement dated 20-9-1946. No record is found of any reference having been made by either of the two Munsifs to the Dist. J. for such an order. We may, therefore, proceed on the basis that there was no order of the Dist. J. sanctioning the transfer of the suit from the Court of the Second Additional Munsif to that of the third Additional Munsif.

(3) Mr. Lal Narayan Sinha admits that, as to place, valuation, subject-matter & person, the third Additional Munsif had jurisdiction to entertain the suit. But he contends that, as the suit was in the seisin of the second Additional Munsif, it could not, without an order of transfer u/s. 24 of the Civil P. C., have been dealt with by the Third Additional Munsif. His point is that not more than one Ct. can be in seisin of of a suit at one time.

(4) In support of his contention, he cites 'Chokkalinga Pillay v. Velayudha Mudaliar', AIR (12) 1925 Mad 117. In that case after the institution of a mortgage suit in the Kumbakonam Court the local jurisdiction over the subject-matter of the suit was transferred to the Mayavaram Court. Nevertheless, the Kumbakonam Court proceeded with the suit & disposed of it. In a subsequent suit to challenge the validity of the decree, it was held that, once a Court has seisin of a case, it does not lose its jurisdiction to try it by reason of a general order transferring the local jurisdiction to another Court. On the facts, that decision does not help us here, as what we have to consider is the effect of a trial by a Court other than the one which had originally the seisin of the case. 'Jagannath Prasad v. Sheonandan', 5 Pat L J 304, also cited by Mr. Lal Narayan Sinha, is equally distinguishable. It related to the execution of a mortgage decree passed by the Subordinate Judge, First Court, Gaya. Under the orders of the Dist. J. passed subsequent to the decree, the business in the Subordinate Judge's file arising within the area in which the mortgaged property was situate was transferred to the Subordinate Judge, Third Court Gaya. An application was made to the Subordinate Judge, First Court for executing the decree. Under a misapprehension regarding his jurisdiction, the Subordinate Judge returned the application to the filing pleader to be refiled in the proper Court. Accordingly, the petition was filed before the Subordinate Judge, Third Court who entertained it in spite of an objection by the J. D. regarding his jurisdiction. The execution proceeded to the sale of the J. D's property. In appeal, the order of the Subordinate Judge, Third Court was set aside by the Dist. J. on the ground that, under section 38, Civil P. C., the jurisdiction to execute the decree was still vested in the Subordinate Judge, First Court. His decision was upheld by this Court. That case is distinguishable on two grounds, firstly, that from the inception the J. D. objected as to jurisdiction, & secondly, that, as the Subordinate Judge, Third Court, had no jurisdiction to entertain the execution, no execution case really came into being & could form the basis of the execution sale held by him. On both grounds, it differs from the case of 'Inderdeo Prasad v. Deonarayan', 25 Pat 50, where a petition for the execution of a decree by the Munsif, Second Court Bhagalpur, was filed in the Court of a Munsif at Monghyr. The irregularity in that case was that the Munsif, Second Court Bhagalpur, sent the decree to the Munsif at Monghyr for execution direct instead of through the Dist. J. as required by O. XXI, R. 5, Civil P. C. Their Lordships held that, u/s. 39 of the Code, the Munsif, Second Court Bhagalpur, had the power to transfer the decree, & his failure to comply with O. XXI R. 5, was a mere defect in procedure which was cured by the failure of the J. D. to raise the point on the several previous occasions on which execution petitions had been filed before the Munsif's Court for executing this decree.

(5) The leading case on this subject is 'Ledgard v. Bull', 13 I. A. 134, in which an action for the alleged infringement of certain exclusive rights secured by three Indian patents was instituted in the Court of the Subordinate Judge of Cawnpore & was subsequently transferred to the Court of the Dist. J. & disposed of by him. The institution of the suit contravened S. 34 of Act XV of 1859, which provides that no action for infringement:

"shall be maintained in any Court other than the principal Court of original jurisdiction in civil cases within the local limits of whose jurisdiction the cause of action shall accrue or the defendant shall reside as a fixed inhabitant."

The defendant contested the jurisdiction of the Dist. J. to proceed with the suit on the ground that the subordinate Judge had no jurisdiction to entertain it in the first instance. His objection was overruled by the Dist. J. & by the H. C. in appeal. This decision was reversed by their Lordships of the P. C. At first sight, the case appears to be distinguishable from that with which we are concerned. It is clear that, the Subordinate Judge being incompetent to entertain such a suit, there was no suit before him, & the order of the Dist. J. purporting to transfer the suit to his own file was equally incompetent. This is the view expressed by their Lordships at p. 144 of the report, but it is not the ground upon which the case was decided.

Their Lordships proceeded to lay down the principle governing such a case in the following words:

"The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a Court incompetent to entertain it, & that the order of transference was also incompetently made. The Dist. J. was perfectly competent to entertain & try the suit, if it were competently brought, & their Lordships do not doubt that, in such a case a defendant may be barred by his own conduct, from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, & be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the judge is competent to try, the parties without objection join issue, & go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit."

Having done so, they went on to consider & accept the defendant's plea that he objected as to jurisdiction — an investigation which in their opinion was necessary. The principle enunciated in this case was re-affirmed by their Lordships of the Judicial Committee in 'Minakshi Naidu v. Subramanya', 11 Mad 26. In that case, however, as also in 'Sevak Jeranchod Bhogilal v. Dakore Temple Committee', A I R (12) 1925 P C 155, as the Court had no inherent jurisdiction to entertain the case, it was held that the acquiescence of the party could not confer jurisdiction upon the Court.

(6) Another instructive case is 'Jang Bahadur v. Bank of Upper India Ltd.', 55 I A 227. That case related to the execution of a mortgage decree obtained against the father of the appellant in the subordinate Court at Lucknow. The decree had been transferred to the Court at Hardoi for execution, &, upon the death of the J D., the Hardoi Court after notice to the appellant ordered that execution should proceed against him. The validity of the proceedings was challenged on the ground that, u/s. 50, sub-s. (1) of the Civ. P. C., the jurisdiction to direct execution to proceed against the legal representatives of the J. D. is vested in the Court which passed the decree. The order substituting the appellant in place of his father was clearly in contravention of an express provision of the statute. Nevertheless, as the jurisdiction to execute the decree was vested in the Hardoi Court by reason of the order transferring the decree to it for execution, & as their Lordships considered that the obtaining of an order of substitution was merely a matter of procedure, they held that the defect was curable by waiver.

(7) Irregularity in the institution of a suit formed the subject-matter of consideration in 'Henry Peter Pisani v. Her Majesty's Attorney-General for Gibraltar', (1874) L R 5 P C 516. The suit was initiated on an information by the Attorney-General claiming for the Crown lands which had belonged to Miss Manuela Perro as escheated for want of heirs. He made defts. to the information the appellant Pisani & several other persons, who had opposing claims to the property as among themselves. The Attorney-General failed to establish the title of the Crown by escheat &, thereupon, the suit, as originally framed, ought to have been dismissed. But, as the opposing claims of the defts. among themselves became clear in the course of the cause, it was proposed that the information should be amended so as to enable the Court to determine & declare what those rights were. This was accordingly done with the consent of the Counsel present on behalf of the defts. The Court proceeded with the suit & gave a decree. In appeal by Pisani to Her Majesty in Council, the Judicial Committee conceded that the procedure followed was a wide departure from the ordinary procedure of the Court which clearly could not have been done without the consent of the parties, & that, with regard to two of the defts. who were infants, no consent could be given. Nevertheless, as the Court had jurisdiction over the subject, & as Pisani had acquiesced in its departure from the ordinary procedure & had done so with knowledge of the fact that these defts. were infants, he could not be heard to object that his consent did not bind him. In the result, they came to the conclusion that the proceedings were a valid proceeding 'in curia' against which an appeal lay to Her Majesty in Council in the ordinary course.

(7a) A similar view as to the effect of waiver on irregularity in the institution of proceedings in Court was expressed by the Court of Appeal in England in 'Ex Parte Pratt', (1884) 12 Q B D 334, & 'Ex Parte May', (1884) 12 Q B D 497. In the former case, the Judge made a receiving order under the Bankruptcy Act, 1883, although the act of bankruptcy was not strictly proved, the debtor, who was present, taking no objection on this ground. The debtor then appealed. It was found that on the files of the Court there was evidence which in the circumstances was amply sufficient to justify the Judge in making the order. The appeal was dismissed, Bowen, L. J. pertinently observing:

"There is a good old-fashioned rule that no one has a right so to conduct himself before a tribunal as if he accepted its jurisdiction, & then afterwards, when he finds that it has decided against him, to turn round & say, 'You have no jurisdiction', You ought not to lead a tribunal to exercise jurisdiction wrongfully."

In the other case, the petition was presented under the Bankruptcy Act, 1869, in accordance with a decision in 'In re Carr' (not reported), that bankruptcy petitions under the Act of 1869, founded on acts of bankruptcy committed under that Act, might be received after the commencement of the Bankruptcy Act of 1883. May appeared, but took no objection to the jurisdiction of the Court to make an adjudication on a petition presented in this way. The registrar adjudicated him a bankrupt, & he did not appeal from the order within the time limited for the purpose. A few days after the expiry of this period, being advised that the effect of the decision in 'Ex parte Pratt' (ante) was to show that there was no jurisdiction to make an adjudication against him under the Act of 1869, he applied to the registrar to appoint a day on which he might apply to the Court for an order that the bankruptcy petition might be re-heard. The registrar refused the application & the bankrupt appealed. It was

clear that the effect of S. 169, Bankruptcy Act of 1883 was to repeal the creditor's right to present a bankruptcy petition under the Act of 1869. But there were certain saving clauses in S. 169 preserving rights & privileges acquired under the previous legislation & proceedings under the Act of 1869 pending at the commencement of the Act of 1883. In the case before the Court of Appeal, liquidation proceedings were pending under the Act of 1869 on 1-1-1884, but became inoperative by reason of the creditors separating without passing any resolution, thus putting an end to the liquidation proceedings. But the receiver who had been appointed had not been discharged, thus keeping the proceedings alive even for the purpose of enabling the Court to order a fresh first meeting of the creditors to be held. By means of an appropriate order, therefore, it was possible for the Court to proceed to make an order of adjudication under the Act of 1869. The Court of appeal held that in the circumstances the failure of the debtor to object to the form of the proceedings disentitled him to a re-hearing on the ground of this error in form. Bowen L. J. observed:

"It is quite true that the Court, being misled by the previous decision in 'In re Carr', did make the adjudication on a wrong ground. But the Court would have had power, if it had chosen to exercise it (& it would no doubt have done so if its attention had been directed to the point), to make the very same adjudication under Sub-s. 12 of S. 125, on the ground that liquidation proceedings were pending in which justice could not be obtained by the creditors unless they were converted into bankruptcy proceedings. If the point had been taken the Court could have clothed itself with jurisdiction to make the adjudication under Sub-s. 12 of S. 125. I think the true ground of our present decision is this, that the debtor had no right to allow the Court which could have exercised jurisdiction rightly, to exercise jurisdiction on a wrong ground, & then to come to the Court of Appeal & say. The Court below had no jurisdiction to make the adjudication against me. The answer to his appeal is: the Court had jurisdiction to make the adjudication if it had exercised it in the right form."

(8) Finally, I would refer to 'Girwar Narayan Mahton v. Kamla Prasad', 12 Pat 117, which shows the extent to which this doctrine has been carried by this Court. There, a suit had been entertained by a civil Court in contravention of the statutory bar of S. 109, Bihar Tenancy Act that a civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted, or proceedings taken u/ss. 105 to 108 of the Act. Subsequently, the validity of the compromise arrived at between the parties to this suit was challenged. The objection succeeded in the Court below. But the decision was reversed by a Bench of this Court which pointed out that the Civil Court had jurisdiction as regards place, valuation, subject-matter & person, & that the prohibition contained in S. 109 was not an inherent want of jurisdiction. In the case before their Lordships, the jurisdiction of the Civil Court had not been challenged before the Civil Court which passed the impugned decree. It was, therefore, covered by the decisions to which I have referred above. Their Lordships went further & observed:

"The criterion is that if the constitution of the Court gives it jurisdiction to entertain a suit, but the jurisdiction may be barred by the existence of some extraneous facts, or the bar depends on an interpretation of the law, there is no inherent want of jurisdiction as the existence of those facts, or the interpretation of the law, is a matter for the Court itself to decide." It is unnecessary to decide in this case how far the above observation is consistent with the decision in 'Ledgard v. Bull', (ante). It will suffice to point out that their Lordships were concerned with a statutory & absolute bar to the entertainment of the suit by the Civil Court & held that it did not affect the inherent jurisdiction of the Court. We are concerned here merely with a bar which was removable by an order of transfer u/s. 25 (sic.) of the Civ. P. C. Had an objection to jurisdiction been raised at the proper stage, the necessary order could have been obtained.

(9) To sum up, the Additional Munsif, Third Court, had inherent jurisdiction to try the suit. All that was necessary was that certain procedure should have been followed in order to remove the case from the file of the Additional Munsif, Second Court, to his file. The failure to obtain this order was a defect of procedure which has been cured by waiver.

(10) In the result, I would dismiss this appeal with costs.

(11) SINHA J.: I agree.

D.H. *Appeal dismissed.*

A. I. R. (39) 1952 PATNA 331 (C. N. 60)

IMAM AND NARAYAN, JJ.

Harihar Prosad Singh and others, Appellants v. Ganga Singh and others, Respondents.

A. F. O. O. No. 85 of 1946, D/- 23-3-1948.

Limitation Act (1908), Art. 182 (4) — Final partition decree — Execution barred — Amendment of decree if gives fresh terminus a quo.

Where a final decree in a partition suit has been amended by alteration in the matter of payment of stamp duty, the amendment being of a substantial character, a fresh 'terminus a quo' for execution of the final decree from the date of the amendment is available to the D. H. The fact that the amendment was made after the decree was time barred is immaterial. (*Para 10*)

Per Narayan J.: Apart from the fact whether the amendment is substantial or not, the 'terminus a quo' would be deemed to be the date of the amendment and not of the original decree. A I R (29) 1942 Pat 478, Foll. A I R (25) 1938 Pat 57, Discussed. A I R (19) 1932 P C 165, Apld., A I R (28) 1941 Lah 131; 65 C L J 455; A I R (22) 1935 Mad 97; A I R (29) 1942 Pat 478, Rel. on. (*Para 3*)

Anno: Limitation Act, Art. 182 N. 50.

K. Dayal, Sarjoo Prasad and T. P. Sinha, for Appellants — Nandlal Untwallia, Girjanandan Prasad and S. P. Srivastava, for Respondents.

Cases referred to:

('32) 60 Cal 1: (A IR (19) 1932 P C 165) (Pr 4)

('37) 41 C W N 1330: (65 C L J 455) (Pr 6)

('41) A I R (28) 1941 Lah 131: (I L R (1941) Lah 659) (Pr 5)

('35) A I R (22) 1935 Mad 97: (58 Mad 743) (Pr 7)

('37) 16 Pat 290: (A I R (24) 1937 Pat 316) (Pr 3)

('38) 16 Pat 453: (A I R (25) 1938 Pat 57) (Prs 4, 11)
('42) A I R (29) 1942 Pat 478: (202 I C 105) (Pr 8)

NARAYAN, J.: This appeal is directed against an order of the Subordinate Judge, first Court, Muzaffarpur, dismissing a petition of objection filed by the J. Ds. in an execution proceeding. The objection was to the effect that the application for execution was time barred.

(2) A preliminary decree for partition had been passed on 23-12-1931, & this decree was made final on 23-12-1935. An appeal was preferred to this Court against the preliminary decree on 13-3-1936, & this appeal was dismissed on 12-1-1939. The D. Hs. applied for the execution of the decree on 5-6-1942 & the J. Ds. filed an application under S. 47, Civil P. C. objecting to the maintainability of the execution petition on the ground that it had not been filed in time. The petition was rejected by the Court of first instance, but on appeal this Court by its order dated 10-11-1944 held the execution to be time barred.

(2) While the matter was pending before this Court delivery of possession in pursuance of the final decree was given to the parties in June, 1943. On 8-11-1943, however, deft. 3 p in a petition for the amendment of the decree, & the amendment was allowed on 2-2-1944. The present application for execution was filed on 6-12-1945, & an objection was taken that the application for execution could not be deemed to be in time because no fresh terminus a quo was available to the D. H. on account of the amendment of the decree. The learned Subordinate Judge was of the opinion that a fresh terminus a quo was available to the D. H. on account of the amendment of the decree & accordingly he held that the application for execution was within time.

(3) In my opinion, the view taken by the Subordinate Judge is correct, & now there is a preponderance of judicial opinion in favour of the view which he has taken. In 'Magan Lal v. Sitaram', 16 Pat 290; Wort, J. after reviewing the authorities on the point came to the conclusion that where a decree was amended more than three years after it was passed & the J. D. objected to the execution of the amended decree, the terminus a quo would be deemed to be the amendment & not the original decree. His Lordship further pointed out that it was not open to the executing Court to go behind the order of amendment & to enquire if the decree was really barred on the date of amendment or not.

(4) In 'Rameshwar Narain v. Raghunandan,' 16 Pat 453, Fazl Ali, J. (as he then was) and Madan, J. no doubt expressed some doubt as to whether in all cases of amendment of the decree, a fresh terminus a quo was available to the D. H. for the execution of the decree. But with the utmost respect, I would point out that whatever their Lordships have said in this case must be regarded as obiter dicta. Their Lordships' ultimate decision on the merits of that particular case was that the amendment, on the basis of which the D. H. claimed that he had a fresh starting point of limitation, was no real amendment. While referring to Cl. (4) of Art. 182, Limitation Act, his Lordship, Fazl Ali, J. observed that this provision had been somewhat unhappily drafted & was liable to present some difficulties, but their Lordships in this case did not finally lay down any principle which can be deemed to be in conflict with the principles laid down in other cases, namely cases of the Calcutta High Court as well as of the Madras High Court in all of which reliance has been placed on the following observations of the Privy Council in the case of 'Nagendra v. Suresh', 60 Cal 1:

"Their Lordships think that nothing would be gained by discussing these varying authorities in detail. They think that the question must be decided upon the plain words of the Article: 'Where there has been an appeal', time is to run from the date of the decree of the appellate Court. There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of period of limitation must always be to some extent arbitrary, & may frequently result in hardship. But in construing such provisions, equitable considerations are out of place, & the strict grammatical meaning of the words is their Lordships think, the only safe guide. It is at least an intelligible rule that, so long as there is any question sub judice between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution, which, if the final result is against them, may lead to no advantage. Nor, in such a case as this, is the J. D. prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors, &, if he is virtuously inclined, there is nothing to prevent his paying what he owes into Court. But whether there be or be not a theoretical justification for the provision in question, their Lordships think that the words of the Article are plain, & that there, having been in the present case an appeal from the mortgage decree of 24-6-1920, time only ran against the appellants from 24-8-1922, the date of the appellate Court's decree."

Undoubtedly, their Lordships were not dealing with a case under Cl. (4) of Art. 182, Limitation Act, but the rule of construction which their Lordships have laid down is binding on us & has been applied in several authorities to a case under Cl. (4) of Art. 182.

(5) Relying on this Privy Council decision, the Lahore High Court in a very recent case 'Imam Din v. Peoples Instalment & Saving Bank, Ltd., Lahore', A I R (28) 1941 Lah 131, held that

"it is not the function of the executing Court to question the correctness or propriety of the amendment of the decree. That is a matter which should be agitated before the Court, which amended the decree, at the time when proceedings for amendment were going on."

(6) In a Calcutta case 'Manohur Chandra v. Sudhi Priya', 41 C W N 1330, a Division Bench of the Calcutta High Court held that under Art. 182, Cl. (4), Limitation Act, time for the execution of a decree, which was amended, ran from the date of the amendment & that it was absolutely beyond the competence of the executing Court to decide as to whether the order for the amendment of the decree was proper or not, even though the amendment was made beyond three years of the date of the decree.

(7) A similar view was taken by the Madras High Court in 'Lakshmikanta Rao v. Ramayya', A I R (22) 1935 Mad 97 & their Lordships in this case also relied on the observations of Sir Dinshah Mulla in the Privy Council case referred to above.

(8) In a recent case of this Court in 'Kesho Singh v. Bhuneshwari', AIR (29) 1942 Pat 478, Agarwala, J. (as he then was) held that where the amendment was of a substantial nature, it resulted in time running against the J. Ds. from the date it was made & not from the date of the original decree.

(9) Even if, however, a question can arise, in spite of the Privy Council decision referred to above & the other authorities on the point, whether only a substantial amendment can create a fresh terminus a quo for the D. H., in this particular case we have no doubt that the amendment was a substantial one. The order in the final decree runs as follows:

"Let the suit be decreed finally & on judicial stamp being filed, a final decree be prepared. The Commissioner's report, map & the takhtabandi will form part of the decree. Costs of commission should be proportionately borne by the parties. Other cost is lost."

(10) This order means that only the costs of commission had to be proportionately divided between the parties, & so far as the remaining costs of the suit were concerned they were treated "as lost". It, however, appears that Rs. 285 had to be spent on stamp duty & this amount was shown as payable by the plffs. defts. 1 to 7 & defts. 8 to 10 in proportion to their shares. Deft. 3 put in a petition for the amendment of the decree on 8-11-1943, & his contention was that in view of the order passed at the time of the final decree, the entire amount of costs incurred on account of stamp duty should be payable by the plffs. This contention was accepted & an amendment was allowed & Rs. 142-8-0 was knocked off from the account of defts. 1 to 7, & Rs. 71-4-0 was knocked off from the account of defts. 8 to 10. It can by no means be held that this amendment was not of a substantial nature. It cannot be deemed to be an ordinary clerical amendment, for the question was as to who would be liable for the stamp duty that had to be paid for making the decree final. In this view, I am of opinion that even if we adhere to the view that only a substantial amendment can furnish a fresh terminus a quo to the D. H. for execution of the decree the amendment on which the D. Hs. are relying in this particular case must be deemed to be a substantial one. In the result, this appeal is dismissed with costs.

(11) IMAM J.: I would refer to the observations of Fazl Ali, J. (as he then was) in 'Rameshwar Narain v. Raghunandan', 16 Pat. 453:

"Having regard, however, to the words of Cl. (4) of Art. 182 it is difficult to distinguish these cases in principle. It appears to me that if Cl. (4) of Art. 182 is to be literally construed there can be no escape from the conclusion that the amendment of a decree provides a fresh starting point for limitation & it is immaterial whether the application for amendment was made within three years of the date of the decree or more than three years after it. At the same time upon reading Art. 182 as a whole it appears to me to be doubtful whether it was contemplated by the Legislature that a decree which is barred under Cl. (1) should be revived by mere amendment. In my opinion Cl. (4) of Art. 182 has been somewhat unhappily drafted & if in fact the Legislature did not contemplate that a decree which was barred under Cl. (1) could be revived by an order of amendment, the clause should be suitably amended by providing that it will be applicable only if either the amendment or the application for the amendment is made within three years of the decree."

& also to the following observations:

"Coming now to the merits of the present case, it appears to me that the amendment which gives a fresh start to limitation must be an amendment in the real sense of the term that is, of some substance as affecting the rights of the parties, & not merely the correction of a clerical error or a trifling arithmetical mistake such as the Court might at any time correct of its own motion."

In the appeal before us, there can be no doubt that by the amendment in question, the rights of the parties were affected with reference to the costs of the non-judicial stamp duty for the preparation of the final decree. This is not a case where the amendment sought is to correct an arithmetical mistake, & as the rights of the parties were affected by the decree not being in conformity with the judgment. I must regard the amendment made as one of substance. It is conceded on behalf of the appellant, that if the amendment is one of substance, it is the consistent view of this Court that a fresh period of limitation starts from the date of the amendment of the decree. In such circumstances, the present application was within time, & the view taken by the Subordinate Judge was correct.

(12) I agree that the appeal be dismissed with costs as suggested by my learned brother.

R.G.D. *Appeal dismissed.*

A. I. R. (39) 1952 PATNA 333 (C. N.61)

B. P. SINHA AND MAHABIR PRASAD JJ.

Rehi Damodar Laljee, Appellant v. Sone Basant Lal and others, Respondents.

A. F. A. O. No. 231 of 1946, D/- 12-8-1948.

(a) Civil P. C. (1908), Ss. 42, 50 (1) — Execution against legal representative — Order by transferee Court.

Though, by virtue of S. 50, the Court which made the decree is the proper Court to order the execution against the legal representative of a deceased J. D., such a jurisdiction is not exclusive and if the transferee Court has ordered the execution of the decree against the legal representatives of a deceased J. D., it is an irregularity in procedure which can be waived. But where an objection to the deciding of the question as to who are the legal representatives of a deceased J. D. by the transferee Court is taken at the earliest stage and the question cannot be gone into for want of sufficient evidence owing to the distance of the transferee Court, the decision of the transferee Court is not proper as the procedure affects the merits of the case and there is no waiver on the part of the objector as regards the irregularity. AIR (15) 1928 PC 162, Rel. on. (*Paras 7, 8, 10*)

Anno: Civil P. C., S. 42, N. 1, pt. 20; S. 50, N. 13.

(b) Civil P. C. (1908), S. 47 and O. 21, R. 58 — Question as to which of parties is legal representative of deceased J. D.

If the simple question in controversy between the parties were whether or not the property proceeded against belonged to deceasd J. D. and his sons on the one hand or to the objector

on the other, the question comes properly within the purview of R. 58, O. 21, Civil P. C. But where the controversy between the parties is as to who are the legal representatives of the J. D. the question is one under S. 47, and hence an appeal lies from the decision of the latter question. (*Para 6*)

Anno: C. P. C., S. 47, N. 27, 84.

Ramanugrah Prasad, for Appellant — C. P. Sinha and Shiveshwar Prasad Sinha, for Respondents.

Cases referred to:

('28) 55 I A 227: (A I R (15) 1928 P C 162) (Pr 7)

('32) 11 Pat 445: (A I R (19) 1932 Pat 261) (Pr 9)

('32) 11 Pat 580: (A I R (19) 1932 Pat 323) (Pr 9)

('41) 19 Pat 838: (A I R (28) 1941 Pat 139) (Pr 9)

B. P. SINHA, J.: This is an appeal from the decision of the learned Additional Dist. J. of Muzaffarpur reversing that of the Subordinate Judge of the same place in an execution proceeding.

(2) In order to appreciate the points in controversy between the parties, it is necessary to state the following facts. The D. H.-resp. obtained a decree for money against Ghanshyam-Lal in the Munsif's Court at Mahaban in the district of Agra. The decretal amount is over four thousand rupees. The D. H. got the decree transferred to the Muzaffarpur Court with a view to executing the same in that Court by attachment & sale of a proprietary interest in village Gaibipur Ranjitpur, tauzi No 19770. During the pendency of the execution proceedings, the J. D., Ghanshyam, died. One of the points in controversy between the parties in the Court below was as to whether he died on 20-11-1944, as alleged by the D. H., or on 22-8-1944, as alleged by the J. D's alleged legal representative. That controversy is now closed, as both the Courts below have found that the D. H's allegations in this respect are correct. On the death of the J. D., the sons of Ghanshyam & his brothers' sons, one of whom, Damodar Lal, son of Dwarka Nath, who is the objector, appellant in this Court, were brought on the record by the transferee Court.

(3) The objections raised by the appellant in the executing Court were (1) that the transferee Court had no jurisdiction to make an order for substitution in place of the deceased J. D.; (2) that the property sought to be proceeded against in execution of the decree by the D. H. was the property of the objector-appellant, to the extent of twelve annas & the remaining four annas belonged to Madho Lal, the son of Shyam Sunder deceased, another brother of Ghanshyam, the J. D.; & (3) that the execution was barred by limitation on the ground that the J. D. had died on 22-8-1944, that is to say, before the application for transfer of the decree was made in the Court which passed the decree.

(4) The executing Court allowed the objection to the execution of the decree, holding that the order for substitution was irregularly made by the Muzaffarpur Court but that the order was not without jurisdiction; that the application was not barred by limitation, as it had not been proved by the objector that the J. D. had died before the appln. for transfer of the decree had been made in the Court which passed the decree; but that the J. D. or his sons have no interest in the property sought to be sold, inasmuch as the four annas interest of the J. D. in the property had been sold to the objector. On appeal by the D. H., the learned Additional Dist. J. allowed the same, holding that the sale of the four annas interest of Ghanshyam in the property in question was not effective to transfer the title of Ghanshyam to the objector. In that view of the matter, he held that the four sons of Ghanshyam should be proceeded against in the execution proceedings, & their four annas interest in the property sold in satisfaction of the decree. Accordingly, he directed the names of Damodar, the appellant, & Madho to be struck out from the category of J. Ds. In effect, therefore, the learned Additional Dist. J. allowed the objection in part & disallowed it to the extent that four annas, out of the sixteen annas interest, were ordered to be sold as being the property of Ghanshyam's sons who were the only legal representatives of the J. D. liable under the decree.

(5) In this second appeal, it has been argued by the learned counsel for the appellant, Damodar, that the order substituting the so-called heirs of the deceased J. D. could not have been passed by the transferee Ct., & could have been legally passed only by the Court which passed the decree; that this was not a mere irregularity but an illegality which affected the jurisdiction of the transferee Court itself; that the lower appellate Court had no jurisdiction to entertain the appeal from the order of the original Court executing the decree, inasmuch as it was an order properly coming under R. 58, Order XXI, Civil P. C., allowing the claim petition of the appellant; &, finally, that the judgment of the lower appellate Court reversing that of the Court of first instance on the merits of the claim was also vitiated by errors of law.

(6) At the outset, it may be noted that Ghanshyam, the J. D., had three brothers, Dwarka Nath (the applt's father), Shyam Sunder (Madho's father) & Chhotey Lal. The four brothers aforesaid inherited from their maternal grandfather the property sought to be proceeded against at the instance of the D. H. The D. H. took the attitude that the property was a joint one in which all the brothers had equal interest, & that Ghanshyam, being a member of that joint family, could bind the property in question. Both the Courts below have held that the family was not a joint one. Hence, the position is that the decree against Ghanshyam cannot be executed against anyone, other than his legal representatives. It is clear, on the findings, that his four sons, who were also substituted on his death, can only be proceeded against as the J. Ds. Hence, the D. H. was not entitled to bring the sons of Dwarka Nath of Shyam Sunder or Chhotey Lal on the record of the execution proceedings in the category of J. Ds. by substitution in place of the original J. D. Ghanshyam. The position, therefore, is that the D. H. alleged that all the persons sought to be substituted by him were the legal representatives of Ghanshyam: on the other hand, the objector contended that only the sons of Ghanshyam could be liable, if at all, under the decree against Ghanshyam. Such an objection, in my opinion, comes within the purview of S. 47, Civil P. C. which enjoins the executing Court to decide the question of

whether certain persons alleged to be the legal representatives of a J. D. were really the persons who could be substituted as the legal representatives of the deceased J. D. If the simple question in controversy between the parties were whether or not the property proceeded against belonged to Ghanshyam & his sons on the one hand or to the objector on the other, the question may have properly come within the purview of R. 58, Order XXI, Civil P. C. But, as already indicated, the controversy between the parties was as to who were the legal representatives of the J. D., & that question can properly be decided in an objection under S. 47, Civil P. C. That being so, in my opinion there is no substance in the contention raised on behalf of the appellant that no appeal lay to the lower appellate Court against the decision of the executing Court on the question of whether all the persons sought to be brought on the record as the J Ds. were really the legal representatives of the J. D .

(7) A more serious objection to the competence of the executing Court & of the lower appellate Court to go into the questions in controversy between the parties is based on the provisions of S. 50, Civil P. C., sub-s. (1) of which lays down that, where the J. D. has died before the decree has been fully executed, the D. H. may apply to the Court which passed the decree to execute the same against the legal representative of the deceased. The contention of the applt. is that the Muzaffarpur Court was not competent to go into the question as to who are the legal representatives of the deceased J. D. & that it was the Munsif's Court at Mahaban in the district of Agra who could have determined this question. It is true, that under S. 50, Civil P. C. , it is the Court which passed the decree which is empowered by Sub-S. (1), of S. 50, to order the execution of the decree against the legal representative of the deceased J. D. But it is not correct to say that it is a matter which goes to the root of the jurisdiction of the Court. The most authoritative decision on this question is that of their Lordships of the Judicial Committee in the case of 'Jang Bahadur v. Bank of Upper India, Ltd.,' 55 I A 227. In that case their Lordships have held that, though, by virtue of S. 50 of the Code, the Court which made the decree is the proper Court to order the execution against the legal representative of a deceased J. D., such a jurisdiction is not exclusive, & that, if the transferee Court has orderd the execution of the decree against the legal representatives of a deceased J. D., it is an irreularity in procedure which can be waived. In that case their Lordships went into the provisions of Civil P. C. of 1859, 1877, 1882 & the present Code of 1908. Their Lordships also noticed the "apparent divergencies of opinion among the different High Courts in India on this question", & pointed out that there was no real conflict between the different decisions in India, which they reconciled by making the following observations:

"If the J. D. dies before any such certificate is issued. the Court of transfer does not lose its jurisdiction over the execution proceeding, which does not abate by reason of the death. But before execution can proceed against the legal representative of the deceased J. D. the D. H. must get an order for substitution from the Court which passed the decree. This is a matter of procedure & not of jurisdiction. The jurisdiction over the subject-matter continues as before, but a certain procedure is prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure the defect might be waived & the party who has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round & challenge the legality of the proceedings."

(8) Applying the dicta of their Lordships of the P. C. to the facts of the present case, can it be said that the appellant had waived by acquiescence the irregularity in the procedure of the Court at Muzaffarpur? As soon as the appellant appeared, he raised the objection that the Muzaffarpur Court had no power to hold the enquiry under S. 50, Civil P. C. , & its order passed 'ex parte', substituting all the persons whom the D. H. wanted to be substituted in place of the deceased J. D. was illegal. But the Court overruled the objection, holding that the order was not void 'ab initio'. The lower appellate Court also agreed with that observation of the Court of first instance, though it reversed the latter's decision on merits. It cannot, therefore, be said that there has been any waiver or acquiescence by the appellant in the order making substitution in place of the deceased J. D.

(9) But reliance was placed on behalf of the D. H. on the D. B. ruling of this Court in the case of 'Debendra Nath V. G. A. Aratoon 19 Patna 838'. In that case their Lordships relied upon the decision of the Judicial Committee referred to above, & held that the appellate Ct. should not interfere with an order passed under S. 50 made by a Ct .to which the decree had been transferred for execution where the merits of the case are not affected by the irregularity. Their Lordships referred to the previous decisions of this Ct. in the cases of 'Chandra Chur Deo' v. 'Mt. Sham Kumari 11 Patna 445' & 'Kalu Ram v. Firm Sheonand Rai Jokhi Ram', 11 Pat 580, which were illustrations of the application of the rule laid down by their Lordships of the Judicial Committee in the case discussed above. It has been argued on behalf of the respondent D. H. that we should follow the decision of the Division Bench of this Court in the case of 'Debendra Nath V. G. A. Aratoon,19 Patna 838'. But in that case their Lordships held that, as the decree had been transferred to Ranchi, which was the place of the J. D. they could not be said to have been prejudiced in the proper prosecution of their case, if the Ranchi Court passed the order impugned. But in the present case it appears that the appellant is a resident of Gokhul in the district of Mathura, & both the Courts below have made a point that some persons belonging to their family, who could have thrown a light on the questions in controversy between the parties, had not been examined in this case. The lower appellate Court has adversely commented upon the non-examination of the sons of Ghanshyam & the absence of the appellant's mother from the witness box. Hence, it cannot be said that the appellant has not been prejudiced in the trial of this case by the Muzaffarpur Court going into the issues involved in the case.

(10) For these reasons, in my opinion, the executing Court should have stayed its hands & called upon the D. H. to take recourse to proceedings under S. 50 (1), of Civil P. C. in the Mahaban Court which passed the decree, & then the execution in Muzaffarpur Court should have gone on. In my opinion, this irregularity in the procedure has affected the merits of the case,

& I would, therefore, set aside the order of the Courts below, & uphold the objection raised by the appellant. It is not necessary, therefore, at this stage to go into the merits of the case which are left open to be determined after the objections of the appellant have been gone into by the Court which passed the decree under execution.

(11) In the result, the appeal is allowed, & the judgment & orders passed by the Courts below set aside with costs in all the Courts.

(12) MAHBIR PRASAD, J.: I agree.

D. R. R. *Appeal allowed.*

A. I. R. (39) 1952 PATNA 336 (C. N. 62)

MANOHAR LALL AND RAY, JJ.

Thakurji and another pltfs, Appellants v. Raghveshsurendra Sahi, Deft. Resp.

A. F. O. D. No. 68 of 1945, D/- 18-3-1948.

(a) *Court-fees Act (1870), S. 7 — Valuation of suit for purposes of court-fees — Considerations stated — Civil P. C. (1908), O. 7 R. 1.*

In order to determine the question of Court-fees the nature of the reliefs sought or the class to which the suit belongs has to be scrutinised. The pltf. is required to pay court-fee upon the allegations which he makes in the plaint and not on what transpires after the reading of the written statement. (*Paras 2, 3, 8*)

Anno: C. P. C. O. 7 R. 1 N. 11; Court-fees Act S. 7 N 3

(b) *Court-fees Act (1870), Sch. II, Art. 17, para 6 — Suit for possession of trust property by idol and delivery of it to pltf. 2 as mutawalli — Court-fee — Principle stated.*

Where a suit is for declaration of any legal character by the plff. and for consequential relief, the valuation for Court-fee would be the valuation at which the pltf. valued the relief. The pltf. in such cases has some amount of liberty to put his own valuation on the relief. This liberty cannot be curtailed or in any way diminished so long he does not value the relief arbitrarily. The value of the relief certainly depends upon the value of the benefit that is to be derived from it. Under the circumstances, it is only fundamental that the valuation should weigh according as the quantum of the benefit involved in the relief varies. In this view a relief for taking charge of an office or trust estate must be different from recovery of possession of properties though the latter relief is sought by a trustee. (*para 6*)

Disputed properties were endowed to an idol. There was a dispute as to possession of the said properties as between plff. 2 and the deft each claiming to be rightful mutwalli in possession. In a proceeding under S. 145 Criminal P. C., the Criminal Court attached the properties under S. 146 of the Code. Thereupon, both the pltf. 2 as well as the defendant instituted suits for establishment of their respective title as mutwalli and for possession of the properties. The defendant's suit was decreed and the plff's suit was dismissed by virtue of a compromise. Accordingly, the defendant, got possesssion of the properties from the receiver appointed by the Criminal Court, in pursuance of the order of attachment. The plff. instituted another suit in which the compromise was impugned as a fraudulent one. The plff. claimed the following reliefs, namely, (1) declaration that the plff. was the mutwalli of the endowed properties; (2) declaration that the plff. was and the deft. was not entitled to remain in charge of the trust estate and (3) that the deft. be directed to make over charge of the said estate to the plff. 2.

Held, that in substance, the plff's suit was for recovery of the office of shebaitship which, according to him, had been usurped by the deft. under a colourable compromise decree. As the scheme of the endowment, according to the plff's allegations in the plaint, did not provide for any emoluments being attached to the office of mutwallship, the aforesaid reliefs were not capable of valuation. Consequently fixed Court-fee provided by Sch. II, Art. 17, para 6 was payable. 'A I R (21) 1934 Pat 647, Folld'. (*Para 6*)

Anno: Court -fees Act Sche. II, Art. 17. (VI) N. 2

G. P. Singh, for Appellants — Govt.-Advocate and Harnarain Prasad, for Respondents.

Cases referred to:

('99) 21 All 200: (1899 A W N 32) (Pr 5)
('32) A I R (19) 1932 All 593: (54 All 869) (Prs. 5, 10)
('25) A I R (12) 1925 Mad 421: (80 I C 1053) (Pr 11)
('25) A I R (12) 1925 Mad 804 (88 I C 209) (Prs. 5, 10)
('34) A I R (21) 1934 Pat 647: (153 I C 296) (Prs. 3, 9, 12)

RAY J: This is a plff's appeal agaist an order rejecting the plaint for non-payment of ad valorem Court-fees. The plff. valued the relief in the suit at Rs. 1400/- for the purpose of jurisdiction & paid a fixed fee of Rs. 15/- provided by Sch. 2, Art. 17 part 6, Court-fees Act, as the subject-matter of the suit is not capable of being valued in money. The trial Court by its Order No. 52 in title suit No. 14 of 1942 (in the Court of the second Subordinate Judge, Gaya) dated 29-3-44 came to the conclusion that the actual value of the right claimed in the properties can hardly be less than the market value of the lands & any other valuation would be arbitrary. In this view, in consideration of the actual income of the villages in the suit being Rs. 14700/- & odd, he fixed the market value of the properties at Rs. 147550/-. Accordingly the plff. was directed to correct the valuation stated in the plaint & to pay court-fees thereon by a fixed date. As no court-fees were paid, the plaint was rejected.

(2) In order to determine the question at issue the nature of the reliefs sought or the class to which the present suit belongs has to be scrutinised. The dispute properties are admittedly endowed to Sri. Thakurji (plff. 1) at Ajodhya. There was a dispute as to possession of the said properties as between the plff. 2 & the deft. each claiming to be rightful mutwalli in possession. In a proceeding under S. 145, Criminal P. C., the criminal Court attached the properties under S. 146, of the Code. Thereupon, both the plff. 2 as well as the deft. instituted suits for establishment of their respective title as mutwalli & for possession of the properties. The deft's suit was decreed & the plff's suit was dismissed by virtue of a compromise. Accordingly, the deft. got possession of the properties from the receiver appointed by the criminal Court in pursuance of the order of attachment, already referred to. In the present suit the compromise is impugned as a fraudulent one. The plff. claims the following reliefs, namely,

(1) declaration that the plff. is the mutwalli of the endowed properties; (2) declaration that the plff. is & the deft. is not entitled to remain in charge of the trust estate & (3) that the deft. be directed to make over charge of the said estate to the plff. 2.

(3) It is obvious that plff. 2 does not claim any beneficial ownership in respect of the properties in suit. It is further quite plain that plff. 2 is nominally a party in order to meet the objection regarding what can be called a technical defect in it, as neither by virtue of the previous compromise nor under the decree obtained by the deft. in his suit, already referred to, title of the deity (plff. 1.) was at all challenged. The conflicting claims as between the parties are as to their respective rights to hold charge of the endowment, or, in other words, the endowed properties. In determining the nature of the suit for the purpose of fixation of Court-fees, the allegations made & the reliefs sought in the plaint are the only relevant materials. The defence set up by the deft. does not come into the picture at all in ascertaining the nature of the plff's suit. In substance, the plff's suit is for recovery of the office of shebaitship which, according to him, has been usurped by the deft. under a colourable compromise decree. As the scheme of the endowment, according to the plff's allegations in the plaint, does not provide for any emoluments being attached to the office of mutwalliship, the aforesaid reliefs are not capable of valuation. Reliance is placed by the appellants' learned Counsel on the decision in the case of 'Maulavi Sayeed v. Shah Tafazul Hussain', A I R (21) 1934 Patna 647 in which a Division Bench of this Court held :

"Where the subject-matter of the suit is the right to mutwalliship & the office does not carry any salary or any other material enjoyment, it is not capable of monetary valuation & therefore the proper Court-fee is the fixed fee of Rs.15/- provided by Sch. 2, Art. 17, Para 6".

(4) Mr. S.K.Mitra appearing for the Crown strenuously urged that the facts of Maulavi Syeed's case are different from the facts of the present case, & therefore, the decision referred to does not apply. No doubt the facts are slightly different in so far as in that case the plff. claimed for recovery of a sum of Rs.151/- being arrears of rent due from deft. 1 in respect of the house in dispute; but the dispute as between the plff. & deft. 2 each of whom were claiming the mutwalliship in rivalry against the other was of exactly the same description as here. Mr. Mitra wanted to distinguish that the house was in occupation of a third person. It is, however, clear that the dispute in that case was with regard to the right to receive rents & profits of the house which was the waqf property, & the occupier of the house pleaded that he had already been sued for the arrears of rent by deft. 2. At any rate, even if the facts are different, the principle laid down is a correct one, if I may say so with great respect.

(5) Reliance, however, is placed by Mr. Mitra on two cases, namely, 'Mohammad Ghouse In re', A I R (12) 1925 Mad 804, and 'Parsottamanand Giri v. Mayanand Giri', A I R (19) 1932 All 593. The 'case of Parsottamanand Giri' can be distinguished on the simple ground that the relief in that case was for recovery of possession of immoveable properties. It appears from the following quotation that the ratio of the decision consisted in the mode of relief, & the learned Judge made a distinction between the case before him & the case of Girdhari Lal referred to at the Bar. The quotation is as follows:

"The case of 'Girdhari Lal v. Ram Lal', 21 All 200, was also a suit under S. 539. The plffs. claimed that new superintendents should be appointed for the management of the endowed property & that the property should be taken from the deft. & placed in the possession of the new superintendents. Here again, it was held that the Court-fee was governed by S. 17, Cl. (vi), but the case is distinguishable because the plffs. claimed nothing for themselves personally; they only asked that the trust property should be placed in the possession of the new superintendents whoever they might be. It was not contended that it was a suit for possession of trust property."

(6) On principle where a suit is for declaration of any legal character by the plff. & for consequential relief, the valuation for Court-fee would be the valuation at which the plff. valued the relief. The plff. in such cases has some amount of liberty to put his own valuation on the relief. This liberty cannot be curtailed or in any way diminished so long he does not value the relief arbitrarily. The value of the relief certainly depends upon the value of the benefit that is to be derived from it. Under the circumstances, it is only fundamental that the valuation should weigh according as the quantum of the benefit involved in the relief varies. In this view a relief for taking charge of an office or trust estate must be different from recovery of possession of properties though the latter relief is sought by a trustee. The deft. in this case holds the property by virtue of a compromise. There is no knowing that he would retain his wrongful possession of the properties even after the plff. is declared a mutwalli & is given charge of the trust. The necessity of recovery of actual possession of the properties may arise in case the deft. chooses to hold it adversely notwithstanding the plff's success in the present suit. As at present, however, the relief sought for by the plff. is one which is not capable of any money valuation. I am bound by the Division Bench decision of this Court which I consider, if I may say so with great respect, lays down the correct principle applicable to the facts of this case. I should, therefore, hold that the Court-fee paid is sufficient.

(7) In the result, the appeal succeeds & is allowed, the order of the trial Judge rejecting the plaint is set aside & the case is remitted back to the Court below for hearing in accordance with law. The appellant is entitled to costs of this appeal. Hearing fee is assessed at three gold mohurs.

(8) MANOHAR LALL, J.: I am of the same view. The plff. is required to pay Court fee upon the allegations which he makes in the plaint & not on what transpires after the reading of the written statement. The plffs' case is, as is evident from a perusal of the plaint that the deft. erroneously styled himself as the shebait of the properties belonging to the deity, & that the compromise decree by which the right of the deft. to that office was acknowledged was fraudulent & not binding upon the plff. I am unable to hold that this suit is a suit for

recovery of possession, it is merely a suit for being put in charge of an office. Therefore, the plffs. are entitled to put a reasonable valuation upon the relief which he claims in the plaint. I am unable to hold that Rs. 4,100/- is an arbitrary valuation. The plff. must pay Court fee on this valuation.

(9) The two cases relied upon by the learned Govt. Advocate do not support him and in any case we are bound by the decision of this Court in 'Maulavi Sayeed v. Tafazul Hussain', A I R (21) 1934 Pat 647, in which the facts are almost identical.

(10) In the case reported in 'Parshottamanand Giri v. Mayanand Giri', A I R (19) 1932 All 593, the plff. as the duly elected mahant sought for recovery of possession of the properties which were in the possession of the deft. who was alleged to have lost his title to mahantship & to retain possession of the properties. The suit itself was valued for the purposes of jurisdiction at 2 lacs & odd & for the purposes of Court fee at 1 lac & 60 thousand & the Court fee of Rs. 1750 was paid. Having lost the suit in part he preferred an appeal to the High Court & valued at one lac & 60 thousand, & contended that it was by mistake that an ad valorem Court fee had been paid in the trial Court & the proper C. F. payable was only Rs. 10/-. The learned Judge in overruling the contention of the appellant that he was only asking for such possession as pertains to the office of the mahant & therefore he was not claiming the possession of the property observed that "the suit is for possession of immovable property & that the C. F. should be governed by S. 7, Cl. (5)." In this connection it was remarked that the Court fees Act does not make any distinction between a suit for possession as a beneficial owner & a suit for possession as a trustee or as the manager of a religious endowment. The learned Judge then considered the earlier Allahabad cases, Rangoon case & some Madras cases. He relied upon the case of 'Mahomed Ghouse, In re', A I R (12) 1925 Mad 804.

(11) In that case the facts were that the plff. was suing for a declaration that he was the Sajjadanashin of two durgas & for the possession of the durgas & the properties attached thereto. He alleged in the plaint that he was appointed by the last Sajjada as his successor & he took possession of the durgas & the properties on the death of that Sajjada, but that he was subsequently dispossessed by deft. 1. It was obvious that this was a suit for recovery of possession. The learned Judge distinguished the case of 'Swaminath Iyer v. A. Ramier', A I R (12) 1925 Mad 421, in which the facts were that the plffs. had sued for a declaration that they & deft. 1 were the lawfully appointed trustees of a certain temple, & they prayed for a declaration that defts. 2 & 3 should be made to restore the office of the trustee to them & for an injunction restraining them from interfering with the exercise by the plffs. & deft. 1 of their duties as trustees. It was held that the plffs. were not bound to sue for the possession of the temple properties.

(12) In my opinion, both these cases relied upon by the learned Govt. Advocate did not take the view contrary to that taken in 'Maulvi Sayeed v. Tafazul Hussain', A I R (21) 1934 Pat 647, & even if these cases took the contrary view, I am bound to follow the Patna decision. I have read the plaint carefully, & I am unable to hold that the plaint can be treated as a suit for restoration of the office of the shebaitship of the plffs. For these reasons, I agree that the plaint should not have been rejected & the appeal must be allowed.

R.G.D. *Appeal allowed.*

A. I. R. 1952 Patna 338

SARJOO PROSAD J.

Palat Ahir, Petitioner v. Baijnath Mahton & others, Opposite Party.

Civil Revn. No. 332 of 1950, D/- 8-1-1952.

(a) Civil P. C. (1908), O. 9, R. 1 — What rule contemplates.

What O. 9, R. 1 contemplates is that the date for appearance given in the summons served on the defendants is the date fixed for the hearing of the case but the hearing may be adjourned from time to time. (Para 2)

(b) Civil P. C. (1908), S. 115, O. 9, R. 13 — Suit to set aside ex parte decree — Dismissal in default — Restoration in revision.

Where a suit for setting aside an 'ex parte' decree is dismissed for default, the High Court in revision will not restore the suit as against some of the defendants as such restoration would be fruitless the suit being eventually bound to result in dismissal. (Para 3)

Anno: C. P. C., O. 9, R. 13 N. 30.

S. N. Banerji, for Petitioner; G. P. Das and Bishun Kumar Singh, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras ('39) AIR 1939 Pat 160: (179 Ind Cas 563) (Pr 2)

ORDER.: This application is against an order dismissing for default a suit instituted by the plaintiff-petitioner. The suit was for setting aside an 'ex parte' decree passed against the petitioner. The suit in question was instituted in March, 1947, and the petitioner took steps for service of notices upon the defendants. It appears from the order of the Court, dated the 15th of May, 1947, that summonses and notices were served on all the defendants except defendant No. 9. Apparently the Court was not satisfied with this service, and therefore the Court directed that the plaintiff should file registered cards for defendants 1 to 8 and 10 to 12 and take steps for service on defendant No. 9.

Eventually notices appear to have been served on defendant No. 9 also, on the 16th of July 1947, but there was some delay in the service of the registered cards on some of the defendants with the result that on the 10th of September 1947, the Court directed that the postmaster should be written to about the service of registered cards on defendants 3, 5, 9, 10 and 12 by the date fixed. From time to time the order sheets disclose that issues were settled and parties appear to have been ready. On the 30th of November 1948, the Court found that the registered cards were served on the other defendants except defendants 3 and 9, and it directed that the plaintiff should take fresh steps for service of registered notices on these defendants.

In the meantime defendant No. 1, died and in his place the heirs sought to be substituted had also to be served with notices. The Court accordingly passed an order on the 5th of January 1949, directing the plaintiff to take necessary steps for service of notices upon all these persons. This

order was not complied with in spite of repeated adjournments. Ultimately the suit was dismissed for default on the 15th of January 1949. In the application for restoration of the suit the petitioner alleged that he was not correctly informed of the date fixed by the Court for taking those steps by his 'karpardaz'. That allegation of his has not been accepted by either of the two Courts below, and they have both held that this explanation was quite unsatisfactory and could not be entertained.

(2) Mr. Banerji on behalf of the petitioner has, however, contended that the application could not be dismissed without a date of hearing having been fixed by the Court below, and he relies upon a decision of this Court in 'SRIPATI SARAN PRASAD SINGH v. INDARJIT MAHTON', AIR 1939 Pat 160. I am afraid this decision does not help Mr. Banerji's contention because in the present case, as rightly pointed out by the learned Subordinate Judge in appeal, there was a date fixed for the appearance of the defendants. This is apparent from the order of the Court, dated the 8th of April 1947, in which the Court fixed the 15th of May 1947, for appointment of a guardian and for settlement of issues. That being so, the contention of the learned counsel is without any foundation.

It is true that in one of the orders dated the 23rd of August 1948, the Court observed that summons would be issued to certain persons for proving a certain document when the date for hearing would be fixed. Order 9, Rule 1, Civil Procedure Code, provides that on the date fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court. Therefore, what this rule contemplates is that the date for appearance given in the summons served on the defendants is the date fixed for the hearing of the case but the hearing may be adjourned from time to time. There can be no doubt that there was such a date fixed in the summons as it appears from the order, dated the 8th of April 1947, to which I have already referred. The contention, therefore, fails.

(3) It is next pointed out that in any case the suit should not have been dismissed in its entirety; it could be dismissed as against the heirs of the deceased defendant No. 1 and as against defendants 3 and 9 only. There is some substance in this contention, but in revision I am not inclined to interfere because the restoration of the suit would be fruitless as eventually it is bound to result in dismissal. The suit was for setting aside an 'ex parte' decree, and it is impossible to hold that the decree would be a good decree as against some of the defendants but a bad decree as against the other defendants. That being so, the dismissal of the suit as against some of the defendants would be tantamount to a dismissal of the suit itself.

(4) For these reasons, the application fails and must be dismissed with costs: hearing fee one gold mohur.

V.R.B. *Application dismissed.*

A. I. R. 1952 Patna 339

JAMUAR AND RAI JJ.

Sailesh Kumar and another, Defendants-Petitioners v. Rama Devi, Plaintiff and others, Defendants-Opposite Party.

Civil Revn. No. 570 of 1950, D/- 12-2-52.

Specific Relief Act (1877), S. 9 — Dispossession of tenant — Suit by landlord against trespasser for possession.

Where a tenant is dispossessed by a trespasser, his landlord can maintain a suit under S. 9 against the trespasser for possession even when at the date of dispossession the property is in occupation of the tenant entitled to its exclusive use: ILR (1951) 2 All 16 and AIR 1929 Bom 467, Foll.; AIR 1926 Mad 18, Dissent.; 18 All 440 (FB), Dist. (Para 8)

Anno: Specific Relief Act, S. 9 N. 5.

P. B. Ganguli, for Petitioners; Janak Kishore, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras.

('96) 18 All 440: (1896 All WN 162 FB) 6
('50) 1950 All LJ 288: (ILR (1951) 2 All 16) 8
('29) 53 Bom 773: (AIR 1929 Bom 467) 8
('26) AIR 1926 Mad 18: (92 Ind Cas 20) 6

JAMUAR, J.: This case has been referred to a Division Bench for the consideration of the question whether a landlord can maintain a suit under S. 9 of the Specific Relief Act against a trespasser for immediate possession when, at the date of dispossession, the house was in occupation of a tenant entitled to its exclusive use.

(2) The application is directed against a judgment and order dated the 30th June, 1950, passed by the learned Subordinate Judge of Arrah in Title Suit No. 109 of 1949.

(3) The suit was brought by the plaintiff opposite party for a decree for possession of a house bearing Municipal Holding No. 6 in Circle No. 2 of the Arrah Municipality after evicting defendants 1 to 4 therefrom. The suit was under the provisions of S. 9 of the Specific Relief Act.

(4) The plaintiff's case was that the house had been allotted to her under a partition decree dated the 26th February, 1947, and actual delivery of possession was obtained by her on the 27th November, 1948. Thereafter, she let out a smaller portion of the house to one Raghubir Ram, & the major portion to one Kashi Ram on the 1st December 1946. Kashi Ram vacated the house on the 29th February, 1949, and, on the 1st March, 1949, that portion was let out to defendants 5 and 6. It was then alleged that defendant No. 4, father of defendants 2 and 3, interfered with the possession of defendants 5 and 6, and a proceeding under S. 144 of the Code of Criminal Procedure was started, resulting in an order against defendant No. 4. The further case of the plaintiff was that, during the temporary absence of defendants 5 and 6, defendants 1 to 4, in collusion, unlawfully dispossessed defendants 5 and 6 from the portion of the house which had been let out to them. This dispossession was on the 15th May, 1949. Thereafter, the suit under S. 9 of the Specific Relief Act was instituted by the plaintiff. The suit was decreed; hence this application in revision.

(5) It has been found by the Court below that the plaintiff is the proprietress of the house in question, that she had let out the major portion of it to defendants 5 and 6, and that defendants 5 and 6 were unlawfully dispossessed from their possession on the 15th May, 1949, by defendants 1 to 4.

(6) Mr. P. B. Ganguly, appearing in support of this application, contended that the plaintiff's suit under S. 9 of the Specific Relief Act was not maintainable, as she could not sue for possession, the actual possession having been with defendants 5 and 6 who were the tenants of the house. In support of his contention, he placed reliance on the cases of 'SITA RAM v. RAM LAL', 18 All 440 and 'VEERASWAMI v. VENKATACHALA', AIR 1926 Mad 18. It is sufficient to state that the Allahabad

case was not one under Section 9 of the Specific Relief Act, and it is beside the point in issue before us. The Madras case, however, supports the contention. That case is a single Judge case, and it appears that in the Madras High Court there are conflicting decisions on this point.

(7) Section 9 of the Specific Relief Act is as follows:

"If any person is dispossessed without his consent of immoveable property otherwise tnan in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit."

(8) The contrary view was taken in the cases of JADU NATH SINGH v. BISHUNATH SINGH', 1950 All LJ 288 & 'RATANLAL GHELABHAI v. AMARSINGH RUPSANG', 53 Bom 773. I respectfully agree with the view expressed in these cases. I am of opinion that there is nothing to bar a landlord from suing a trespasser under S. 9, Specific Relief Act, for possession even when at the date of dispossession the propery is in occupation of a tenant entitled to possession.

(9) There is furthermore another difficulty in the way of the petitioners. In the written statement filed on behalf of defendants Nos. 5 and 6, it was stated as follows:

"8. That it is also true that on 15-5-49 defendant No. 1 in collusion with defendant No. 4 dispossessed your petitioners and took forcible and unlawful possession of the house.

"9. That these defendants did not think it worth while to pursue the matter once again in a Court of law and they determined the lease of the house and the relationship of landlord and tenant ceased between them and the plaintiff and statements to the contrary in paragraph 9 of the plaint are entirely wrong.

"10. That these defendants have no longer any interest left in the house."

It is plain from this written statement that defendants 5 and 6 terminated their lease. The plaintiff was, in the circumstances, entitled to bring her suit for possession under S. 9 of the Specific Relief Act.

(10) The application, therefore, fails, and is dismissed with costs; hearing fee one gold mohur.

(11) RAI, J.: I agree.

G.M.J. Application dismissed.

A. I. R. 1952 Patna 340

LAKSHMIKANTA JHA C. J.

Banwarilal Agarwalla and others, Appellants v. Ankurnath Banerjee and another, Respondents.

A. F. A. D. No. 2193 of 1949, D/- 12-9-51.

Tenancy Laws —Chota Nagpur Tenancy Act (VI (6) of 1908), Ss. 64 and 67 — 'Cultivator' — Meaning of — Acquisition of 'Korkar' right.

The word "cultivator" used in S. 64 has not been defined in the Act. Therefore, it must be understood in its ordinary dictionary sense. Anyone who cultivates land either himself or with the help of his servants or labourers may be a cultivator. A person may be a colliery owner and even then he may be a cultivator and can acquire 'korkar' right. Where the defendant took settlement of the land from the other 8 annas co-sharer landlords only, partly in 1943 and partly in 1944, and he was in possession since even if the defendant be held not to have acquired any 'korkar' right, he cannot be evicted by the plaintiffs in the action for eviction brought in 1946 because it is not a suit for joint possession and partition of the milkiat interest.

(Paras 4, 6)

S. C. Mazumdar, for Appellants; B. C. De and Lala Atul Chandra, for Respondents.

JUDGMENT: This is an appeal by the heirs of the original plaintiffs in a suit in which the defendant No. 1 (hereinafter referred to as the defendant) claimed a 'korkar' right. Both the Courts below have dismissed the suit.

(2) The only question for decision is whether the defendant can be evicted from the land in suit. The case of the plaintiffs, who are co-sharer landlords, is that the land in dispute is 'bakasht' of the 'maliks' and they are entitled to joint possession. The case of the defendant, on the other hand, is that the land was originally waste land and that he has made it fit for cultivation of transplated rice. He accordingly claims 'korkar' right and contends that he has acquired an occupancy right therein and is not liable to eviction. He also pleaded settlement of the land from all the co-sharer landlords.

(3) The Court of appeal below has held that the defendant has acquired 'korkar' right and has acquired an occupancy right in the land in dispute and cannot be evicted.

(4) The contention of Mr. Mazumdar, on behalf of the plaintiffs, is that the defendant is a colliery owner and not a cultivator and, therefore, he could not acquire any 'korkar' right in the land in suit. I do not think there is any substance in this contention. A person may be a colliery owner and even then he may be a cultivator. The word "cultivator" used in S. 64 of the Chota Nagpur Tenancy Act has not been defined in the Act. Therefore, it must be understood in its ordinary dictionary sense. Anyone who cultivates land either himself or with the help of his servants or labourers may be a cultivator. The defendant has been found to be a cultivator by the Courts below. Therefore, on this finding, the contention of Mr. Mazumdar cannot prevail.

(5) The next question is whether the defendant has acquired an occupancy right in the suit land. The defendant came into possession partly in 1943 and partly in 1944. The present suit was instituted in June 1946. According to the defendant, although the plaintiffs had notice of the fact that he was in actual cultivating possession of the suit land, they did not seek his eviction before the Deputy Commissioner under S. 64(3) of the Act. It must, therefore, be presumed that the defendant was in cultivating possession of the land in suit as 'korkardar' to the knowledge of the plaintiffs. Accordingly, under S. 67 of the Act, the defendant had acquired an occupancy right and the plaintiffs cannot eject him.

(6) The defendant's case was, as already stated, that he took settlement of the suit land from the 16 annas landlords. But the finding of the Court of appeal below is that he failed to prove settlement from the plaintiffs. According to the finding, the defendant took settlement of the land from the 8 annas co-sharer landlords only, partly in 1943 and partly in 1944, and he was in possession since. Therefore, even if the defendant be held not to have acquired any 'korkar' right, he cannot be evicted by the plaintiffs in the present action, because this is not a suit for joint possession and partition of the milkiat interest. The appeal must, therefore, be dismissed with costs.

D.H. Appeal dismissed.

*A. I. R. 1952 Patna 341

(SPECIAL BENCH)

REUBEN, DAS AND SARJOO PROSAD JJ.

Mahendra Raut and others, Appellants v. Darsan Raut and others, Respondents.

A. F. A. D. No. 228 of 1948, D/- 30-4-52.

†* **(a) High Court Rules — Patna High Court Rules, Chapter II, Rr. 1 (ii) and 10A — Standing Order No. 2 of 1952 amending R. 1 (ii) — Validity — Government of India Act (1915), S. 108 — Letters Patent (Patna), Cls. 28, 29.**

Under sub-section (1) of S. 108, Government of India Act, 1915, the rules have to be made by the Court itself; it follows that any change in the rules must also be made by the Court. The power of the Chief Justice under sub-section (2) of Section 108 of the Government of India Act, 1915, is to designate Judges for cases and to constitute division Courts of two or more Judges. An amendment of the rules of the Court cannot, therefore, be made by means of administrative action embodied in a Standing Order passed by the Chief Justice. (Para 6)

Though Rule 1(ii) of Chapter II, Patna High Court Rules lays down that a single Judge may hear and dispose of a second appeal which does not exceed Rs. 1,000/- in value, it is open to the Chief Justice to direct that a single Judge shall deal with second appeals of a lesser value, namely Rs. 500/- only, and second appeals exceeding Rs. 500/- in value shall be placed before a Division Bench. Such practice is sanctioned by and is consistent with Rr. 10 and 10A. Rule 10 or 10A does not empower the Chief Justice to go beyond the limit of the rules or amend the rules of the Court by administrative action embodied in a Standing Order. There is room for administrative action within the framework of the rules but there can be no fundamental change of the rules by administrative action only. (Para 7)

Hence, Standing Order No. 2 of 1952, as it stands, cannot be held to have validly effected an amendment of Rule 1 (ii) in Chapter II at page 5 of the Rules of the Patna High Court, in so far as the Standing Order enlarges the jurisdiction of a single Judge with effect from a particular date and in respect of all pending appeals. The proper way to change the rule is by means of an amendment, to be made by the Court in exercise of the power conferred on it under Section 108 of the Government of India Act, 1915 and the Letters Patent. (Paras 8, 34, 37)

(b) Precedents — Privy Council — Value of — Civil P. C. (1908), Pre.

A decision of the Privy Council is entitled to very great respect, apart from whether it is now binding on the Courts in India after the coming into force of the Constitution of India. (Para 16)

Anno: C. P. C., Pre. N. 15.

(c) Interpretation of Statutes — Retrospective operation — Civil P. C. (1908), Pre.

The general rule governing the construction of statutes, and statutory rules as well, is that no statute is to have a retrospect beyond the time of its commencement, for the rule and law of Parliament is, that 'nova constitutio futuris formam debet imponere, non praeteritis'. In the absence of express words or necessary intendment, it cannot be supposed that the legislature meant to deprive a man of a vested right. There is a material difference when a statute is dealing with rights already vested, not intended to be taken away and when it is dealing with mere procedure to recover those rights, which it may be quite reasonable to regulate and alter. There is no vested right in procedure. (1864) 11 ER 1200; (1848) 154 ER 389, Rel. on. (Para 11)

Anno: C. P. C., Pre. N. 3.

†* **(d) High Court Rules — Patna High Court Rules, Chapter II, R. 1(ii) — Power of High Court to make rule extending jurisdiction of Single Judge to hear pending appeals from particular date — Constitution of India, Articles 133 and 225 — Government of India Act (1915), S. 108 — Civil P. C. (1908), Ss. 109 and 110.**

It is open to a High Court to make a rule changing the powers of a single Judge and to make the rule applicable to all pending appeals with effect from a particular date. Such a rule does not take away any vested right of appeal. (Para 22)

A change of procedural rule which does not make any alteration in the statutory right of appeal cannot be said to be hit by the principles laid down in the Colonial Sugar Refining Company's case, (1905) AC 369. (Para 22)

A rule laying down the powers of a Single Judge is a rule of practice and procedure as to the internal arrangement within the Court for disposal of cases. No party can say that he has a right to be heard by a particular number of Judges. If, therefore, a change is made in the rules and an appeal is heard by a single Judge instead of by two Judges, no party can object unless some vested right is affected, it being clearly understood that there is no vested right that an appeal to the High Court must be heard by a particular number of Judges. (Para 17)

Such a rule cannot be said to have affected the right of appeal given under Art. 133 of the Constitution of India read with Sections 109 & 110, Civil P. C. Leave to appeal to the Supreme Court is granted either when the case fulfils the requirements of Section 110 of the Code of Civil Procedure or when it is otherwise a fit case for appeal to the Supreme Court. In either case, the petitioner has to apply for a certificate and has to satisfy the Court that the requisite conditions are fulfilled. The right is thus a limited right, but no distinction in principle emerges from the different limitations in Clauses (a), (b) and (c) of Section 109 of the Code of Civil Procedure. The right is to ask for a certificate that the appeal fulfils the requirements of Section 109 or Section 110 of the

Code of Civil Procedure, but the right is only given in such cases as are heard in the High Court by two or more Judges: There is no such right in a case which is heard by a Single Judge, there being a different right of appeal with regard to Single Judge decisions under clause 10 of the Letters Patent. If it is conceded that no party has a vested right to be heard by two or more Judges in the High Court it follows as a necessary corollary that a change of Rules with regard to the powers of a single Judge does not affect the right of appeal given by the Statute. That right still remains the same as before. All that happens is that the statutory prohibition under Section 111 of the Code of Civil Procedure, now clause (3) of Art. 133 of the Constitution comes into operation. AIR 1952 Punj 103 (FB); AIR 1950 Nag 177 (FB), Dissent. Case law ref. (Paras 18, 19)

Hence, assuming that there is a valid amendment of R. 1 (ii) of Chapter II of the Patna High Court Rules by Standing Order No. 2 of 1952 by which a Single Judge is empowered to hear appeals (including pending appeals) exceeding Rs. 1000 in value with effect from a particular date, it cannot be said that it takes away or adversely affects any existing right of appeal. (Para 17)

(e) Civil P. C. (1908), S. 100 — Question of Status — Finding on.

The finding that a person was separate from his pattidar, which is supported by evidence on record is binding in second appeal. (Para 29)

Ano: C. P. C., S., 100 N. 42, 52.

(f) Civil P. C. (1908), S. 100 — Finding as to possession given without reference to any evidence cannot be accepted as binding in second appeal. (Para 30)

Anno: C. P. C., S. 100 N. 53.

Rai T. N. Sahai, P. S. Sinha, K. P. Sinha, W. N. Sinha and Rai Shambhu Nath, for Appellants; B. C. De and J. C. Sanyal, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras.

('27) 54 Ind App 421: (AIR 1927 PC 242) 12
('28) AIR 1928 All 708: (50 All 865) 21
('28) 52 Bom 753: (AIR 1928 Bom 371) 21
('29) 56 Cal 512: (AIR 1928 Cal 640 FB) 15, 20, 21
('29) 56 Cal 507: (AIR 1928 Cal 819 FB) 15, 20
('29) 52 Mad 361: (AIR 1929 Mad 381 SB) 15, 20, 21
('50) ILR (1950) Nag 532: (AIR 1950 Nag 177 FB) 15, 18, 38
('52) AIR 1952 Punj 103: (54 Pun LR 1 FB) 15, 18, 19, 22
(1901) AC 495 22
(1905) AC 369: (74 LJPC 77) 12, 14, 19, 20, 22, 35
(1843) 154 ER 389: (2 Ex 22) 11
(1864) 11 ER 1200: (10 HLC 703) 11, 22

DAS, J.: This second appeal has had a chequered career. It arises out of a suit for redemption of two mortgage bonds dated the 29th of September, 1920, executed by one Rikhai Raut in favour of the defendants first party. On the 25th of February, 1924, Rikhai Raut, it is alleged, sold to one Ganesh Raut an area of 14 bighas and odd kathas which included an area of seven bighas and odd kathas, being the property under mortgage. The consideration for the sale-deed was stated to be Rs. 1,500/- out of which a sum of Rs. 1,175/- was kept in deposit with Ganesh Raut for redeeming the two mortgages, and the balance of Rs. 325/- was stated to have been set off towards previous dues. Ganesh Raut was the father of two of the plaintiffs, and grandfather of the other plaintiffs. Rikhai Raut, it was stated, died in 1933 in a state of separation from his agnates, leaving behind four daughters, who were defendants third party. In Baisakh 1351 Fasli, the plaintiffs tendered the amount of the two mortgage bonds to the defendants first party who refused to accept the amount on the ground that they had transferred their rights to the defendants second party. The plaintiffs thereupon tendered the money to the defendants second party who refused to accept the same. Thereupon, the plaintiffs brought the suit on the 1st of September 1945. The suit was valued, for purposes of jurisdiction and court-fees, at Rs. 1,200/-, the sum of Rs. 1,175/- being the mortgage money and the remaining sum of Rs. 25 was stated to be the approximate mesne profits which the plaintiffs claimed.

(2) The suit was decreed by the learned Additional Subordinate Judge on the 24th of March, 1947, and the learned District Judge on appeal affirmed the decision of the learned Subordinate Judge on the 8th of October, 1947. The present second appeal was then preferred to this Court by the defendants second party on the 2nd of March 1948, and was admitted on the 13th of September 1948.

(3) Under the Rules of the Court as published in 1938, a single Judge is competent to hear and dispose of a second appeal, when the value of the subject-matter of the appeal does not exceed Rs. 1,000/-; see Rule 1 (ii) in Chapter II at page 5 of the Rules of the High Court at Patna. On the 28th of February 1952 was passed Standing Order No. 2 of 1952, which reads as follows:

"The Single Judge's Jurisdiction in appeal from appellate Decrees and orders is raised from Rs. 1,000/- to Rs. 5,000/- and all such appeals standing on the Weekly Cause list shall be heard by a Single Judge. The rules at present in vogue for the preparation of paper-book in Second Appeals below Rs. 1,000/- in value and in appeals exceeding Rs. 1,000/- in value shall be followed until further orders.

This order will take effect from 3rd March, 1952."

This Standing Order was passed by our Lord the Chief Justice. In pursuance of the said Standing Order, this appeal was listed for hearing before a single Judge. As the value of the appeal exceeded Rs. 1,000/-, the question whether a single Judge was competent to hear and dispose of the appeal was raised, and Narayan, J., before whom the appeal was placed for hearing passed an order on the 20th of March, 1952, directing that the appeal be placed before a Division Bench. The appeal was then placed before a Division Bench consisting of myself and Sarjoo Prosad, J. As the question raised was of considerable general importance and was likely to arise in all second appeals above the value of Rs. 1,000/- we directed on the 21st of March 1952, that the appeal be placed before our Lord the Chief Justice for constituting a larger Bench for determination of the question whether a single Judge is now competent to hear and dispose of such appeals by reason of the aforesaid Standing Order.

(4) We have had the advantage of hearing arguments, both for and against the view that a single Judge is now competent to hear second appeals exceeding Rs. 1,000/- in value. It has not been disputed before us that this larger Bench is competent to dispose of the appeal on merits, without

going into the question of the competence of a single Judge to hear second appeals exceeding Rs. 1,000/- in value. This Bench was, however, constituted specially for determining the legal validity and effect of the Standing Order. As I have already said, the question is of considerable general importance and has to be decided so as to set at rest the controversy whether such appeals should or should not be placed before a single Judge for hearing. I propose, therefore, to deal first with the question whether a single Judge is, by reason of the Standing Order, competent to hear second appeals exceeding Rs. 1,000/- in value and then dispose of the present second appeal on merits. It is necessary to decide the second appeal on merits; because the appeal itself, being an appeal from an appellate decree, has been referred to us, under the rules of the Court, for final decision and not merely the particular question of the competency of a single Judge to hear such appeals.

(5) The first question really involves three points: (1) whether Standing Order No. 2 of 1952 can be said to have validly effected an amendment, pro tanto, of Rule 1 (ii) in Chapter II of the Rules of the Court; (2) if so, has it retrospective effect; in other words, does it apply to appeals arising out of suits or cases which were instituted before the 3rd of March 1952, on which date the Standing Order is expressly stated to have come into effect and (3), is it open to this Court, by an amendment of the rules, to take away what has been described as a vested right of appeal to the Supreme Court? I think that the first point can be dealt with independently, but the second and third points are closely connected and will be dealt with together.

(6) I proceed now to consider the first point. Article 225 of the Constitution lays down, 'inter alia', that the jurisdiction of any existing High Court and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of the Constitution. There is a proviso to the Article with which we are not concerned. It is clear that the power to make rules which this Court had before the commencement of the Constitution is preserved by Article 225 of the Constitution, the only limitation being that the power is subject to other provisions of the Constitution and to the provisions of any law of the appropriate legislature made by virtue of powers conferred on that legislature by the Constitution. The Government of India Act, 1935, contained a similar provision in Section 223 which also stated that the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as before. These provisions take us back to the Government of India Act, 1915, Section 108 of which was in these terms:

> "(1) Each High Court may by its own rules provide as it thinks fit for the exercise, by one or more Judges, or by division Courts constituted by two or more Judges, of the High Court, of the original and appellate jurisdiction vested in the Court.
>
> (2) The Chief Justice of each High Court shall determine what Judge in each case is to sit alone, and what Judges of the Court, whether with or without the Chief Justice, are to constitute the several division Courts."

The first sub-section deals with the exercise of the jurisdiction of the High Court, for which each High Court may make its own rules; the second sub-section deals with the powers of the Chief Justice to designate Judges for cases, or in other words with the power to settle the roster of the Court. The Letters Patent of the Patna High Court also contain provisions enabling the Court to make rules to regulate its own practice. Clause 29 of the Letters Patent says:

> "And we do further ordain that it shall be lawful for the High Court of Judicature at Patna from time to time to make rules and orders for regulating the practice of the Court....."

Clause 28 of the Letters Patent states:

> "And we do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Patna, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, 1915...."

It is, I think, sufficiently clear that the rules of the Court, which are material for our present purpose, are statutory rules made by the Court under the powers conferred on it by Section 108 of the Government of India Act, 1915, and the Letters Patent. The material rule is Rule 1 (ii) in Chapter II which reads:

> "1. The following matters may be heard and disposed of by a single Judge:
>
> * * * *
>
> (ii) A second appeal, or an appeal from a decree or order passed in the execution of a decree where the value of the subject-matter of the appeal and of any cross-objection therein under Order XLI, Rule 22, as stated in the memorandum of appeal or cross-objection, does not exceed Rs. 1,000 and which is not an appeal under Order XLIII, Rule 1."

There is, I think, no doubt that the rule is a statutory rule, which the Court has power to amend. The question is if Standing Order No. 2 of 1952 has the effect of amending the rule in so far as it enlarges the jurisdiction of a single Judge with effect from a particular date and in respect of all pending appeals. The answer to the question depends on whether the Standing Order itself has been made by the Court. In form and on the face of it, the Standing Order purports to be an order of the Chief Justice. We examined the relevant administrative files on the subject and found that there was a decision by the Full Court for enlarging the jurisdiction of a single Judge to hear second appeals up to Rs. 5,000/- in value. That decision was reached on the recommendations made by the Committee which was appointed some time ago, to consider the arrears of work in different High Courts. There was, however, no decision by the Court as to other matters incorporated in the Standing Order; such as, the date from which the change shall take effect, whether the change shall govern appeals standing in the Weekly Cause List or not. It seems clear to me that under Sub-section (1) of Section 108 the rules have to be made by the Court itself; it follows that any change in the rules must also be made by the Court. As I have already stated the power of the Chief Justice under Sub-section (2) of Section 108 of the Government of India Act, 1915, is to designate Judges for cases and to constitute division Courts of two or more Judges. I do not, therefore, think that an amendment of the rules of the Court can be made by means of administrative action embodied in a Standing Order passed by the Chief Justice. I must, how-

ever, make one point clear. Rule 10 at page 9 of the Rules of the Court says:

"Save as provided by law or by these rules or by an order of the Chief Justice every other case shall be heard by a Bench of two Judges."

Rule 10A at the same page reads:

"Subject to the provisions of these rules, the Chief Justice shall direct what case or classes of cases shall be placed before each Judge or Bench."

(7) Within the limit and boundary of the rules, it has been the practice in this Court, within my experience, for the Chief Justice to direct what case or class of cases shall be placed before each Judge or Bench. For example, under R. 1 (XV) a single Judge has power to hear all criminal appeals other than an appeal in which a sentence of death or of transportation for life has been passed. Within the framework of this rule, it has been the long standing practice of this Court for the Chief Justice to direct that appeals involving a lesser sentence, such as six months', three years' or even five years' imprisonment, shall only be placed before a single Judge and appeals involving a higher sentence shall be placed before a Division Bench. Similarly, though R. 1(ii) lays down that a single Judge may hear and dispose of a second appeal which does not exceed Rs. 1,000/- in value, it is open to the Chief Justice to direct that a single Judge shall deal with second appeals of a lesser value, namely, Rs. 500/- only, and second appeals exceeding Rs. 500/- in value shall be placed before a Division Bench. Such practice is, I think, sanctioned by and is consistent with Rr. 10 and 10A quoted above. I do not, however, think that R. 10 or 10A, empowers the Chief Justice to go beyond the limit of the rules or amend the rules of the Court by administrative action embodied in a Standing Order. There is room for administrative action within the framework of the rules; but there can be no fundamental change of the rules by administrative action only.

(8) My view, therefore, is that Standing Order No. 2 of 1952, as it stands, cannot be held to have validly effected an amendment of R. 1(ii) in Chapter II at page 5 of the Rules of the Court, in so far as the Standing order enlarges the jurisdiction of a single Judge with effect from a particular date and in respect of all pending appeals. The proper way to change the rule is by means of an amendment, to be made by the Court in exercise of the power conferred on it under S. 108 of the Government of India Act, 1915 and the Letters Patent.

(9-10) I now proceed to consider the other two points which present greater difficulty and have led to a divergence of views in some of the High Courts in India. It would, perhaps, have been enough for us to say, for the purpose of this appeal, what I have already stated, namely, that Standing Order No. 2 of 1952 does not validly effect an amendment of the rules of the Court and leave the other two points to be dealt with if and when an amendment of the rules is validly made. We have considered this aspect of the question, but have felt that a postponement of the consideration of the other two points will only mean postponing the evil day. The question of the power of this Court to make rules which will be applicable to pending appeals has been raised and argued at the Bar. In view of the large number of such appeals which are still pending, it is necessary and desirable that our opinion on the question should be recorded at the earliest opportunity.

(11) The power of this Court to make rules for the exercise of the original and appellate jurisdiction vested in the Court, by one or more Judges or by Division Courts constituted by two or more Judges of the High Court, is not in dispute. The power of this Court to amend such rules is also not in dispute. It is admitted that the power to make rules includes the power to amend the rules. What is in dispute is if this Court can give retrospective effect to the amendments made so as to take away what is described as a vested right of appeal to the Supreme Court. It is necessary to start a consideration of this question with a statement of certain general principles which are not in dispute. As observed in 'MOON v. DURDEN', (1848) 154 ER 389, the general rule governing the construction of statutes, and I take it statutory rules as well, is

"that no statute is to have a retrospect beyond the time of its commencement; for the rule and law of Parliament is, that 'nova constitutio futuris formam debet imponere, non praeteritis".

The general rule was so stated by Lord Coke, in the Second Institute, 292, in his Commentary on the Statute of Gloucester. It is now well settled that in the absence of express words or necessary intendment, it cannot be supposed that the legislature meant to deprive a man of a vested right; and though there is no doubt of the justice of the rule of construction laid down, by Lord Coke, the rule would yield to the intention of the legislature. On the other hand, it is equally clear that there is a material difference when a statute is dealing with rights already vested, not intended to be taken away and when it is dealing with mere procedure to recover those rights, which it may be quite reasonable to regulate and alter (as per Lord Wensleydale in 'A.-G v. SILLEM', (1864) 11 E R 1200). As has been often said, there is no vested right in procedure. The above principles are well-established and I do not wish to encumber this judgment with a citation of authorities in support of such well-known principles.

(12) Keeping the aforesaid general principles in mind, let me approach the problem before us. The point urged on behalf of the appellants is that an amendment of the rule of procedure made by this Court cannot take away a vested right of appeal. The argument in support of this point is founded on a process of reasoning which may be briefly indicated; first, it is stated that a right of appeal is

"the right of entering a superior Court and invoking its aid and interposition to redress the error of the Court below"

created and granted by statute is a vested right, a substantive right, and not a mere matter of procedure; the right to enter the superior Court is deemed to arise to a litigant before any decision has been given by the inferior Court; namely, the determining date is the date of the institution of the suit, because

"the legal pursuit of a remedy-suit, appeal and second appeal — are really steps in one legal proceeding connected by an intrinsic unity."

'COLONIAL SUGAR REFINING COMPANY, LIMITED v. IRVING', 1905 AC 369; 'DELHI CLOTH AND GENERAL MILLS CO. LTD. v. INCOME-TAX COMMISSIONER, DELHI', 54 Ind App 421 (PC); secondly at the date of the institution of the suit out of which this appeal has arisen and till the date of the passing of the Standing Order, the parties had an existing right of appeal — first to the District Judge under S. 96 of the Code of Civil Procedure, then to the High Court under S. 100 of the Code of Civil Procedure, and lastly to the Supreme Court under Art. 133 of the Constitution read with Ss. 109 and 110 of the Code of Civil Procedure; the third step in the argument is that by an amendment of the rule — assuming the Standing Order to have validly effected an amendment of

the rule — it is not open to this Court to take away or affect adversely any of the existing rights of appeal; it is pointed out that by directing the appeal to be heard by a single Judge, the right of appeal to the Supreme Court is either taken away or adversely affected, because Cl. (3) of Art. 133 of the Constitution lays down that unless Parliament by law otherwise provides, no appeal shall lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

It is contended that the right of appeal from the judgment of one Judge under Cl. 10 of the Letters Patent is dependent upon the Judge declaring that the case is a fit one for appeal and is not the same right as given by Art. 133 of the Constitution read with Ss. 109 and 110 of the Code of Civil Procedure. It is contended that where the statute gives a right of appeal, it is not open to the rule-making authority to take away or adversely affect the right by an amendment of the rule relating to practice or procedure.

(13) I have summarised above the argument advanced before us in support of the contention that a single Judge is not competent to hear second appeals exceeding Rs. 1000/- in value, which have arisen out of suits instituted before the date on which the amendment was made.

(14) Mr. Lalnarain Sinha, appearing in a connected appeal which was heard along with this appeal but was disposed of on compromise, supported the opposite view, and contended that the decision of the Privy Council in 'COLONIAL SUGAR REFINING CO. LTD. v. IRVING', (1905) AC 369, which is the leading decision on the subject, is no longer binding on us and requires re-examination. He has contended that the reasoning of the decision which goes to support the proposition that right of appeal to a litigant at the date of the institution of the suit is not correct and should be re-examined. He has pointed out that S. 212 of the Government of India Act, 1935 which made the law declared by any judgment of the Privy Council binding on all Courts stands repealed, and S. 141 of the Constitution makes the law declared by the Supreme Court binding on all Courts. He has also referred to S. 8 of the Abolition of Privy Council Jurisdiction Act, 1949 and has contended that it does not make the decision in Colonial Sugar Refining Co. Ltd. binding on us. Lastly, he has submitted that if the decision in Colonial Sugar Refining Co. Ltd. is accepted as correct and binding, then there is no escape from the position that a right of appeal vested in a litigant at the commencement of the section cannot be interfered with by an amendment of a rule relating to practice or procedure.

(15) Having summarised the arguments of learned counsel on both sides, I proceed now to give my own views and the conclusion at which I have arrived after a careful consideration of the arguments and the case-law on the subject. There are two decisions directly bearing on the question, in which two opposite views have been taken; 'RADHAKISHAN v. SHRIDHAR', ILR (1950) Nag 532. and 'GORDHAN DAS BALDEV DAS v. GOVERNOR GENERAL IN COUNCIL', AIR 1952 Punj 103. There are three other decisions which do not directly bear on the problem before us but are relevant and require careful consideration. These are 'RAM CHARAN v. HAMID ALI', 56 Cal 507; SARDAR ALI v. DALIMUDDIN', 56 Cal 512 and 'IN RE, VASUDEVA SAMIAR', 52 Mad 361. All the aforesaid decisions are Full Bench or Special Bench decisions.

(16) I do not think that it is possible to get rid of the decision of the Privy Council in Colonial Sugar Refining Co. Ltd. in the way suggested by Mr. Lalnarain Sinha. The decision was accepted as correct in a large number of cases by Courts in India, and may be said to have established a course of decisions declaring the law on the subject, which cannot be disturbed or unsettled except for very compelling reasons. There cannot be the least doubt that a decision of the Privy Council is entitled to very great respect, apart from whether it is now binding on the Courts in India. The Privy Council decision in question may be said to have laid down three principles; first, the general principle established by a long line of authorities from the time of Lord Coke that a statute cannot be supposed to take away a vested right, except by express enactment or necessary intendment; second, to deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure; third, the right of appeal arises at the date of the suit. As to the correctness of the first two principles, there can, I think, be no doubt. As to the third principle, it may be somewhat of a paradox that a right of appeal arises even before a decision has been given by the inferior Court. But I think that the paradox is resolved, if the distinction between the 'existence of a right' and the 'exercise of the right' (when the occasion arises) is kept in mind. A right may exist long before it is exercised.

(17) Therefore, the crux of the problem before us is assuming that there is a valid amendment of the Rules of the Court by which a single Judge is empowered to hear and dispose of all second appeals (including pending appeals) exceeding Rs. 1000/- in value with effect from a particular date, can it be said that such an amendment takes away or adversely affects any existing right of appeal? I venture to think that it does not, and my reasons are these. I do not think that it can be doubted that a rule laying down the powers of a single Judge is a rule of practice and procedure as to the internal arrangement within the Court for disposal of cases. No party can say that he has a right to be heard by a particular number of Judges. If, therefore, a change is made in the rules and an appeal is heard by a single Judge instead of by two Judges, no party can object unless some vested right is affected, it being clearly understood that there is no vested right that an appeal to the High Court must be heard by a particular number of Judges.

Let us examine if any vested right of appeal is really affected by such a change in the rule as I have predicated above. Take the right of appeal under S. 96 of the Code of Civil Procedure. Clearly enough, it is not affected in any way by the change; nor is the right of appeal under S. 100 of the Code of Civil Procedure affected, because the right is that of an appeal to "the High Court" not to any particular Judge or Bench. Then comes the important question of the right of appeal to the Supreme Court — previously to the Privy Council or the Federal Court. Whatever difference of opinion there has been on this problem centres round this question. Now, we must first make sure what right of appeal the statute has given, before we consider if the right is taken away or adversely affected. The right given by the statute (Art. 133 of the Constitution read with Ss. 109 and 110 of the Code of Civil Procedure now; Ss. 109-112 of the Code of Civil Procedure before) was the right to appeal to a superior Court, on certain conditions being fulfilled, provided the judgment decree or final order was not of one Judge of a High Court. The statute itself put certain limitation on the right of appeal, from order of a single Judge, except in the manner laid down in Clause 10 of the Letters Patent. If

that be the position with regard to the right of appeal and if the party had no vested right to have his appeal heard by a particular number of Judges, in the High Court, how can it be said that a change in the rules relating to the power of a single Judge has taken away his right of appeal given by the statute? The right of appeal given by the statute remains unaffected unless the party aggrieved can say that he had a vested right to be heard by two Judges — which right he clearly had not.

(18) The view which I have expressed above was the view expressed by Bose, C. J., (as he then was) in the order of reference leading to the Full Bench decision in 'RADHAKISHAN v. SHRIDHAR', ILR (1950) Nag 532. I am not unmindful of the observations made by Bose, C. J., as a member of the Full Bench, in which he said:

"I have read the opinion of my learned brother Hidayatullah, J., and I am driven by his remorseless logic to the conclusion that he is right and that the tentative opinion expressed by me in my order of reference is wrong so far as appeals which my learned brother has called appeals as of right are concerned."

Hidayatullah, J., made distinction between appeals which satisfied the condition of valuation prescribed in Section 109, Clauses (a) and (b), read with Section 110 of the Code of Civil Procedure, and appeals which came under the third clause of Section 109 of the Code of Civil Procedure. In making this distinction he observed:

"My conclusion is that while under Clauses (a) and (b) of Section 109 a substantive right is involved, the same cannot be said of appeals under Clause (c) of that Section."

He further pointed out that appeals under Section 109 (c) of the Code of Civil Procedure depended not on any right of the party concerned, but upon the discretion of the Court. According to him,

"a difference must be made between those cases in which the appeal is such an absolute fact that it can be said to vest in a litigant the moment his case is before the Court and those cases in which the litigant has no immediate right and the appeal can only be taken to the Superior Court when the Court itself decides that the case is fit for decision of the King in Council."

The distinction which Hidayatullah, J., made was not accepted as a valid distinction by the Full Bench of the Punjab High Court in 'GORDHAN DAS BALDEV DAS v. GOVERNOR-GENERAL IN COUNCIL', AIR 1952 Punjab 103. Bhandari, J., with whom Soni, J., agreed, the third Judge expressing some doubt in regard to cases under Section 109 (c) of the Code of Civil Procedure, said:

"Section 109 draws no distinction whatsoever between appeals which can be preferred under any of the three clauses of the said section for it provides that 'an appeal shall lie' to the Supreme Court; (a) from any decree or final order passed on appeal by a High Court or by any other Court or final appellate jurisdiction; (b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction; and (c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

Leave to appeal to the Supreme Court can be granted either when the case fulfils the requirements of S. 110 or when it is 'otherwise' a fit case for appeal to the Supreme Court. In either case the petitioner has to apply for a certificate either that the case fulfils the requirements of S. 110 and is therefore a fit case for appeal to the Supreme Court, or that for other reasons it is a fit case for appeal to the Supreme Court. Ordinarily, it is not difficult to satisfy the Court that the case fulfils the requirements of S. 110 as far as the value of the subject-matter is concerned. It is more difficult to satisfy the Court that the case involves the decision of a substantial question of law. It is still more difficult to satisfy the Court that even though the matter in controversy is not measurable by money the case is a fit one for appeal to the Supreme Court. But the fact that it is more difficult to obtain a certificate in one case than in another does not, in my opinion, alter the fact that a person who procures the certificate under Clause (c) has as much right to prefer an appeal to the Supreme Court as the person who procures a certificate under either of the other two clauses. The only construction that may reasonably be placed on the words 'an appeal shall lie to the Supreme Court' is that a person who satisfies any one or more of the conditions specified in Sections 109 and 110 of the Civil P.C., is entitled to claim that leave to appeal must be given to him as a matter of right. If, for example, he satisfied the Court that his case fulfils the requirements of S. 110 or that the case is a fit one for appeal to the Supreme Court, the Court has no discretion to refuse leave to appeal and must grant it as a matter of course."

I do not wish to repeat the reasons given by Bhandari, J., but content myself with saying that I respectfully agree with him. I do not think that any such distinction can be drawn between Clauses (a), (b) on one side and Clause (c) of Section 109, on the other, as was drawn by Hidayatullah, J. Leave to appeal to the Supreme Court is granted either when the case fulfils the requirements of Section 110 of the Code of Civil Procedure or when it is otherwise a fit case for appeal to the Supreme Court. In either case, the petitioner has to apply for a certificate and has to satisfy the Court that the requisite conditions are fulfilled. The right is thus a limited right, but no distinction in principle emerges from the different limitations in Clauses (a), (b) and (c) of Section 109 of the Code of Civil Procedure.

(19) The point which I wish to make is more fundamental than the distinction made by Hidayatullah, J. My point is that unless it is predicated that a party appealing to the High Court under Section 100 of the Code of Civil Procedure has a vested right to be heard by two Judges, a change in the rules relating to the powers of a single Judge does not take away or affect the right of appeal given to the party by the statute. The nature of the right given by the statute has to be kept in mind. The right is to ask for a certificate that the appeal fulfils the requirements of Section 109 or Section 110 of the Code of Civil Procedure, but the right is only given in such cases as are heard in the High Court by two or more Judges: there is no such right in a case which is heard by a single Judge, there being a different right of appeal with regard to single Judge decisions under Clause 10 of the Letters Patent. If it is conceded that no party has a vested right to be heard by two or more Judges in the High Court, it follows as a necessary corollary that a change of rules with regard to the powers of a single Judge does not affect the right of appeal given by the statute. That right still remains the same as before. All that happens is that the statutory prohibition under Section 111 of the Code of Civil Procedure, now Clause (3) of Article 133 of the Constitution, comes into operation.

A party can say that his right of appeal has been taken away or adversely affected, if he establishes two premises — (1) that he had a vested right to be heard by two Judges, and (2) that the right of appeal consequent on hearing by two Judges has been taken away or curtailed by a change in the rules of procedure. It must be conceded that a rule of the Court relating to the powers of a single Judge is a rule of procedure only; therefore, a party whose appeal under the old rules would have been heard by two Judges cannot say that his vested right of appeal has been taken away because his case is now to be heard by a single Judge. He must, I think, submit to such procedure as is laid down by the Court for the hearing of his appeal. Speaking with great respect, it seems to me that this aspect of the matter has not received much consideration by their Lordships of the Punjab High Court in 'GORDHAN DAS BALDEV DAS v. GOVERNOR-GENERAL IN COUNCIL', AIR 1952 Punj 103. Bose, C. J., indicated this line of approach in his order of reference leading to the Full Bench decision in the Nagpur case, and though the learned Chief Justice (as he then was) said later that his tentative opinion expressed in the order of reference was wrong, I venture to say with very great respect that the view expressed by him in the order of reference is supported by reasoning, the cogency of which is not shaken by any logical fallacy or even by the principles established by a long line of authorities following the case of 'COLONIAL SUGAR REFINING CO. LTD.', (1905) A C 369.

(20) It remains now to consider the other three Full Bench decisions in 'RAM CHARAN v. HAMID ALI', 56 Cal 507, 'SARDAR ALI v. DALIMUDDIN', 56 Cal 512 and In re: 'VASUDEVA SAMIAR', 52 Mad 361. These decisions dealt with a somewhat different problem. Prior to the amendment of the Letters Patent of the Court concerned, a party had a right of appeal from the decision of a single Judge without a certificate from the Judge that the case was a fit one for appeal. The amendment in the Letters Patent read with Section 111, C.P.C., took away that right, and an appeal lay from the decision of a single Judge only when the Judge gave a certificate that the case was a fit one for appeal. In these circumstances, the question arose whether the amendment affected appeals which arose out of suits instituted before the date of the amendment. The decision was that the amendment did not affect such appeals. Their Lordships were dealing with a case in which the amendment, if given effect to in all pending appeals from the date on which it was made, would undoubtedly have taken away an existing right of appeal given by the unamended Letters Patent. The principles laid down in the 'COLONIAL SUGAR REFINING COMPANY'S CASE', were accordingly applied, and it was held that the amendment could not take away an existing right of appeal unless it said so expressly. After the decisions given by the Calcutta and Madras High Courts, the Letters Patent were amended so as to make it clear that the amendment would affect all appeals after a particular date. In my opinion, those decisions do not directly bear upon the problem before us, the problem before us being of a different nature. It is, however, pertinent to quote certain observations of Rankin, C. J., in 'SARDAR ALI'S CASE', 56 Cal 512 at page 517:

> "Now, there is a certain paradox in regarding the right to appeal within the High Court from the decision of a single Judge as a right 'vested' in the litigant at the date of the suit, since it is in no way certain that the case will ever be decided by a single Judge. Again, as the right of Second Appeal is the right given by Section 100 of Civil Procedure Code to appeal 'to the High Court', it does not seem unreasonable that a litigant should take the internal arrangements of the High Court as he finds them when he gets there. If, under the Letters Patent, all Second Appeals had been required to come before two Judges and a new Letters Patent had provided that one Judge should be competent to exercise this jurisdiction, leaving the right of appeal to the High Court and from the High Court, as before it would have been difficult, in my opinion, to hold that any litigant had a right to a hearing before two Judges."

Rankin, C. J., said that if under the Letters Patent all second appeals had been required to come before two Judges and a new Letters Patent had provided that one Judge should be competent to exercise this jurisdiction, leaving the right of appeal to the High Court and from this the High Court as before, it would have been difficult to hold that any litigant had a right to a hearing before two Judges. The problem before us is exactly what Rankin, C. J., had in mind when he made the above observations. All that is necessary is to substitute "Rules of the Court" for the expression "Letters Patent." Under the rules of the Court as they existed at the date of the institution of the suit, certain second appeals were required to come before two Judges; a change in the rules provided that one Judge should be competent to hear such appeals, but the rule made no change in the right of appeal to the High Court and from the High Court as given by the statute. The view of Rankin, C. J., as expressed in the observation quoted above, was that it would be difficult to hold that any litigant had a right to a hearing before two Judges. If I may say so with great respect to an eminent Judge, I think that the problem cannot be better stated, and it would, indeed, be difficult to hold that any litigant had a right to a hearing before two Judges. If he had no such right, neither had he any vested right of appeal to a higher tribunal under Sections 109 and 110 of the Code of Civil Procedure or under Article 133 of the Constitution.

(21) It is worthy of note that after the amendment in the Letters Patent came into force, there arose a conflict of opinion as to whether it had retrospective effect. According to the High Court of Bombay in the case of 'BADRUDIN v. SITARAM VINAYAK', 52 Bom 753, it had such effect, so that no appeal lay against a judgment of a single Judge, in second appeal filed after the amendment in the absence of the requisite certificate. The High Courts of Calcutta 'SARDAR ALI v. DALIMUDDIN', 56 Cal 512 and Madras 'In re: VASUDEVA SAMIAR', 52 Mad 361, held on the other hand, that the amendment did not operate retrospectively so as to affect the right of appeal which had accrued in respect of suits instituted prior to the amendment. According to the High Court of Allahabad 'BAIJNATH v. DOOLAREY HAJJAM', AIR 1928 All 708, all judgments delivered after the amendment were governed by the amended clause. In order to set this conflict at rest, the clause was again amended and the words "on or after the first day of February 1929" were added.

(22) As a result of a careful consideration of the case law on the subject, my conclusion is that it is open to this Court to make a rule changing the powers of a single Judge and to make the rule applicable to all pending appeals with effect from a particular date. Such a rule does not take away any vested right of appeal. If I were of the opinion that Standing Order No. 2 of 1952 had validly effected an amendment of the rules of the Court, I would have been prepared to hold that a single Judge was competent to hear this

appeal. The conclusion at which I have arrived does not, in my opinion, militate against the principles laid down in the 'COLONIAL SUGAR REFINING COMPANY'S CASE', (1905) AC 369, and subsequent decisions which have followed that case. Those decisions should be considered in the context of the facts on the basis of which they were given, and it would be wrong on principle, to enlarge the decision; after all a case is only an authority for what it decides 'QUINN v. LEATHAM', 1901 A C 495.

In 'ATTORNEY-GENERAL v. SILLEM', (1864) 11 E R 1200, Lord Westbury said that the creation of a new right of appeal is plainly an act which requires legislative authority; similarly, the taking away of a vested right of appeal requires express enactment or necessary intendment to that effect. A rule of procedure, however, stands on a different footing and a change of procedural rule which does not make any alteration in the statutory right of appeal cannot be said to be hit by the principles laid down in the 'COLONIAL SUGAR REFINING COMPANY'S CASE.' I shall be reluctant to so enlarge the decision of that case as to make it almost impossible to effect a satisfactory change in the rule of this Court. It is right to add that in the course of arguments I felt that prima facie, the view accepted by the Punjab High Court in 'GORDHAN DAS BALDEV DAS v. GOVERNOR-GENERAL IN COUNCIL', AIR 1952 Punj 103, was correct. My learned brother, Sarjoo Prasad, J., felt differently. On a more careful consideration, I now think that the decision in the 'COLONIAL SUGAR REFINING COMPANY'S CASE', does not really militate against the conclusion at which I have arrived.

(23) I now proceed to consider the appeal on merits. But before I do so, it is necessary to refer to one more point. There does not appear to be any rule in the Rules of this Court relating to civil matters under which a particular point only can be referred to a Full Bench, except Rule 3 in Chapter V which is applicable to a first appeal only. The other rules seem to contemplate that the appeal itself shall be referred for the final decision of the Full Bench. Clause 28 of the Letters Patent provides for the reference of a particular point on which two or more Judges of a Division Court are divided in opinion; in such a case the point has to be stated and the case heard upon that point by one or more of the other Judges and the point is decided according to the opinion of the majority of Judges who hear the case including those who first heard it. The provisions of Clause 28 of the Letters Patent do not, however, cover an appeal of the nature which we have before us, where there is no difference of opinion but a particular point of general importance and legal complexity has arisen necessitating a decision by a larger Bench. I am mentioning this matter so that if there is any lacuna in the Rules of the Court, it may be brought to the notice of the Full Court for such action as may be considered necessary.

(24) I now turn to the merits of the appeal. At the beginning of this judgment, I have stated some of the facts on which the plaintiffs-respondents brought their suit for redemption. The defence of the appellants was that Rikhai Raut was joint with them and died in a state of jointness. It was denied that the defendants third party were his daughters. The principal defence, however, was that the sale-deed, on the basis of which the plaintiffs-respondents claimed the right of redemption, was collusive, fraudulent and without consideration. In substance, the defence was that Rikhai Raut was a member of a joint family and had no necessity, nor occasion, for executing the sale-deed, dated the 25th of February 1924. The transaction was challenged as a sham and collusive transaction. It was alleged that in Jeth 1350 Fasli the appellants redeemed the bonds in question and were in possession of the lands stated to be the subject of the two mortgages as also other lands of Rikhai Raut.

(25) The learned Additional Subordinate Judge, who dealt with the suit in the first instance, came to the following findings under Issue No. 3: first, he found that Rikhai Raut was living separate from his other agnates and died in a state of separation sometime in October 1933; secondly, he found that the defendants third party were daughters of Rikhai Raut. On the question of the genuineness of the sale-deed (Exhibit 2), on which the plaintiffs-respondents claimed the right of redemption, the learned Subordinate Judge found that the evidence of the payment of consideration, particularly with regard to the sum of Rs. 325 which was stated to have been set off against the previous dues, was unsatisfactory. The learned Subordinate Judge stated, however, that he was not prepared to hold that the transaction was a bogus one merely because the evidence of the payment of a part of the consideration was unsatisfactory. On the question of possession, the learned Subordinate Judge expressed himself as follows:

> "As regards the question of possession over the area outside the rehan bond, no finding is necessary, because those lands are outside the purview of the present action. Moreover, the parties were not particularly prepared to adduce evidence on this point, because this question was not directly in issue."

After having come to the aforesaid findings, the learned Subordinate Judge stated:

> "So on a consideration of all these facts and circumstances, I must hold that the plaintiffs have clearly got title under Exhibit 2 and they are entitled to redeem the bonds in question."

(26) On appeal, the learned District Judge formulated three main points which arose for consideration before him: (1) whether the sale-deed set up by the plaintiffs is valid and for consideration; (2) whether Rikhai Raut died in a state of separation from the defendants second party; and (3) whether the defendants third party are Rikhai Raut's daughters. The learned District Judge affirmed the findings of the learned Subordinate Judge on the three questions formulated by him though on somewhat different grounds.

(27) Learned counsel for the appellants has contended before us that the learned District Judge misdirected himself as to the principal question for decision before him, namely, the right of the plaintiffs-respondents to redeem the two mortgage bonds. Learned counsel has further contended that the learned District Judge has not considered the relevant evidence on the record bearing on that principal question and he has arrived at a finding on the question of possession without any consideration of the evidence in the record. Learned counsel for the respondents, on the contrary, has contended that this appeal is concluded by findings of fact.

(28) On a cursory perusal of the two judgments it seems as though the appeal is concluded by findings of fact. On closer examination, however, it appears to me that the contentions of learned counsel for the appellants are correct and the finding of the learned District Judge on the principal question, namely, the right of the plaintiffs-respondents to redeem the mortgage bonds, is vitiated by reason of the fact that the learned District

Judge did not correctly appreciate what was the principal question at issue before him and also by a failure to consider the relevant points and relevant evidence bearing on that question.

(29) It is obvious that the plaintiffs-respondents could succeed only if they proved the genuineness of the sale-deed, dated the 25th of February 1924. In paragraph 6 of the plaint, the plaintiffs-respondents themselves stated that the basis of the suit was their title to the land by virtue of the purchase made on the 25th of February 1924. The appellants alleged that the sale-deed was a sham and bogus transaction and conferred no title on the plaintiffs-respondents. Therefore, the principal question for determination was whether the sale-deed was a genuine transaction or not. The learned District Judge misdirected himself when, after formulating the three points, he said as follows:

> "If the second and the third points are found against the appellants, they will not be entitled to question the right of the plaintiffs to redeem the mortgages."

The second and third points referred to by the learned District Judge related to the question whether Rikhai Raut died in a state of separation and whether the defendants third party were Rikhai's daughters. The learned District Judge, in my opinion, was wrong in thinking that an adverse finding on those two questions would disentitle the appellants from questioning the right of the plaintiffs to redeem the mortgages. The plaintiffs-respondents asked for redemption and recovery of possession from the appellants or the defendants first party. It is obvious that they had to prove their right to redeem. Even assuming that the appellants being strangers to the transaction were not entitled to challenge the passing of consideration for the sale-deed, it was clearly open to them to plead, and they did so plead, that the sale-deed on the basis of which the plaintiffs-respondents claimed the right of redemption was a bogus and a sham transaction. Even if one takes the worst possible view against the appellants, namely, that they were trespassers, yet the plaintiffs-respondents had to prove that they had a better title, namely, the right to redeem and to ask for recovery of possession. The learned District Judge clearly misdirected himself when he thought that if Rikhai Raut was separate from his agnates and the defendants third party were his daughters, the appellants would not be entitled to question the right of the plaintiffs-respondents to redeem the mortgages. This wrong view of the learned District Judge appears to have affected his finding on the principal question and, as I shall presently show, he has failed to take into consideration several relevant facts and evidence bearing on the principal question.

Learned counsel for the appellants contested also the finding of the Courts below that Rikhai Raut was separate from his 'pattidars' and pointed to a statement in the sale-deed which was to the effect that the family was joint and further to a finding of the learned District Judge himself in another appeal (Title Appeal No. 78 of 1945) which was to the effect that Rikhai Raut was joint with his 'pattidars'. The Courts below have considered the statement in the sale deed and the finding in Title Appeal No.. 78 of 1945. It is worthy of note that the plaintiffs-respondents were not parties to the suit out of which Title Appeal No. 78 of 1945 arose. The statement in the sale deed has been differently explained by the two Courts. Both Courts have, however, referred to other evidence in the record showing separate dealings and transactions by Rikhai Raut and his 'Pattidars' in respect of the lands in their possession. From that evidence the Courts below found that Rikhai Raut was separate from his 'pattidars'. I do not think that that finding can be disturbed in second appeal. There is evidence in the record which supported that finding, in spite of the statement made in the sale deed and the finding of the learned District Judge in Title Appeal No. 78 of 1945. The finding that Rikhai Raut was separate from his 'pattidars' must be accepted as binding in second appeal.

Not so, however, the finding regarding genuineness of the sale deed. I have already referred to the wrong view which the learned District Judge adopted with regard to that question. The learned District Judge found, as also the learned Subordinate Judge, that the evidence of the plaintiffs-respondents relating to the passing of consideration was extremely unsatisfactory. The learned District Judge wrongly thought that the recital in the sale deed that consideration had passed was by itself sufficient to prove the passing of consideration, even though the evidence regarding the passing of consideration was unsatisfactory. When direct evidence was given about the passing of consideration, the question of presumption hardly arose. It is to be noted that the question of the passing of consideration has an important bearing on the question whether the sale deed was a genuine transaction or not. The learned District Judge does not appear to have considered the question of passing of consideration from that point of view. Similarly, the question of possession has an important bearing on the principal question. The learned Subordinate Judge wrongly thought that the question was of no importance. He stated that the parties were not particular to adduce evidence on the point. The learned District Judge without referring to any particular evidence in support of his finding said:

> "The question is whether the plaintiffs came in possession of the land covered by their sale deed, excluding the land covered by the mortgage deeds in question. I have no doubt on the evidence that they did come in possession of that land."

(30) There is no reference to any evidence on which the learned District Judge came to that finding, though earlier he had said that the oral evidence was conflicting and it was not possible to come to any finding on it. On the contrary, there were rent receipts (Ex. A series), revenue chalan (Ex. D series) and notices of certificate cases (Ex. E series) which were produced by the appellants in support of their plea of possession. The learned District Judge explained those documents, and I concede that it was open to the learned District Judge to consider the documentary evidence and reject it, for reasons given by him; but before recording a finding of possession in favour of the plaintiffs-respondents it was incumbent on the learned District Judge to refer to such evidence as supported that finding. He has, however, referred to no such evidence, and the learned Subordinate Judge said that the parties were not prepared to give evidence on the question of possession of the lands sold by Rikhai Raut. A finding given without reference to any evidence cannot be accepted as binding in second appeal.

(31) The original sale deed, was not produced by the plaintiffs-respondents. That aspect of the matter was, however, considered by both Courts. There was a suggestion on behalf of the appellants that Ganesh Raut was the father of a son-in-law of Rikhai Raut and the sale deed was a bogus one. The learned District Judge has referred to that suggestion, but does not appear to have considered it carefully. Be that as it may, this case must, I think, go back on remand to the learned District

Judge for a fresh determination of the principal question, namely, whether the sale-deed on the basis of which the plaintiffs-respondents claimed the right of redemption is genuine or not. The learned District Judge will consider afresh all the circumstances bearing on that question in the light of the observation made above. We are not interfering in any way with the other two findings of the Courts below, namely, that Rikhai Raut died in a state of separation and that the defendants third party were his daughters.

(32) For the reasons given above, the appeal is allowed and the judgment and decree of the learned District Judge dated the 8th of October, 1947, are set aside. The appeal will now be re-heard by the learned District Judge as directed above. The costs of the hearing of the second appeal in this Court will abide the result of the hearing by the learned District Judge.

(33) REUBEN, J.: This Special Bench was constituted to consider the question of law arising out of Standing Order No. 2 of 1952 extending a single Judge's jurisdiction to hear second appeals. In the absence of any provision under the High Court Rules by which the point of law alone could be referred the second appeal itself has been referred to us. In consequence it is no longer necessary for the disposal of the appeal to decide the question of law for deciding which this Special Bench was constituted. Keeping in view the purpose for which the reference was made and the importance of the question referred, we decided that we ought to record our opinion on the point. Therefore, we heard the parties and are greateful to Mr. Ganesh Sharma, Rai T. N. Sahai and Mr. Lalnarain Sinha who have been of great assistance to us in considering this difficult question.

(34) I agree with my learned brother Das, J. that the Standing Order in question has not the effect of amending the High Court Rule which defines the jurisdiction of a single-sitting Judge to hear second appeals. S. 108 of the Government of India Act, 1915, under which the High Court Rules are made distinguishes between the High Court as such and the Chief Justice. Under sub-s. (1) the High Court may by rule provide for the exercise by one or more Judges or by Division Courts constituted by two or more Judges of the original and appellate jurisdiction vested in the Court. Under sub-s. (2) the Chief Justice is empowered to decide which Judges will sit alone and which of them will constitute the Benches. From the administrative files examined by us it appeared that, although there was a decision of the Full Court for enlarging the jurisdiction of a single-sitting Judge to hear second appeals up to the value of Rs. 5000, there was no decision as to the date from which the proposed change should come into effect.

(35) It remains to consider, whether the Court has power to make an amendment to this effect which can apply to pending second appeals, that is to say, whether such an amendment can be made with retrospective effect. Prima facie, it would appear that this can be done. It is apparent from sub-s. (1) of S. 108 of the Government of India Act, 1915, and Cl. 28 of the Letters Patent of the High Court that it is a matter of procedure whether the original and appellate jurisdiction of the High Court is exercised by it through a single-sitting Judge or a Division Court and, since no party has a vested right in procedure, an amendment affecting the powers of a single-sitting Judge to exercise original or appellate jurisdiction will operate with retrospective effect. The reason urged against retrospective operation in the present case is that the amendment will affect a vested right, namely, the right of appeal to a superior Court. It has been held in a number of cases following the decision in 'COLONIAL SUGAR REFINING CO. LTD. v. IRVING', (1905) AC 369, that the right of appeal vests in a party when the suit is instituted. Mr. Lalnarain Sinha has urged that the decision in 'COLONIAL SUGAR REFINING CO. LTD. v. IRVING', 1905 AC 369 is no longer binding on this Court and that the correctness of this proposition should be re-examined. I do not think that it is necessary for the purpose of this case. All that is necessary is to examine what exactly is the right of appeal which is said to be affected by the amendment of the rule. The suit is for redemption of a usufructuary mortgage and is valued at Rs. 1200. It was instituted on the 1st September, 1945. Under the law in force at the time when the suit was instituted the parties to the suit were entitled to appeal from the decree in the suit to the District Judge. From the decision in the appeal so filed the law gives the party aggrieved a right of second appeal to the High Court subject to the conditions specified in S. 100 of the Code of Civil Procedure. All that the party can ask for is that its second appeal, provided that it satisfies these conditions, shall be entertained and heard by the High Court. Up to this stage the provisions of the law regarding the venue of the appeal are definite. For the stage after the hearing by the High Court, the provisions are in the alternative and are dependent on whether the appeal is heard by a Single Judge or by a Division Court. In the former case an appeal lies to the High Court itself under Cl. 10 of the Letters Patent, in the latter case to the Privy Council, and since the commencement of the Constitution of India to the Supreme Court, subject to the conditions prescribed in the relevant provisions of the law. This, then, is the right of appeal which has vested in the party, namely, a right to go to the High Court if the second appeal is heard by a single Judge and a right to go to the Privy Council, now the Supreme Court, if the hearing is by a Division Court. As I have observed, whether the second appeal is heard by a single Judge or by a Division Court is a matter of procedure, and there is nothing in the amendment under consideration which will affect the further right of appeal from the decision in the second appeal. Viewed in this light the amendment under consideration is an amendment of a rule of procedure, and, therefore, can be made with retrospective effect.

(36) On the merits of the appeal before us I agree with what has been said by my learned brother Das, J. and have nothing to add.

(37) SARJOO PROSAD, J.: I have read with interest judgment prepared by my learned brother Das, J. and I agree with him in his decision both on the question of law, to consider which this Special Bench was constituted, and also on the merits of the appeal.

(38) As observed by Das, J. in course of arguments I was strongly inclined to the view that a vested right of appeal was something quite different from the claim put forward in this reference that a party had the right to have his appeal heard by a Bench of two Judges and not by a single Judge of this Court. The latter is a mere matter of procedure affecting the internal administration of this Court and the arrangement of Benches therein in which no litigant could claim any vested right. In taking this view I appealed to have struck the same line of thought which attracted Bose, C. J. as indicated in his order of reference in 'RADHAKISHAN v. SHRIDHAR', ILR (1950) Nag 532, but I avoided demurring out of deference to the observations made from time to time by my learned colleagues in course of arguments. I am glad to find that the view then expressed by me has eventually found favour with Das, J. and I feel no hesitation

in accepting the same for the reasons so elaborately discussed by my learned brother to which I have little to add.

K.S. Order accordingly.

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RAMASWAMI AND SARJOO PROSAD JJ.

Gopal Ram and others, Appellants v. Ram Prasad and others, Respondents.

A. F. A. D. Nos. 2278 and 2279 of 1948, D/- 25-2-52.

Partition Act (1893), S. 2 — Ancestral land — Defendant erecting houses — Suit for partition.

If one of the co-sharers intends to appropriate to his own use a portion of the joint land and takes up a portion of such land and builds a pucca house thereon he ought not to be treated as a trespasser. Secondly, if a co-sharer, seeing one of his co-sharers erect a house on a piece of joint land, stands by and makes no objection, a Court of Equity will presume his acquiescence to the erection of the building and will not order demolition of the pucca building on the joint land unless it is shown that injury would accrue to the co-sharer plaintiff and also before the building was started objection was taken to its erection.

The plaintiffs claimed that the land was ancestral and they were entitled to be granted partition of eight annas share therein. The defendants had not only constructed houses on the land but the plaintiffs were aware of the construction and the defendants had been in occupation of the house for a long term of years. The plaintiffs were in occupation of certain houses, other than the two houses which were in dispute in the present case. In any event the plaintiffs had not sought for partition of the two houses built by the defendants but only of the land on which the houses stood:

Held that in the circumstances of the case the plaintiffs should not get eight annas share of the two houses but the commissioner should instead fix a reasonable price for the land in dispute and the defendants should be asked to compensate the plaintiffs in money to the extent of their share. Case Law rel. on. (Paras 4, 6)

Anno: Partition Act, S. 2 N. 1.

P. R. Das and A. B. N. Sinha, for Appellants; B. N. Mitter, Kanhaiyaji, B. K. Sharma (in both); K. B. N. Singh and S. C. Mukherji (in No. 2278 only) and Chandrasekhar Pd. (in No. 2279 only), for Respondents.

REFERENCES: Courtwar/Chronological/ Paras.

('87) 9 All 661: (1887 All WN 253) 4
('11) 11 Ind Cas 370: (15 Cal WN 555) 5
('06) 4 Cal LJ 198 4
('31) 61 Mad LJ 552: (AIR 1932 Mad 15) 5
('51) 31 Pat LT 7: (AIR 1950 Pat 511) 4

JUDGMENT: These appeals are brought by defendants 1 to 3 and by defendants 12 to 14 against a preliminary decree granted in a partition suit.

(2) The land in dispute comprises plot 1863, area 18 dhurs and 12 dhurkis, and plot 1869, area 1 katha and 12 dhurs, located in the town of Buxar. The plaintiffs claimed that the land was ancestral and they were entitled to be granted partition of eight annas share therein. Defendants 1 to 3 contested the suit on the allegation that plot 1869 was acquired by Gaya Master from whom they had purchased the plots by an unregistered document. It was alleged on behalf of these defendants that on a portion of the plot they had erected a house to the knowledge of the plaintiffs and in consequence they had acquired title by ouster. A similar claim was advanced on behalf of defendants 12 to 14 who contested the suit so far as plot 1863 was concerned. They alleged that they had purchased the plot from Gaya Master by virtue of an oral sale and subsequently built a house thereon. An alternative claim of ouster was also pleaded on their behalf.

Upon a consideration of oral and documentary evidence the Munsif found that both the plots were joint family properties and that the story of the defendants that they had made a purchase of the plots was not acceptable. The Munsif also held that the defendants had not established the plea of ouster with respect to either of the plots in question. The Munsif therefore granted a decree to the plaintiffs for partition of eight annas share of the two plots and directed that the

> "commissioner will have due regard in effecting partition to the convenience of the parties and that he may allow compensation in money to others if he thinks it advisable not to partition the house."

The decision of the Munsif was affirmed by the learned Subordinate Judge in appeal. But in the operative portion of the judgment the Subordinate Judge observed:

> "As the defendants have made constructions, so naturally they would be entitled to compensation or such relief at the time of actual partition and this is a matter which has to be determined at the time of partition."

(3) The main question argued is that upon the findings reached there ought to be a direction in the decree that the house erected should not be partitioned but that the two plots should be assessed at a reasonable price and that the plaintiffs ought to be granted their share of the value so assessed which is to be paid by the defendants.

(4) In approaching this question it is necessary to bear in mind two important principles. In the first place, if one of the cosharers intends to appropriate to his own use a portion of the joint land and takes up a portion of such land and builds a pucca house thereon he ought not to be treated as a trespasser. Secondly, if a co-sharer seeing one of his co-sharers erect a house on a piece of joint land stands by and makes no objection, a Court of Equity will presume his acquiescence to the erection of the building and will not order demolition of the pucca building on the joint land unless it is shown that injury would accrue to the co-sharer plaintiff and also before the building was started objection was taken to its erection. The principles were clearly enunciated by Mahmood J. in 'PARAS RAM v. SHERJIT', 9 All 661, in which the learned Judge said that the mere fact of a building being erected by a joint owner of land without the permission of his co-owners, and even in spite of their protest, is not sufficient to entitle such co-owners to obtain the demolition of such building, unless they can show that the building has caused such material and substantial injury as could not be remedied in a suit for partition of the joint land.

To a similar effect is the decision of 'ANANDA-CHANDRA SEN v. PARBATI NATH SEN', 4 Cal LJ 198 wherein the eminent Judge Sir Asutosh Mookerjee observed that acquiescence is quiescence under such circumstances as that assent may be

reasonably inferred from it and is no more than an instance of the law of estoppel by words or by conduct; in other words, acquiescence does not mean simply an active, intelligent consent, but may be implied, if a person is content not to oppose irregular acts which he knows are being done. The principle has been followed by this High Court in 'KRISHNA KUMAR SINGH v. PADUM SINGH', 31 Pat LT 7, wherein it was held that a co-owner cannot obtain a mandatory injunction for demolition of a building erected by the co-owners unless he can establish that he had sustained some substantial injury by reason of the erection of the building and that he took reasonable steps in time to prevent the erection.

(5) In support of his argument Mr. P. R. Das also referred to S. 2 of Partition Act IV of 1893 which states:

"Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the share-holders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds."

Learned counsel addressed the argument that even if Section 2 of the Partition Act was not strictly applicable to the present case the Court has inherent jurisdiction to apply the well-known principle of equity embodied in the statute, viz., that where it is inconvenient to divide a property, that property must be left in the possession of the person in occupation and other persons who cannot conveniently get actual possession should be compensated. Learned counsel founded his argument on 'BASUNTA KUMAR GHOSH v. MOTI LAL GHOSH', 11 Ind Cas 370 (Cal) and 'DARBHAMULLA SUBBAMMA v. VALIVETTI VEERAYYA', 61 Mad L J 552.

(6) Applying the principle established by these authorities it is plain, in the circumstances proved in the present case, that the plaintiffs cannot be permitted to claim partition of the two houses built on the land by the defendants. The plaintiffs of course have proved that the land is ancestral and they are entitled to claim partition of eight annas share of the land. It was argued by Mr. P. R. Das that the house covers almost the whole of plot 1863 and a great part of plot 1869 though exact measurement is not known. The lower Courts have also found that the defendants had not only constructed these houses but the plaintiffs were aware of the construction and that the defendants had been in occupation of the house for a long term of years.

It was argued by Mr. B. N. Mitter that if the plaintiffs are deprived of a share of the house much hardship would be caused. This argument is not correct since the learned Munsiff states at page 6 that there was evidence that the parties had separate houses and they had been living separately in them and that the plaintiffs might not have objected to the construction on these plots because they were not inconvenienced. It would therefore seem that the plaintiffs are in occupation of certain houses, other than the two houses which are in dispute in the present case. In any event the plaintiffs have not sought for partition of the two houses built by the defendants but only of the land on which the houses stand. In the circumstances of the case we therefore consider that the plaintiffs should not get eight annas share of the two houses but the commissioner should instead fix a reasonable price for the land in dispute and the defendants should be asked to compensate the plaintiffs in money to the extent of their share.

If it is possible to make a division of the vacant area of the two plots which is not covered by the two houses, the commissioner will make an attempt to give to plaintiffs their proper share of the vacant land, otherwise the commissioner will grant money compensation to the plaintiffs. In our opinion the decree of the lower appellate Court should be modified in this manner.

(7) The appeals are accordingly allowed and the decree of the lower appellate Court will be modified in the manner indicated above. There will be no order as to costs of the appeals.

D.H. Appeals allowed.

A. I. R. 1952 Patna 352

LAKSHMIKANTA JHA C. J. AND AHMAD J.

Pramada Prasad Mukharjee, Defendant-Appellant v. Sagarmal Agarwala and others, Plaintiffs-Respondents.

A. F. O. O. No. 9 of 1952, D/- 30-4-1952.

(a) Arbitration Act (1940), S. 34 — Repudiation of contract containing arbitration clause — Stay of suit.

From the language of S. 34 it is clear that a party can apply to stay a legal proceeding only when the repudiation is of the right or obligation in respect of any matter 'agreed to be referred', and not when the very existence of the agreement is repudiated. (Para 6)

If there be in a suit allegations and counter-allegations of fraud or misrepresentation in bringing a contract containing an arbitration clause into existence, such a suit is independent of the contract, and the dispute must be decided by the Court and not by the domestic tribunal, for the repudiation is of the contract itself, and not of the obligations arising out of the contract. (1915) 3 KB 167; AIR 1943 Pat 53; 1942 AC 356; 27 Pat 930, Rel. on. (Paras 5, 9)

Anno: Arb. Act, S. 34 N. 10.

(b) Arbitration Act (1940), S. 34 — Arbitration clause — Construction — Clause ousting jurisdiction of Court — Submission of question relating to validity of contract containing arbitration clause challenged on ground of fraud and misrepresentation.

In order to oust the jurisdiction of the Court the words conferring jurisdiction on the arbitrators must be clear, precise and unambiguous for, as a rule, the arbitrator cannot clothe himself with jurisdiction. (Para 10)

Where the arbitration clause in a contract relating to managing agency of a colliery was "that if any dispute arises between the parties regarding the agreement and in respect of the managing agency.....", those words, though wide, are not of such amplitude that it can be said that the jurisdiction of the Court was ousted and the

arbitrators were empowered to decide a dispute going to the very root of the contract, including the submission clause. These words clearly indicate that the parties intended that the arbitrators should decide questions arising on the basis of a valid and subsisting contract. Reading the arbitration clause as a whole, it cannot be said that it was the intention of the parties that the arbitrators should decide, under the arbitration clause, a dispute relating to the validity of the contract challenged on the ground of fraud or mis-representation or any other ground, legal or equitable. (Para 10)

It is, however, extremely doubtful whether when the whole document is challenged, the submission clause, which is ancillary to the main contract, can stand and give jurisdiction to the arbitrators to decide the question of fraud and the like. 1942 AC 356, Ref. (Para 10)

Anno: Arb. Act, S. 34 N. 2.

(c) Arbitration Act (1940), S. 34 — Repudiation of contract containing arbitration clause — Allegation of fraud in suit — Stay of suit.

When the suit is independent of the contract, the allegation of fraud in the plaint is enough to oust the jurisdiction of the arbitrators and stay should be refused. Even if the contract be admitted and the obligation arising on the breach of the contract be repudiated on the ground of fraud, stay should be refused if a 'prima facie' case of fraud is made out, because fraud is a serious charge and the investigation of fraud must be made by a Court and not by a lay arbitrator. AIR 1943 Pat 53, Expl.; AIR 1949 Cal 179, Ref. (Para 11)

Anno: Arbitration Act, S. 34 N. 6, 10.

(d) Arbitration Act (1940), S. 34 — Repudiation of contract containing arbitration — Allegation of estoppel or ratification of contract — Stay cannot be granted on those grounds.

The question of stay has to be decided on the plaint as it stands, for what has to be considered for the purpose of stay is the nature of the suit as pleaded. Matters like estoppel or ratification can be decided in the suit and the suit itself may be dismissed by the Court on any of these grounds; but they are not grounds upon which the Court can stay a suit under S. 34 of the Arbitration Act. (Para 12)

Anno: Arbitration Act, S. 34 N. 6, 10.

(e) Arbitration Act (1940), S. 39 (1) (v) — Order refusing stay of suit under S. 34 — Interference in appeal.

Where on consideration of all the matters placed before him, the trial Court has declined to stay the suit and in so doing he has not followed any wrong principle of law, his discretion should not be interfered with in appeal. (Para 13)

Anno: Arb. Act, S. 39 N. 1.

Lal Narayan Sinha, Lala Atul Chandra and A. N. Chatterji, for Appellant; B. C. De and S. K. Mazumdar, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras.

('48) 52 Cal WN 137: (AIR 1949 Cal 179) 11
('42) 21 Pat 544: (AIR 1943 Pat 53) 7, 11
('48) 27 Pat 930 9
(1942) App Cas 356: (111 LJKB 241) 8, 10
(1915) 3 KB 167: (84 LJKB 1091) 6, 12
(1895) 1 QB 253: (64 LJCh 152) 11

JUDGMENT.: The question for decision in this appeal is whether an action commenced by the plaintiffs should, on the application of the defendant, who is the appellant before us, be stayed, pursuant to Section 34 of the Indian Arbitration Act, 1940 (Act X of 1940), in order that the matters in dispute between the parties may be dealt with by the arbitrators under the arbitration agreement. The trial Court has declined to stay the suit. The defendant has, therefore, come up to this Court in appeal.

(2) The defendant has a lease-hold interest in a colliery in village Patlabari in the Jharia Coalfield in the district of Manbhum, fully specified in Schedule A to the plaint. On the 28th of June 1948, there was an agreement between the plaintiff No. 1 (hereinafter referred to as the plaintiff: other plaintiffs being junior members of his family) and the defendant, under which the latter granted what is described as a managing agency of the colliery for a term of seven years to the plaintiff on certain terms and conditions fully set out in the agreement and made over possession of the colliery together with the machinery, building and structures appertaining thereto, to the plaintiff, and the plaintiff came into possession of the colliery on the 29th of June 1948. The agreement contains 25 clauses. Clauses 1 to 24 set out the obligations which the parties undertook towards each other and Clause 25 is the arbitration clause which reads as follows:

"That if any dispute arises between the parties regarding this Agreement and in respect of the Managing Agency the same shall be referred for decision to two Arbitrators one to be nominated by each party and in case of difference between the arbitrators on any point the same shall be referred to an Umpire to be appointed by the Arbitrators before proceeding with the Arbitration which shall be governed by the provisions of the Indian Arbitration Act now in force or of any Act of the Legislature passed in substitution or modification thereof."

It is alleged in the plaint that the plaintiff started working the colliery and in pursuance of the terms of the agreement he paid to the defendant Rs. 20,000/- as 'salami' deposited Rs. 30,000/- with him as security and thereafter paid Rs. 8,000/- on the 1st of September 1948, as the price of coal raised from the colliery and a sum of Rs. 6,500/- as the minimum royalty up to July 1948.

(3) Sometime in June 1949, disputes arose between the parties. According to the defendant, there were various breaches of the terms and covenants on the part of the plaintiffs and so under Clause 25 of the agreement he nominated an arbitrator and called upon the plaintiff to nominate his own. The plaintiff accordingly nominated his arbitartor and thereafter the parties appeared in the arbitration proceedings and submitted their respective case. On the 31st of July 1949, the arbitrators after hearing the lawyers of the parties framed issues. One of them was:

"Whether the Managing Agency dated 28/6/1943 is vitiated by fraud and misrepresentation of the petitioner P. P. Mukherjee and voidable at the option of the opposite party Sagarmal Agarwal?"

On the 15th of February 1950, the parties were informed by the arbitrators that evidence would commence on the 21st of February 1950. On that date a sitting of the arbitrators was held and the parties filed a joint petition praying for extension

of time. The sitting was adjourned to the 13th of March 1950, for evidence on behalf of the present plaintiff and the plaintiff was called upon to come ready with evidence on that date. The plaintiff, however, did not appear or adduce any evidence before the arbitrators on the date fixed and later on he along with other members of his family, instituted the present suit on the 31st of May 1951, in the Court of the Subordinate Judge at Dhanbad for a declaration that the agreement is not a managing agency but a lease and is void for want of registration and is further vitiated by fraud and misrepresentation. The particulars of fraud are set out in paragraphs 4, 6, 10, 12, 15 and 17 of the plaint. The fraud alleged, in substance, is that the defendant represented to the plaintiff that the colliery in dispute would give immence profit if worked, although he knew that the mine did not contain any coal and was closed from 1929 to 1944 because it was not found a profitable business; that the agreement was drafted by the defendant and it was not shown to him nor was he given an opportunity to get the draft examined by a local expert or to get the coal mine examined by a mining expert. On these allegations, amongst others, the plaintiff asked for the following reliefs:

"(a) That the Court may be pleased to declare that the agreement dated 28/6/1948 between the parties is vitiated on the ground of fraud and misrepresentation and is therefore inoperative and not binding upon the plaintiffs.

"(b) That the Court may be pleased to declare that the agreement dated 28/6/1948 between the parties is a void lease for want of registration and hence is inoperative and not binding upon the plaintiffs.

"(c) That the Court may be pleased to give the plaintiffs a decree for Rs. 55,000/- against the defendant as per account given in Schedule B below.

"(d) Cost of the suit and interest during the pendency of the suit and interest till realisation be decreed to the plaintiffs, against the defendants.

(e) Any other relief or reliefs to which the plaintiffs may be found entitled under the facts and circumstances of the case may also be awarded to the plaintiffs against the defendant."

(4) Before filing a written statement or taking any steps in the suit on the date fixed for his appearance, the defendant applied to stay the suit and to refer it to arbitration under Section 34 of the Indian Arbitration Act. His case as set out in his application under Section 34 of the Arbitration Act read with the affidavit filed on his behalf in connection with it is that the agreement referred to in the plaint is a managing agency and not a lease and as such not void for want of registration nor is it vitiated by any fraud or misrepresentation. In short, his case is that the agreement is "still binding upon the parties." The learned Subordinate Judge has held that the dispute does not fall within the purview of the arbitration clause, and in that view of the matter he has rejected the application for stay of the proceedings.

(5) It is clear that the dispute between the parties is as to the factum and validity of the agreement itself. On the allegations of the parties, two questions emerge for decision in the suit: (1) whether the agreement is vitiated by fraud or misrepresentation or both, and (2) whether it is a lease and as such void for want of registration. The point for consideration is whether these questions can go to the domestic tribunal for decision under the arbitration clause The contention of Mr. Lal Narayan Sinha is that the words of Clause 25 are of sufficient amplitude and confer power on the arbitrators to decide the dispute raised in the suit. This contention, in our view, is not correct. There is nothing in the deed to show that the arbitrators were empowered to decide the question of legality or fraud going to the very root of the contract. The attack is on the contract as a whole and the dispute is whether there is a binding contract between the parties. If the plaintiff's allegation of fraud and misrepresentation is proved or the document, on construction, is held to be a lease, and as such void for want of registration, the arbitration clause which is only a part of the contract must perish along with the other clauses. It is well-settled that if there be in a suit allegations and counter-allegations of fraud or misrepresentation in bringing a contract into existence, such a suit is independent of the contract, and the dispute must be decided by the Court and not by the domestic tribunal, for the repudiation is of the contract it self, and not of the obligations arising out of the contract. The points in dispute cannot, therefore, go to the arbitrators under the submission clause and the suit cannot, in our view, be stayed under Section 34 of the Indian Arbitration Act, which provides:

"Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

(6) From the language of the section it is clear that a party can apply to stay a legal proceeding only when the repudiation is of the right or obligation in respect of any matter 'agreed to be referred', and not when the very existence of the agreement is repudiated. The present case is fully covered by the decision in 'MONRO v. BOGNOR URBAN DISTRICT COUNCIL', (1915) 3 K B 167. In that case the plaintiff, who was a contractor, entered into a written contract with the defendants for the construction of certain sewerage works. The contract contained an arbitration clause in these terms:

"If at any time any question, dispute or difference shall arise between the council or their engineer and the contractor upon or in relation to or in connection with the contract the matter shall be referred to and determined by the engineer..."

(7) After the plaintiff had done some amount of work under the contract he refused to complete the work, alleging that he had been induced to enter into the contract by fradulent misrepresentations made in the specifications as to the nature of the sub-soil of the ground where the work was to be done, and he brought an action to recover damages for the alleged misrepresentation and claimed "a declaration that the said contract is void and that it be rescinded." The defendant took out a summons under Section 4 of the English Arbitration Act, 1889, which corresponds to Section

34 of the Indian Arbitration Act, 1920, to stay the proceedings and refer the dispute to arbitration under the arbitration clause in the contract. The stay was refused and Pickford, L. J., in rejecting the application for stay observed:

"It is, therefore, in no sense an action on the contract at all. Nor do I think that it is an action in relation to or in connection with the contract.....I do not think that it is an action which comes within the arbitration clause at all, and therefore I think there was no power to stay it."

'In 'NARSINGH PRASAD v. DHANRAJ MILLS', 21 Pat 544 Harries, C.J., held that where an agreement is impeached on the ground of fraud and the dispute is as to the factum or validity of contract, such a dispute does not fall under the arbitration clause and should be decided by the Court.

(8) The conflicting authorities bearing on the interpretation of Section 4 of the English Arbitration Act, 1889, came up for discussion by the House of Lords in 'HEYMAN v. DARWINS', 1942 AC 356. That was a case in which the main question for consideration was the effect of a repudiation of the contract by one of the parties and the acceptance of such repudiation by the other. On a review of the authorities Viscount Simon, L. C., stated the law thus:

"If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he had ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void. But, in a situation where the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been a breach by one side or the other, or whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of' or 'with regard to', or 'under' the contract, and an arbitration clause which uses these, or similar, expressions should be construed accordingly."

Lord MacMillan in the same case observed:

"If it appears that the dispute is whether there has ever been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate. The greater includes the less. Further, a claim to set aside a contract on such grounds as fraud, duress or essential error cannot be the subject-matter of a reference under an arbitration clause in the contract sought to be set aside. Again, an admittedly binding contract containing a general arbitration clause may stipulate that in certain events the contract shall come to an end. If a question arises whether the contract has for any such reason come to an end, I can see no reason why the arbitrator should not decide that question. It is clear, too, that the parties to a contract may agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in the contract, it perishes with the contract. If the parties substitute a new contract for the contract which they have abrogated the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement."

(9) The decision of the House of Lords was considered by a Bench of this Court in 'N. K. JAIN v. S. B. SUGAR MILLS, LTD.', 27 Pat 930, wherein the defendant was sued as a trespasser. It was held in that case that where a suit is independent of the contract, such a suit cannot be stayed under Section 34 of the Act, and Das, J., observed:

"If the very fact or existence of the contract creating the tribunal is denied, it is obvious that the very basis of the jurisdiction of the domestic tribunal is challenged."

In our view, therefore, the defendant's application for stay of the suit is not maintainable under Section 34 of the Arbitration Act.

(10) The next contention of Mr. Lal Narain Sinha is that the words of the arbitration clause are severable and are so wide that it can be said that the parties intended that the arbitrators may decide any dispute as to whether the contract is void or voidable on the ground of fraud or misrepresentation, and in support of this contention he relied upon an observation of Lord Wright in 'HEYMAN'S CASE', 1942 A C 356, which reads thus:

"I see no objection to a submission of question whether there ever was a contract at all, or whether if there was, it had been avoided or ended. Parties may submit to arbitration any or almost any question."

We do not think that the words of Clause 25 of the agreement, which we have already quoted, warrant this extreme contention. In order to oust the jurisdiction of the Court the words conferring jurisdiction on the arbitrators must be clear, precise and unambiguous, for, as a rule, the arbitrator cannot clothe himself with jurisdiction. The opening words of paragraph 25, relied upon by Mr. Lal Narain Sinha, are:

"That if any dispute arises between the parties regarding this agreement and in respect of the Managing Agency....."

These words, though wide, are not of such amplitude that it can be said that the jurisdiction of the Court was ousted and the arbitrators were empowered to decide a dispute going to the very root of the contract, including the submission clause. These words clearly indicate that the parties intended that the arbitrators should decide questions arising on the basis of a valid and subsisting contract. Reading the arbitration clause as a whole, it cannot be said that it was the intention of the parties that the arbitrators should decide, under the arbitration clause, a dispute relating to the validity of the contract challenged on the ground of fraud or misrepresentation or any other ground, legal or equitable. Therefore, even if it be assumed that the arbitration clause is severable, it cannot be said that the parties intended that the arbitrators should decide the dispute regarding fraud or the legality of the contract.

We are, however, extremely doubtful whether when the whole document is challenged, the submission clause, which is ancillary to the main contract, can stand and give jurisdiction to the arbitrators to decide the question of fraud and the like. In making this observation we are not unmindful of the weighty observation of Lord Wright in 'HEYMAN'S CASE', 1942 A C 356 at p. 385, relied upon by Mr. Lal Narain Sinha, which we have already quoted. Therefore, this argument of Mr. Lal Narain Sinha must also fail.

(11) Mr. Lal Narain Sinha has further contended that even assuming that there is an attack on the validity of the contract on the ground of fraud,

mere allegation of fraud in the plaint is not sufficient to defeat an application under Section 34 of the Arbitration Act. His contention is that the Court must be satisfied that a 'prima facie' case has been made out before refusing stay, and in support of this contention he relies upon the following observation of Harries, C. J., in 'NARSINGH PRASAD BOOBNA v. DHANRAJ MILLS', 21 Pat 544 at p. 569:

"If the party resisting an application to stay a civil suit is the party making a charge of fraud, different considerations arise as the person charged does not desire trial by a Civil Court. In such a case the Court will stay the suit unless a prima facie case of fraud is made out."

This contention, in our view, is not sound. When the suit is independent of the contract, the allegation of fraud in the plaint is enough to oust the jurisdiction of the arbitrators and stay should be refused. Even if the contract be admitted and the obligation arising on the breach of the contract be repudiated on the ground of fraud, stay should be refused if a 'prima facie' case of fraud is made out. This was the view of Harries, C. J., in 'NARSINGH'S CASE', and with that view we respectfully agree; because fraud is a serious charge and the investigation of fraud must be made by a Court and not by a lay arbitrator. The argument of Mr. P. R. Das, appearing for the appellant, in 'NARSINGH PRASAD BOOBNA'S CASE', 21 Pat 544, to quote the language of the learned Chief Justice himself was in these words:

"Even if this was not a case where the whole contract was impeached and, therefore, not within the principles laid down in 'KITTS v. MOORE', (1895) 1 Q B 253, and other cases already cited in this judgment, yet the proceedings should not be stayed because serious allegations of fraud were involved in the dispute. He urged that where a prima facie case of fraud was made out a civil suit should not be stayed."

This argument was on the hypothesis that the whole contract was not impeached. Dealing with this argument, Harries, C. J., held (at page 570):

"A prima facie case of fraud has been established and, that being so, the allegations of fraud should, in my view, be investigated by a Civil Court which is a far more competent tribunal to decide such questions than a lay arbitrator."

While dealing with the question of stay when there is repudiation of the contract itself and not of the obligations arising thereunder, the learned Chief Justice observed (at page 553):

"It is clear that if the contract containing the arbitration clause is impeached then the suit should not be stayed and the matter should be decided by a Civil Court."

In 'JOHURMULL PARASRAM v. LOUIS DREYFUS & CO', 52 Cal W N 137 at p. 139, Harries, C. J., held that if the Court comes to a conclusion that a suit as pleaded is a suit on the contract or arising out of the contract, then the suit should be stayed. But on the other hand if the suit as pleaded is a suit independent of the contract, then the Court has no power to stay the suit though it is satisfied that the frame of the suit is merely a means of avoiding the consequences of alleging the true nature of the claim. Regarding his own observation in 'NARSINGH PRASAD BOOBNA'S CASE', 21 Pat 544, the learned Chief Justice said:

"The case of 'NARSINGH PRASAD v. DHANRAJ MILLS', was a case in which a suit had been brought on the contract and the question arose whether or not it was a fit case to be stayed under Section 34 of the Arbitration Act. In the present case the point to be decided is entirely different. Here the suit is based on causes of action wholly apart from the contract and therefore entirely different considerations apply. That being so, this Patna Bench decision based upon English cases has no relevance at all in the recent dispute."

Therefore, Mr. Lal Narain Sinha is not right in his contention that a prima facie case of fraud must be made out before an application for stay can be refused.

(12) The last contention of Mr. Lal Narain Sinha is that, in view of the fact that the plaintiff nominated his own arbitrator and attended the arbitration proceedings, he is estopped from challenging the contract and therefore the suit should be stayed. This argument is equally fallacious. The question of estoppel is not a question arising out of the contract; it is independent of the contract. The arbitrators are, therefore, not competent to decide the question of estoppel. The question of estoppel, if any, has got to be decided in the suit if the defendant raises this question in his defence. Moreover, the question of stay has to be decided on the plaint as it stands, for what has to be considered for the purpose of stay is the nature of the suit as pleaded. Matters like estoppel or ratification can be decided in the suit and the suit itself may be dismissed by the Court on any of these grounds; but they are not grounds upon which the Court can stay a suit under Section 34 of the Arbitration Act. In 'MONRO v. BOGNOR URBAN DISTRICT COUNCIL', (1915) 3 K B 167, the plaintiff wrote a letter to the defendant ratifying the contract which was alleged to have been vitiated by fraud. It was contended, therefore, that the suit should be stayed and the matter should go to arbitration. In repelling this argument Pickford, L. J., (at page 171) observed:

"That seems to me to be a matter which, if it be correct, is a matter to be decided in the action. It may show that the action cannot be maintained."

Therefore, this contention must also fail.

(13) It may be observed that this appeal is directed against an order passed by the learned Subordinate Judge in the exercise of his discretionary power under Section 34 of the Arbitration Act. The learned Subordinate Judge on consideration of all the matters placed before him has declined to stay the suit, and in so doing he has not followed any wrong principle of law. His discretion should not, therefore, be interfered with by us sitting in appeal.

(14) In the result, therefore, the appeal must fail and is dismissed with costs.

V.B.B. Appeal dismissed.

A. I. R. 1952 PATNA 356

MEREDITH J.

Madhav Chandra Chatterji, Petitioner v. The King.

Cri. Misc. Case No. 241 of 1949, D/- 7-6-1949.

Penal Code (1860), S. 188 — Applicability — Eviction order against tenant — Tenant obtaining injunction against landlord restraining execution of order — Prosecution of tenant under S. 188, Penal Code for contravening order — Maintainability — Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control Act (III (3) of 1947), Ss. 17 and 20.

A landlord who had obtained an eviction order against his tenant took out execution

of the same under S. 17 of the Bihar Buildings (Lease, Rent and Eviction) Control Act. The tenant thereupon filed a civil suit for declaration that the eviction order was illegal and obtained an 'ad interim' injunction restraining the landlord from executing the order of eviction. The landlord then moved the Controller and at his instance a complaint was filed against the tenant for contravening the eviction order. The tenant was however proceeded against under S. 188, Penal Code.

Held that S. 188, Penal Code had no application to the case as it relates to violations of orders made under the Code. The tenant having obtained an injunction from the civil Court was fully entitled to rely upon it and refuse to vacate the house so long as it subsisted. The course adopted savours unpleasantly of a manoeuvre to evade the injunction granted by the civil Court. This kind of thing is against the public interest and cannot be approved. Hence the prosecution must be quashed. (Para 3)

Anno: Penal Code, S. 188 N. 2.

Baldeva Sahay and N. N. Ray, for Petitioner; G. P. Shahi, for the Crown.

REFERENCES: Courtwar/Chronological/ Paras.
('49) Jatindra Nath v. Province of Bihar, AIR 1949 FC 175: (50 Cri LJ 897 (FC)) 5

ORDER.: This is an application for quashing criminal proceedings against the petitioner. An order was passed against the petitioner for his eviction at the instance of his landlord under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947. There is a provision in Section 17 of this Act that every order of the Controller passed under Act shall be executed by the Court having jurisdiction to entertain a suit for the recovery of arrears of rent in respect of the building, in relation to which the order to be executed is passed, as if such order were a decree passed by such Court. Accordingly the landlord took out execution under this provision. The petitioner countered this by himself filing a civil suit for a declaration that the eviction order was illegal. In this suit he obtained an 'ad interim' injunction restraining the landlord from executing the eviction order.

(2) The next move in the game was apparently played by the landlord by approaching the controller who has accordingly filed a complaint against the petitioner for contravening Section 20, Sub-section (2) of the Act which says: "whoever fails to comply with any direction made or deemed to have been made under this Act shall be punishable with imprisonment for a term which may extend to one year or with fine or with both." On this complaint, however the petitioner is now being proceeded against under Section 188 of the Indian Penal Code.

(3) In my opinion Section 138 relates to violations of orders made under the Code, and has no application to a matter like the present. But apart from that the injunction given by the Civil Court must be respected, and the petitioner having obtained his injunction was fully entitled to rely upon it and refuse to vacate the house so long as it subsisted. The course adopted savours unpleasantly of a manoeuvre to evade the injunction granted by the Civil Court. This kind of thing is against the public interest and cannot be approved, and indeed the learned Advocate for the Crown, who has, if I may say so, taken a very proper attitude, concedes that a procedure which in effect ignores the Cvil Court injunction, cannot be supported.

(4) Accordingly this case cannot be allowed to proceed. I say nothing as to the position if and when the injunction is vacated but the proceedings upon the present complaint must be and are quashed.

(5) An alternative point was raised before me relying upon the recent decision of the Federal Court in 'JATINDRA NATH v. PROVINCE OF BIHAR', decided on the 28th of May 1949 to the effect that the provisions contained in Section 1, Sub-sections (2) and (3) of the Bihar Maintenance of Public Order Act 1947, under which the Act has in fact been extended by notification, are 'ultra vires'. As the application succeeds on the other ground, I do not consider it necessary to enter into this question, interesting though no doubt it is.

(6) The rule is made absolute and the proceedings are quashed. The petitioner should be discharged.

K.S. Proceedings quashed.

A. I. R. 1952 PATNA 357

RAMASWAMI AND SARJOO PROSAD JJ.

Doma Sao Kishun Lal, Petitioner v. State of Bihar.

Misc. Judicial Case No. 103 of 1950, D/- 6-2-1952.

(a) Sales Tax — Bihar Sales Tax Act (XIX (19) of 1947), Ss. 25 and 32 — Order passed by Board of Revenue under S. 20 (3) of Sales Tax Act of 1944 — Application to Board of Revenue for referring case to High Court — Section 21 of Act of 1944 and not S. 25 of Act of 1947 applies — Applicant is bound to apply to Board within 60 days from passing of order — (Sales Tax — Bihar Sales Tax Act (VI (6) of 1944, S. 21). (Para 3)

(b) Sales Tax — Bihar Sales Tax Act (VI (6) of 1944), S. 21 — Limitation — Exclusion of time requisite for obtaining copy — (Limitation Act (1908), S. 12 (2)).

In a taxing Act, one has only to look at what is clearly said, and there is no room for any intendment. It is not open to the Court to entertain any argument that hardship would be caused. (1869) LR 4 HL 100, Rel. on. (Para 4)

Since there is no provision in the Act for excluding the time requisite for obtaining copies form the period prescribed, it is not possible to extend the period prescribed in S. 21 for any equitable reason. (Para 4)

Anno: Lim. Act, S. 12 N. 5.

(c) Sales Tax — Bihar Sales Tax Act (VI (6) of 1944), S. 21 — Improper reference — High Court's opinion on such reference.

If the Board of Revenue improperly makes reference in violation of the provision of the Statute the High Court is certainly capable of entertaining objection to the statement of the case and if it comes to the conclusion that the case should never have been stated the High Court is not compelled to express its opinion upon the questions referred. (Para 5)

(d) Sales Tax — Bihar Sales Tax Act (VI (6) of 1944), S. 21 — Omission to make reference within time prescribed.

The time prescribed by S. 21 is an essential condition pre-requisite for making the reference and the omission to make the reference within the time prescribed is fatal to the validity of the reference. AIR 1930 PC 151, Foll. (Para 6)

S. N. Dutta and Bemdabasni Pd., for Petitioner; Government Advocate and R. Prasad, for the State.

REFERENCES: Courtwar/Chronological/ Paras.

('30) 57 Ind App 152: (AIR 1930 PC 151) 7
(1869) LR 4 HL 100: (38 LJEx 205) 4

RAMASWAMI, J.: This reference is made by the Board of Revenue under Section 21 (1) of the Bihar Sales Tax Act, 1944.

(2) The petitioner Doma Sao Kishun Lal was assessed to sales-tax for six quarters, that is, quarters ending 31st December 1945, 31st March 1946, 30th June 1946, 30th September 1946, 31st December 1946 and 31st March 1947. The assessment order was made on 18th December 1947. A revision petition was filed on behalf of the Department before the Commissioner of Sales Tax, Patna, on the ground (1) that the Sales-tax Officer had not examined the books properly and (2) he had reduced the figure of gross-turnover as compared with the figures for the previous quarters. The Commissioner came to the conclusion that the assessment order was not satisfactory and that the figures of the gross-turnover were based on mere surmise. The Commissioner accordingly set aside the order and remanded the case for a fresh assessment to be made by the Deputy Commissioner of Sales Tax himself.

The assessee moved the Board of Revenue against the order of the Commissioner but the petition was rejected. On 18th August 1949 the assessee filed six applications before the Board of Revenue for referring the case to High Court on certain questions of law. It was objected on behalf of the State of Bihar that the petitions were time barred. But the petitioner alleged that though the orders were passed by the Board of Revenue on 15th May 1949 he was not apprised of the same. On 2nd June 1949 he filed an application for copies which he obtained only on 18th June 1949. It was argued that the time for obtaining copies should be excluded from the period fixed by the statute. After hearing the parties the Board of Revenue made the present reference without deciding the point whether the objection raised by the State of Bihar was valid or not.

(3) In this Court the preliminary question argued is whether the reference is incompetent and whether the Board of Revenue has jurisdiction to make it. Learned Government Advocate pointed out that the Board of Revenue was erroneous to think that the petitioner could make the application within 90 days from the date of the order. It was argued that under Section 21 of the Sales Tax Act, 1944, the assessee was required to make an application within 60 days from the passing by the Board of Revenue of any order under sub-s. (3) of S. 20 affecting the liability of the assessee. The Board of Revenue considered that S. 25 of the Sales Tax Act of 1947 applied to the case.

But this opinion is incorrect. For S. 32 of the Bihar Sales Tax Act of 1947 while repealing Bihar Sales Tax Act, 1944, provides that nothing in the repeal shall affect any liability to pay tax incurred before the date of such appeal and proceedings pending on the said date, as also all proceedings initiated after the commencement of this Act but relating to any such liability as aforesaid shall be continued and disposed of or initiated and disposed of, as the case may be as if the Act of 1947, had not been passed. It is manifest therefore that S. 21 of the Act of 1944 applies to this case and that the petitioner was bound to make an application to the Board of Revenue within 60 days from the passing of the order.

(4) On behalf of the assessee Mr. Dutta stressed the argument that though the Board of Revenue had passed order on 15th May, 1949 the assessee had no information till the end of the month. As soon as he came to know about the order the assessee filed an application for copy on 2nd June, 1949, and copy was supplied only on 18th June, 1949. It was maintained that the time for obtaining copy should be excluded from the period of limitation. It is not possible to accept this argument. There is no provision in the Sales Tax Act for excluding the time requisite for obtaining copies from the period prescribed. But S. 67A of the Income Tax Act states that in computing period of limitation the time requisite for obtaining copy of the order shall be excluded. Section 66(7A) of the Income Tax Act also states that S. 5 of the Indian Limitation Act shall apply to an application to the High Court by an assessee under sub-s. (2) or sub-s. (3). There are no corresponding provisions in the Sales Tax Act of 1944.

The omission is striking and it is therefore not possible to extend the period prescribed in S. 21 for any equitable reason. In a taxing Act, one has only to look at what is clearly said, and there is no room for any intendment. It is not open to the Court to entertain any argument that hardship would be caused. To adopt the language of Lord Cairns

> "If there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you should simply adhere to the words of the statute: 'PARTINGTON v. ATTORNEY GENERAL', (1869) LR 4 HL 100."

It is plain that in computing period of limitation the time requisite for obtaining copy cannot be excluded.

(5) On behalf of the petitioner it was contended that when a case has been stated by the Board of Revenue the High Court cannot consider whether reference is competent or not. It was urged that the High Court has no alternative other than to express its opinion on the question contained in the reference. In my opinion this argument is not correct. If the Board of Revenue improperly makes reference in violation of the provision of the Statute the High Court is certainly capable of entertaining objection to the statement of the case and if it comes to the conclusion that the case should never have been stated the High Court is not compelled to express its opinion upon the questions referred.

(6) The question must, therefore, be determined whether the reference made by the Board of Revenue is incompetent. It was contended for the petitioner that even if the application was made beyond the time fixed the reference was not incompetent. It was maintained that the condition imposed was in the nature of a mere direction, the neglect of which did not affect the validity of the reference. In my opinion this argument is not acceptable. If the scope and context of the Act is considered it is clear that the time prescribed by S. 21 is an essential condition pre-requisite for making the reference and the omission to make the reference within the time prescribed is fatal to the validity of the reference. It is obvious that in dealing with a reference under S. 21 the High Court does not act in exercise either of its original or

appellate jurisdiction. But the High Court acquires special jurisdiction to deal with the case by virtue of the express provision of the Bihar Sales Tax Act. Now the principle is: that when a statute confers special jurisdiction upon a Tribunal the conditions and qualifications annexed to the grant must be strictly complied with. It would not be competent to a tribunal to dispense with what the Legislature had made the indispensable foundation for its jurisdiction. It follows that in the present case, the High Court cannot acquire special jurisdiction to deal with the reference unless the preliminary conditions are strictly complied with. I am of opinion that the preliminary conditions imposed by S. 21 of the Act are mandatory and the reference made by the Board of Revenue in this case is without jurisdiction.

(7) This view finds support from 'TRUSTEES CORPORATION (INDIA) LIMITED v. COMMISSIONER OF INCOME TAX, BOMBAY', 57 Ind App 152 in which Lord Blanesburgh said:

"Their Lordships are fully alive to the circumstances in which the High Court was considered to direct that these further questions should be referred to it for consideration, and the result in the present case of the order then made merely serves to confirm the view of the Board that the High Court, will, in future cases, be well advised to require, before they seek to entertain any questions under S. 66 of the Income Tax Act that the preliminary requirements of the section are strictly complied with. The stringency of these requirements is clearly deliberate. It is the intention of the enactment that the High Court is not to be flooded with such applications. The object is salutary and in their Lordships' judgment the High Court will be well advised before they entertain any question under the section, always to see that the preliminary statutory conditions have been fully observed."

(8) For these reasons I hold that the reference made by Board of Revenue in this case is not competent and the High Court has no jurisdiction to hear the reference or answer the questions raised therein.

(9) There will be no order as to costs, but the petitioner is not entitled to refund of the amount of deposit.

(10) SARJOO PROSAD, J.: I agree.

V.R.B. Reference rejected.

*** * A. I. R. 1952 PATNA 359**

SPECIAL BENCH

DAS, NARAYAN AND SARJOO PROSAD JJ.

Atma Ram Budhia, Plaintiff v. State of Bihar, Defendant.

Titles Suits Nos. 1 and 3 of 1952 and 5 of 1951, D/- 8-5-1952.

† * * **(a) Bihar Finance Act (XVII (17) of 1950), Ss. 12, 26 and Part III — Tax imposed by Part III is intra vires of Bihar Legislature — (Constitution of India, Art. 246 and Sch. VII, List II, entry 56).**

The tax imposed by Part III of the Bihar Finance Act, 1950, is not beyond the legislative competence of the State Legislature and is valid. (Paras 8, 15, 27 and 30)

The preamble to the statute, the heading of Part III itself, and the language of S. 12 (1) or the various other provisions of the Act show that the tax was levied on goods and passengers and not upon the income of the owners and the fares and freights realisable by them. The fact that the tax is to be measured in proportion to the fares and freights realised does not alter the nature of the tax or affect its "intrinsic character" which is actually a tax upon the goods and passengers carried on the motor vehicles. The standard of measurement adopted is not an unreasonable standard regard being had to the primary purpose of the Act which is to obtain revenue for the State; and the constitutional right to adopt the standard of measurement is derived from the constitutional authority of the Legislature which authorises the tax to regulate the matter in question. (Para 11)

Although the statute does not expressly authorise the owners to collect the tax from the passengers and consignors of goods, yet the statute must be construed to have implicitly granted the power and the right to the 'owners' to collect the tax in order to make the statute effective. AIR 1940 Bom 65 FB, Rel. on. (Para 12)

Although the word 'payable' used in S. 12 (1) may grammatically refer only to the fares and freights payable to the owners, yet to give effect to the meaning of the statute, it should be held to mean that it refers not only to the fares and freights but also to the tax payable to owners by the passengers and consignors of goods carried by motor vehicles belonging to such owners. The main object and intention of the statute being quite clear, the mere unskilfulness or ignorance of the draftsman cannot reduce the statute into a nullity except where the language was absolutely intractable which is not the present case. (Para 14)

The rules passed under S. 26 of the Act which rules have the force of law indicate unmistakably that the "owner" is not technically the assessee in respect of the tax payable, but he is an assessee only in so far that he has realised the tax and is liable to pay the same to the State Government. The other provisions of the statute are, therefore, quite consistent with the main purpose of the statute, namely, realisation and collection of the tax and the payment thereof to the State Government. These rules may be taken into account for the purpose of construing the language of the Act itself and removing any ambiguity that may arise therefrom. It cannot be said that these rules are inconsistent with or beyond the authority of the Act. (Para 15)

(b) Interpretation of Statutes — Two constructions possible — One which leans towards the constitutionality of legislation should be preferred to that which has the effect of destroying it — (Civil P. C., Pre.). (Para 10)

Anno: C. P. C. Pre. N. 7.

(c) Interpretation of Statutes — Rules of Grammar — Duty of Court — (Civil P. C., Pre.)

Rules of Grammar have to yield to common sense. As there are risks involved in the application of rules of construction of statutes, Courts of law should not be too prone to resort to them unless the exigencies of

the case pre-eminently call for their application. It must never be forgotten that they are rules of construction only, and are not meant to cure inherent defects in a legislation. (Para 14)

(d) Interpretation of Statutes — Taxing statutes — Rules under — Relevancy of, in construing statute when 'vires' of Statute is assailed — (Stamp Act (1899), Pre.)

It is true that the principle of necessary intendment should not be ordinarily extended to taxing statutes and where the question only is whether a particular item of property has or has not been taxed, the Act must expressly and unequivocally supply the answer. Where, however, the 'vires' of the statute itself is being assailed and it is said that the statute is beyond the legislative competence of the State, the rules can be certainly called in aid in order to understand the scheme and purpose of the legislation: (1871) 6 Ch A 875; AIR 1952 Pat 106 Ref. (Para 15)

Anno: Stamp Act, Pre. N. 16.

*** * (e) Bihar Finance Act (XVII (17) of 1950) Part III — Validity — Provisions of, do not contravene Arts. 14, 19, 23 or of Part XIII of the Constitution — (Constitution of India Arts. 14, 19, 23, 246, Part XIII).**

The provisions of Part III of the Bihar Finance Act do not contravene any of the fundamental rights guaranteed under Articles 14, 19 and 23 or of Part XIII of the Constitution of India. (Paras 16, 17, 27, 38)

The Act does not impose unjustified and unwarranted duties and penalties upon the owners of motor vehicles. Article 23 (2) of the Constitution clearly makes an exception in favour of the State and enables the State to impose compulsory service for public purposes provided such an imposition is not vitiated on grounds of discrimination. The Legislature, therefore, is entitled to impose burdens on citizens in the interest of the public. This is particularly so in the case of a taxing statute where the Legislature has to levy taxes for the purpose of the State revenue and has to collect these taxes through the most convenient and efficient channels. In doing so, the State would be justified in imposing obligations upon the citizens concerned to assist in the collection of those taxes. The levying of a tax, that is to say, the determination that a given tax shall be imposed, assessed and collected in a certain manner is a legislative function provided it is exercised within the permissible bounds of legislation as given in the Constitution. Therefore, the Legislature having the power to authorise the tax, it must 'a fortiori' possess also the power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced. (1916) 240 US 328; AIR 1940 Bom 65 (FB) Rel. on. (Para 16)

It cannot be said that the Act by imposing those duties and obligations affects the right of free "trade or business" which the citizens enjoy under Art. 19 (g) of the Constitution. The statute professes and in fact is an Act to tax 'goods and passengers' and does not profess to regulate "trade or commerce". 52 Comw LR 189; AIR 1950 SC 27 and AIR 1951 SC 318 Ref. (Para 17)

The rule of pith and substance applies to different subjects of legislation in the same list. Taxation is not a restraint on trade unless it is discriminatory in its character and is levied with the object of helping one person or party against the other. The Court will, therefore, be reluctant to declare a taxing statute unconstitutional merely because it is claimed that the legislation may result in some kind of interference with trade or commerce which may be indirectly the unavoidable consequence of all taxing statutes. If the subject of the legislation is within the taxing authority of the legislature concerned, that should be sufficient to sustain it: (1919) 249 US 86; (1922) 259 US 20 Ref. (Para 17)

The impugned Act is a legislation directly dealing with the imposition of tax on goods and passengers and it does not profess to impose any restrictions whatsoever either on inter-State trade or on trade with or within the State. Therefore, Part XIII of the Constitution has no application and hence no question of infringement of Part XIII would at all arise. (Para 17)

(f) Constitution of India, Art. 304 (b) — "Trade and commerce with or within the State" — Meaning of.

Per Sarjoo Prosad J.: Prima facie, the trade and commerce within the State referred to in Art. 304 (b) of the Constitution appears to contemplate such trade and commerce with or within the State which has to be understood in the nature of an inter-State trade and commerce having its branches in different States. The States can by legislation regulate such trade and communication subject to the limitations imposed by Part XIII of the Constitution. (Para 17)

Per Narayan J.: The expression "within that State" as used in Art. 304 (b) refers to trade, commerce or intercourse between other States or the citizens living under those States, and the State or the citizens of the State which under Art. 304, has the authority to impose restrictions on the freedom of trade, commerce and intercourse. This appears to be manifest from the heading of Part XIII which runs as follows: "Trade, Commerce and Intercourse within the Territory of India". (Para 38)

Per Das J.: The expression "within that State" occurring in Art. 304 (b) is wide enough to include freedom of trade within the State. (Para 28)

*** * (g) Bihar Finance Act (XVII (17) of 1950) Part III — Is not unconstitutional by reason of delegation of legislative function — (Constitution of India, Art. 246).**

The provisions of Part III of the Bihar Finance Act are not unconstitutional by reason of delegation of legislative function to the State Government. (Paras 25, 27 & 37)

The constitutional legality of the Act cannot be decided on the assumption that the

prescribed authority, or the appellate authority under the impugned Act will be some one wholly unfit to discharge those responsibilities and too lowly or humble in his rank and position to wield the powers which the statute contemplates. There is no delegation of legislative powers if the choice of the officer is left by the statute to the State Government, and there is no constitutional limitation debarring the executive authorities from nominating such a person. AIR 1951 SC 332; AIR 1945 PC 48; AIR 1951 Cal 3, Rel. on. AIR 1950 SC 211; AIR 1952 Pat 220 Ref. (Paras 22, 37)

In No. 3/52

Dr. Sir Sultan Ahmad, Sarwar Ali and Shamsul Hussain, for Plaintiffs; Government Pleader and Lakshman Saran Sinha, for Defendants.

In No. 5/51

Dr. Sir Sultan Ahmad, Baldeva Sahay, J. P. Chowdhury, Shivanugrah Narain and Chhatrapati Kumar Sinha, for Plaintiffs; Government Pleader and Lakshman Saran Sinha, for Defendant.

REFERENCES: Courtwar/Chronological/ Paras

('45) 72 Ind App 57: (AIR 1945 PC 48: 46 Cri LJ 589) 22
('49) AIR 1949 FC 81: (1948 FCR 207) 11
('50) 1950 SCR 88: (AIR 1950 SC 27: 51 Cri LJ 1383) 17
('50) 1950 SCR 519: (AIR 1950 SC 211: 52 Cri LJ 550) 19
('51) AIR 1951 SC 118: (ILR (1951) Hyd 221) 17
('51) AIR 1951 SC 318: (52 Cri LJ 1361) 17, 38
('51) 1951 SCR 747: AIR 1951 SC 332 35, 36
('40) AIR 1940 Bom 65: (ILR (1940) Bom 58 FB) 14, 16, 33
('51) 55 Cal WN 53: (AIR 1951 Cal 3) 19
('52) AIR 1952 Pat 220: (1952 Cri LJ 710 SB) 23
('52) AIR 1952 Pat 106: (30 Pat 1033) 15
(1883) 9 AC 117: (53 LJPC 1) 35
(1933) AC 710: (102 LJPC 137) 11, 33
(1936) AC 578: (105 LJPC 115) 17
(1938) AC 708: (AIR 1939 PC 36) 36
(1871) 6 Ch A 875: (41 LJBk 14) 15
46 CLR 73 35
52 Comw LR 189 17
(1916) 240 US 328: (60 Law Ed 672) 16
(1919) 249 US 86: (63 Law Ed 493) 17
(1922) 259 US 20: (66 Law Ed 817) 17

SARJOO PROSAD J.: These three suits have been heard together because they raise a common question of law, viz.; whether Part III of the Bihar Finance Act, 1950 (Bihar Act, XVII of 1950) is without jurisdiction. This Act will be hereinafter called the impugned Act.

(2) Title Suits Nos. 1 and 3 of 1952 were originally instituted in the court of the Subordinate Judge at Ranchi, while Title Suit No. 5 of 1951 was instituted in the court of Subordinate Judge at Gaya; but, in view of constitutional question involved in all these suits, they have been transferred to this Court for disposal. In Title Suit No. 1 of 1952 the plaintiff is the co-sharer partner of one Radhe Shyam Bus Service, Ranchi, and he also calls himself the President of the Bihar Motor Congress, an Association which, according to him, has been formed to look after and safeguard the interest of 'transport owners'. In Title Suit No. 5 of 1951 there are a large number of plaintiffs who claim to hold licenses and permits for plying motor cabs, public service vehicles and public carriers for hire on different routes mentioned in their licenses. In other words, these suits are by the 'owners' of motor vehicles as defined in the 'impugned Act'.

The plaintiff in Title Suit No. 3 of 1952 is one Satya Narayan Chowdhary who styles himself a member and President of the Bihar Motor Travellers' Association, resident of Ranchi, and he claims that, in course of his duties, he has to travel a great deal by motor buses and taxis and has to transport goods by 'public carriers'. It may be mentioned here that the term 'public carriers' as used in the Act refers to vehicles and is different in its import from the meaning given to it under the Motor Vehicles Act (Act IV of 1939). He has, therefore, instituted the suit as a passenger carried by these vehicles. The principal defendant in all these suits is the State of Bihar. The plaintiffs have substantially sued for a declaration that the impugned Act is 'ultra vires' the Bihar Legislature and for permanent injunction restraining the defendant, its servants and agents from realising any tax under the Act, or calling upon the plaintiffs to file returns as "owners" or to deposit security or to maintain accounts in pursuance, or in furtherance of the provisions of the said Act.

(3) The Bihar Finance Act, 1950, received the assent of the Governor on the 27th of March, 1950, and was published in the Bihar Gazette, Extraordinary, on the 30th of March, 1950, and it came into operation on the 1st of April following. Acting under Part III of the Act, the State of Bihar has levied a tax on all passengers and goods carried by motor vehicles and 'public carriers' at the rate of 2 annas in the rupee on all fares and freights payable to the owners of such vehicles and 'public carriers'. The Act also provides for the framing of rules to give effect to the purpose of the Act, and, in pursuance of that provision, rules were framed which were notified on the 24th of July, 1950, and published in the Bihar Gazette Extraordinary on the 25th of that month. The plaintiffs allege that taking advantage of the provisions of the Act, the State of Bihar and the officers of the Commercial Taxing Department of the State had been insisting upon the plaintiffs for the payment of those taxes and have realised such taxes from them. They have also compelled the plaintiffs, who are owners of such vehicles, to file returns and to do certain other acts prescribed by the aforesaid statute.

The plaintiffs submit that the Act nowhere provides for payment of the taxes by passengers and consignors of goods, nor is there any provision in the Act making passengers or consignors of goods liable for the payment of the tax either to the owner or to the State Government. It is, therefore, stated that the acts of the State Government are all illegal and arbitrary though made under cover of the provisions of the impugned legislation. They further contend that the tax imposed under the said Act was beyond the legislative competence of the State Legislature and was not covered by any of the Entries in List II or III of the Seventh Schedule of the Constitution of India. They also allege that the aforesaid Part III of the Bihar Finance Act, 1950, and the rules made thereunder are null and void and are also opposed to various provisions of the Constitution of India dealing with

fundamental rights. According to the plaintiffs, the defendant had no right to impose duties and obligations upon the plaintiffs of a drastic character without any corresponding advantage to them and there was no warrant in the Constitution for the imposition of such obligations on the citizens engaged in lawful avocation.

(4) The defendant, on the other hand, has endeavoured to protect the Act and has asserted that the Bihar Finance Act, 1950, as also the rules framed thereunder are valid and within the competence of the respective authorities; that the tax imposed on goods and passengers carried by road, comes within Entry No. 56 of List II of the Seventh Schedule of the Constitution of India; and the fares and freights have been used merely to determine the measure of the tax which is to be collected through the owners of the vehicles concerned. The defendant also contends that the Act impugned does not in any manner offend against the provisions of the Constitution of India and is not in any way opposed to it, and that there has been no delegation of any essential legislative function.

(5) On these pleadings the following issues were framed by my learned brother Das, J. for determination:-

"1. Is the tax imposed by part III of the Bihar Finance Act, 1950, beyond the legislative competence of the State Legislature?

2. Do the provisions of Part III of the said Act contravene any of the fundamental rights guaranteed under Articles 14, 19 & 23 of the Constitution of India?

3. Are the provisions of Part III of the said Act against the provisions of Part XIII of the Constitution of India, particularly Article 301 and the proviso to Article 304?

4. Are the provisions of Part III of the said Act unconstitutional by reason of delegation of legislative function?

5. To what reliefs, if any, is the plaintiff entitled?"

(6) The case has been ably and fully argued on both sides. I will take up the issues in their order; but to appreciate the arguments of the parties, it would be better to examine at the outset the scheme of the impugned Act and its relevant provisions. The preamble to the Act shows that it purports to be an Act to amend certain existing taxing statutes of the State and also "to levy a tax on passengers and goods carried or transported by public service vehicles and public carriers". Part III which is the part dealing with this object of the statute is headed exactly in similar terms as already quoted. Section 11 gives certain definitions. Then comes section 12 which is the most important section and has figured prominently in the debates at the Bar. The section is divided into three sub-sections. The first sub-section provides for the levy and payment of tax on all passengers and goods carried by motor vehicles at the rate of two annas in the rupee on all fares and freights payable to owners of such vehicles; sub-section (2) provides for payment of tax where the fares and freights are chargeable in a lump; while the third sub-section enjoins that the owners of such vehicles shall pay into the Government treasury the tax realised and furnish returns thereof from time to time. Section 13 deals with the assessment of tax on the basis of those returns or where the returns are unsatisfactory. Section 14 enables the owners of motor vehicles to compound for the tax payable. The other sections which follow deal with the registration of 'owners', the deposit of security by them, maintenance of time-tables and tables of fares and freights. Section 18 enacts that the arrears of tax are realisable as public demand. Section 20 provides for appeals, section 21 for penalties for offences against the law and section 26 for the making of rules by State Government to give effect to the provisions of the Act.

(7) Both parties agree that section 12 is the charging section and it requires very careful consideration. The first sub-section of section 12 runs as follows:

> "From and after the commencement of this Act, there shall be charged, levied and paid to the State Government, a tax on all passengers carried by motor cabs, stage carriages and contract carriages and on all goods transported by public carriers at the rate of two annas in the rupee on all fares and freights payable to owners of such motor cabs, stage carriages, contract carriages or public carriers".

(8) I have quoted this sub-section in full because the contentions of the parties have been focussed upon the interpretation of this provision. Evidently, this sub-section can be split up into two parts; (1) that there shall be charged, levied and paid a tax on all passengers and on all goods carried or transported by motor vehicles; and (2) that the tax levied shall be at the rate of two annas in the rupee on all fares and freights payable to owners. It is significant to note that the first part mentions a tax "on all passengers carried....." and "on all goods transported....." The repetition of the words "on all" with reference to passengers and goods connected by the conjunctive "and" emphasises that the tax was to be on all passengers and on all goods. This is also in consonance with the preamble to the Act and the heading of Part III itself. List II of the State List in the Seventh Schedule to the Constitution of India provides in item No. 56 that State Legislature under Article 246 is entitled to legislate in regard to taxes on goods and passengers carried by road or on inland waterways. Evidently, therefore, in legislating on this subject, the State legislature was acting within the field of its legislative competence.

(9) The contention of the plaintiffs, however, is that the intention was not really to levy tax on passengers and goods carried by road but the intention actually was to impose a tax on 'fares and freights' payable to owners. According to the plaintiffs the language of the sub-section has been simply camouflaged to make a show of legislative competence. It is pointed out that the levy of taxes on fares and freights is not within the competence of the State legislature, and if at all, they fall either under item 89 of List I of the Union List or under the residuary powers of the Union legislature as provided in item 97 of that List. It may be observed at the outset that item No. 89 of List I refers to tax on 'railway' fares and freights. It does not specifically refer to any tax on other fares and freights. The above argument is however sought to be founded upon the latter part of sub-section (1) of section 12 which provides that the tax shall be levied at the rate of

two annas in the rupee on all 'fares and freights' payable to owners.

Reference is also made to various other provisions of the Act on the basis of which it is contended that the tax is not payable by passengers carried and goods transported but payable by 'owners', and is more in the nature of an income-tax which is not permissible in law for the State legislature to impose. Sub-section (2) of section 12 says that where any fare or freight charged is a lump sum paid by a person as a subscription or contribution for a season ticket or for any privilege, right or facility, the tax shall be levied on the amount of such lump sum or on such amount as appears to the prescribed authority to be fair and equitable, and sub-section (3) further provided that every owner shall, in the prescribed manner, pay into a Government treasury "the full amount of tax due from him" under sub-section (1) or sub-section (2), as the case may be, and shall furnish returns within a prescribed period. Section 13 again speaks of assessment of the amount of "tax 'due from the owner'" on the basis of certain returns. Section 14 similarly says that the State Government may permit an 'owner' under certain circumstances to compound for the "tax assessable on him" by paying, in lieu thereof, a fixed fee. It is contended with reference to these provisions that the tax due was 'a tax due from the owner' and was 'assessable on the owner'; therefore, it was urged that it was a tax on the 'owner' of these motor vehicles and not really a tax on goods and passengers carried by those vehicles.

It was further argued by Mr. Baldeva Sahay followed by Dr. Sultan Ahmad that the Act nowhere provides for the recovery of the tax from the passengers or consignors of goods as would have been the case if the intention of the statute actually was that the tax was to be levied on goods and passengers carried by motor vehicles. In this connection reliance has been placed upon the language of various other statutes where such a provision has been specifically made; and it is contended that in the absence of any specific provision, either creating the liability to pay the tax on passengers and goods carried or authorising the owners to collect the tax from them, it must be held that the tax was upon the 'owners' of motor vehicles themselves. It is further argued that if it were a tax on passengers and goods, then it would be a fixed amount and not a variable quantity whereas the section contemplates that the tax would vary in proportion to the fares and freights payable to the owners. The plaintiffs, therefore, submit that construing the various provisions of the Act, the tax is evidently upon the 'owner' and is not a tax upon 'passengers' and 'goods' carried by motor vehicles.

(10) I have no doubt that in finding out the purposes of a legislation or in construing the same all the various provisions of the Act have to be examined as a compact whole and not merely a few sections thereof in their isolation. It must be conceded that there is apparently a lacuna in the Act, in that there is no specific provision authorising the owners of motor vehicles to realise the tax from passengers and goods carried on those vehicles. Such a provision, for instance, occurs in the Cess Act (vide section 41 of the Act): in the Bihar Entertainment Tax Act; in the Bihar Electricity Act (vide sections 3 and 4) and also in the Bengal Ferries Act (Act 1 of 1885).

To my mind, however, the key to the whole statute lies in section 12 of the Act which is the main section, the others being in the nature of corollaries. Sub-section (1) of section 12 specifically provides that the tax shall be on all passengers and on all goods transported. The latter part of the sub-section only indicates the measure of the tax. There is nothing in law to prohibit the tax being a variable quantity. Such a construction is in consonance with the purpose of the Act and any other construction for which the plaintiffs contend would defeat that purpose. It is well settled that where two constructions are possible, then the one which leans towards the constitutionality of the legislation should be accepted in preference to the one which has the effect of destroying it. If this construction is adopted, then there is not much difficulty in understanding the subsequent provisions of the statute which work out the manner in which the tax is to be realised through the owners of such vehicles.

The most convenient way in which a tax of this nature could be levied and realised was through the instrumentality of the owners of such motor vehicles and since they have been put in charge of it, the statute requires that they should collect and pay it to Government, submit returns of the realisations made and be subject to certain penalties in case of their omission to conform to the requirements of the law. The words, therefore, as used in the various sections of the Act, namely 'tax due from owners' or 'tax assessable on them', must in the context be understood to be tax which has been collected by these owners and thus became payable to the State Government, the collection being on behalf of the State by the "owners".

(11) It is true that there is absence of a direct provision authorising the 'owners' to collect the tax from the passengers and consignors of goods, but the word "payable" occurring in sub-section (1) of section 12 with reference to "Owners" may be stretched to apply not only to the fares and freights but also to the tax realisable. The learned Government Pleader concedes that such a construction may not be strictly and grammatically accurate but nevertheless he submits that even if the language required a little stretching in order to give effect to the purpose of the Act, that should be constitutionally permissible. There is no warrant for the assumption that the tax imposed should necessarily be a fixed quantity or a fixed sum of money payable; it may vary in proportion to the fares and freights paid by the travellers or consignors of goods. The learned Government Pleader has relied in this connection upon a decision of the Federal Court in 'RALLA RAM v. PROVINCE OF EAST PUNJAB', A.I.R. 1949 F. C. 81. There the tax was on buildings and lands, and it was contended that the tax was in substance a tax upon the income of the owner. This contention was not accepted. Their Lordships summed up their conclusion as follows:—

> "In the first place, we have to look into the charging section of the statute, because as was pointed out in 'PROVINCIAL TREASURER OF ALBERTA v. KERR', (1933) A. C. 710: (102 LJPC 137) 'the identification of the subject-matter of the tax is only to be found

in that section'. The charging section in the present case is S. 3, which in clear terms levies not a tax on income but a tax on buildings and lands. It is true that we must look not to the mere form but to the substance of the levy, and the tax must be held to be invalid, if in the guise of a property tax it is really a tax on income. There is, however, nothing in the impugned Act to show that there was any intention on the part of the Legislature to get at or tax the income of the owner from the building. It is true that the annual value was used as the basis, but it was very different from the annual value which may be used for getting at the true profits or income. The annual value, as has been pointed out, is at best only notional or hypothetical income and not the actual income. It is only a standard used in the income-tax Act for getting at income, but that is not enough to bar the use of the same standard for assessing a provincial tax. If a tax is to be levied, on property, it will not be irrational to correlate it to the value of the property and to make some kind of annual value the basis of the tax, without intending to tax income."

Here the charging section is section 12, and sub-section (1) of the section quite clearly provides that the tax is upon the passengers and goods and not upon the income of the owners and the fares and freights realisable by them. The fares and freights have been used merely as a standard for calculating the tax, and there is nothing irrational in doing so. This measure of the tax cannot convert it into a tax on the income of the owners themselves. Reference may also be made in this context to a passage in Willoughby on the Constitution of the United States, Vol. 2, page 669, section 378, headed "Measurement of Taxes" where the learned author observes:—

> "The courts have firmly fixed the proposition that, for the determination of the amounts of taxes to be assessed upon individual persons, corporations, or pieces of property, any reasonable standard of measurement may be selected, and that the intrinsic character of the tax is not determined by the mode of measurement thus selected."

Therefore, the fact that the tax is to be measured in proportion to the fares and freights realised does not alter the nature of the tax or affect its "intrinsic character" which is actually a tax upon the goods and passengers carried on the motor vehicles. The standard of measurement adopted is not an unreasonable standard regard being had to the primary purpose of the Act which is to obtain revenue for the State; and the constitutional right to adopt the standard of measurement is derived from the constitutional authority of the legislature which authorises the tax to regulate the matter in question. In this case, I have already referred to item 56 of the State List which authorises the State Legislature to levy a tax of this character.

(12) Though the language of section 12 (1), is not altogether clear, it can be ascertained with reasonable certainty that it intended to impose a tax on all passengers and goods carried by Motor Vehicles, and it also placed a corresponding obligation on the owners of the motor vehicles to realise the tax from the passengers and goods carried by them, such an obligation being implicit in this section as also in the subsequent sections of the Act.

> "Where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. 'Cui jurisdictio data est. ca quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit.' Thus, an Act which empowered justices to require persons to take an oath as special constables, and gave them jurisdiction to inquire into an offence, impliedly empowered them to apprehend the persons who unlawfully failed to attend before them for those purposes":

(See Maxwell on Interpretation of Statutes, 9th Edition, page 360). Again the learned author observes:—

> "Sometimes the express imposition of one duty impliedly imposes another. Thus, when it was enacted that no licence for the sale by retail of beer, cider, or wine, not to be consumed on the premises, should be refused except on one or more of four specified grounds, the obligation was imposed by implication on the justices of stating on which of the specified grounds they based their refusal.....
>
> A duty or right imposed or given to one may also cast by implication a corresponding burthen on another."

Here the obligation of the tax is placed on passengers and on all goods carried by motor vehicles. There is also an obligation upon the 'owners' to pay the tax so realised to the State Government. Therefore, although the statute does not expressly authorise the owners to collect the tax from the passengers and consignors of goods, yet the statute must be construed to have implicitly granted the power and the right to the "owners" to collect the tax in order to make the statute effective.

(13) Sometimes it may be even necessary to modify the language of the statute in order to give effect to its meaning. I will again refer to a passage from Maxwell at page 236:—

> "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by rejecting them altogether, or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. The rules of grammar yield readily in such cases to those of common sense."

(14) It was, therefore, rightly contended by the learned Government Pleader that although the word 'payable' used in section 12 (1) of

the Act may grammatically refer only to the fares and freights payable to the owners, yet to give effect to the meaning of the statute, it should be held to mean that it refers not only to the fares and freights but also to the tax payable to owners by the passengers and consignors of goods carried by motor vehicles belonging to such owners. The main object and intention of the statute in this case is quite clear and the mere unskilfulness or ignorance of the draftsman cannot reduce the statute into a nullity except where the language was absolutely intractable which is not the present case. Rules of grammar have to yield to common sense. I realise that there are risks involved in the application of these rules of construction, and Courts of Law should not be too prone to resort to them unless the exigencies of the case pre-eminently call for their application. It must never be forgotten that they are rules of construction only and are not meant to cure inherent defects in a legislation. I have pointed out already that in the present case the preamble to the statute, the heading of Part III itself, and the language of section 12(1) or the various other provisions of the Act show that the tax was levied on goods and passengers; and, therefore, impliedly the law conceded to the owners of motor vehicles also the right to collect this tax from those passengers and consignors of goods. I am also fortified in this view by a Full Bench decision of the Bombay High Court in 'BYRAMJEE JEEJEEBHOY v. PROVINCE OF BOMBAY', AIR 1940 Bom 65 at p. 76 FB where Beaumont, C J. observed:—

> "If a power to impose the tax is conceded, power to collect the same is necessarily implied. The Provincial Legislature within the province being supreme there appears to be no reason why it should not appoint or name any person to collect the tax".

(15) The learned Government Pleader submits that whatever obscurity there may have been in the statute, the rules framed under section 26 of the Act appear to have removed that obscurity. He says that what was implicit in the Act has been explicitly worked out in the Rules. For instance, rule 9 provides that the ticket for the carriage of a passenger and his luggage in excess of the free luggage allowance shall contain certain particulars; one of those particulars specifically mentioned is "fare and 'tax', if any". Similarly, in regard to the goods' ticket, rule 10 provides for the mention of the particulars in the ticket, one of them being 'total freight and 'tax', if any'. So does rule 13, which relates to registers of ticket issued. To my mind, these rules indicate unmistakably that the "owner" is not technically the assessee in respect of the tax payable, but, he is an assessee only in so far that he has realised the tax and is liable to pay the same to the State Government. The other provisions of the statute are, therefore, quite consistent with the main purpose of the statute, namely, realisation and collection of the tax and the payment thereof to the State Government. These rules may be taken into account for the purpose of construing the language of the Act itself and removing any ambiguity that may arise therefrom. It cannot be said that these rules are inconsistent with or beyond the authority of the Act. These rules have been framed by the State Government in exercise of the powers conferred by section 26 of the Act, and they owe their legal efficacy to that section, and therefore they have the force of law. It was pointed out in 'EX-PARTE WIER', (1871) 6 Ch A 875 by Mellish, L. J. that

> "where the construction of the Act is ambiguous and doubtful on any point, recourse may be had to the rules which have been made by the Lord Chancellor under the authority of the Act, and if we find that in the rules any particular construction has been put on the Act, that it is our duty to adopt and follow that construction."

Mr. Baldeva Sahay has vehemently urged that when the statute itself has not in express terms authorised the owners to recover the tax from the passengers, the rules even if they had provided for it would be open to question on the ground of being in excess of the statutory powers. He also points out that even the rules do not make any specific provision for the recovery of the tax by the owners. He contends that the right to realise the tax should have been granted in unequivocal terms and he submits that the principle of necessary intendment should not be invoked in cases of taxing statutes. He cites in support of his submissions Craies on Statute at page 146-47:

> "Where the language of an Act is ambiguous and difficult to construe, the Court may, for assistance in its construction, refer to rules made under the provisions of the Act, especially where such rules are by the statute authorising them directed to be read as part of the Act."
>
> * * *
>
> "Rules made for the Courts may be regarded as judicial expositions of the Act. But too much stress cannot be rested upon rules, inasmuch as they may be questioned as being in excess of the powers of the subordinate body to which Parliament has delegated authority to make them."

and a decision of this Court in 'LIQUIDATORS, PURSA LTD. v. INCOME TAX OFFICER', AIR 1952 Pat 106. I have already shown that the Act and the rules framed thereunder complement and supplement each other and fully bring out the meaning of the statute and the purpose for which it has been framed. It is true that the principle of necessary intendment should not be ordinarily extended to taxing statutes and where the question only is whether a particular item of property has or has not been taxed, the Act must expressly and unequivocally supply the answer. Where, however, as in this case, the 'vires' of the statute itself is being assailed and it is said that the statute is beyond the legislative competence of the State, the rules can be certainly called in aid in order to understand the scheme and purpose of the legislation. The first issue, therefore, must be answered in favour of the defendant, and it must be held that it was not beyond the legislative competence of the state Legislature to impose the tax by Part III of the Bihar Finance Act, 1950.

(16) I shall now take up the next issues, namely, whether Part III of the impugned Act contravenes any of the fundamental rights guaranteed under the Constitution and whether the provisions of Part III of the impugned Act offended against Part XIII of the Constitution of India. It is contended on behalf of the plaintiffs that the statute imposes gratuitous burdens and onerous duties upon the owners

of motor vehicles, and those duties are obligations, which have been by virtue of the statute placed upon the owners, substantially interfere with their right of freedom to carry on their trade and business. It has been also contended that the duties imposed are not only onerous and unreasonable, but there is no 'quid pro quo' for the obligations with which the owners of motor vehicles have been burdened under the statute. In this connection, reference has been made to the relevant provisions of the impugned Act in order to show that those provisions impose unnecessary and wide restrictions on the plaintiffs' right to trade.

Now, Article 23(2) of the Constitution clearly makes an exception in favour of the State and enables the State to impose compulsory service for public purposes provided such an imposition is not vitiated on grounds of discrimination. No discrimination has been suggested here. The Legislature, therefore, is entitled to impose burdens on citizens in the interest of the public. This is particularly so, in the case of a taxing statute where the Legislature has to levy taxes for the purposes of the State revenue and has to collect these taxes through the most convenient and efficient channels. In doing so, the State would be justified in imposing obligations upon the citizens concerned to assist in the collection of those taxes. The levying of a tax, that is to say, the determination that a given tax shall be imposed, assessed and collected in a certain manner is a legislative function provided it is exercised within the permissible bounds of legislation as given in the Constitution. Therefore, the Legislature having the power to authorise the tax, it must 'a fortiori' possess also the power

> "to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced;"

(Willoughby on the Constitution of the United States, Vol. 2 p. 666). I need not of course call it a sovereign right of the Legislature because here in India the rights of the Legislature flow from the Constitution itself and are conditioned and circumscribed by the provisions of the Constitution. I have already shown that Article 23(2) of the Constitution itself saves the power of the State to impose burdens on citizens in public interest. In 'BUTLER v. PERRY', (1916) 240 U S 328, the Supreme Court of America, while dealing with the effect of the 13th Amendment which declared that neither slavery nor involuntary servitude shall exist, observed as follows:

> "It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury etc. The great purpose in view was liberty under the protection of effective government, nor the destruction of the latter by depriving it of essential powers."

Taxes have been defined to mean

> "burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes" (Cooley, Constitutional Limitations, 7th Edition, page 678).

They of course differ from

> "forced contributions, loans and benevolences of arbitrary and tyrannical periods in that they are levied by authority of law, and by some rule of proportion which is intended to insure uniformity of contribution and a just apportionment of the burdens of Government:" (Cooley, Taxation, Chapter I).

Therefore, the owners of motor vehicles cannot justly complain of the duties which under the provisions of the impugned Act the State has imposed upon them in public interest to insure and secure the collection of taxes and their payment to the State Government. I again feel tempted to advert in this context to the dictum of Beaumont, C. J. 'BYRAMJEE JEEJEEBHOY v. PROVINCE OF BOMBAY', AIR 1940 Bom 65 at p. 76 already quoted by me earlier in this judgment. I, therefore, find neither precedent nor principle to sustain the contention that the Act imposes unjustified and unwarranted duties and penalties upon the 'owners' of motor vehicles; nor do I find that the provisions of the impugned Act infringe the fundamental rights of those 'owners' guaranteed under the Constitution.

(17) It is next contended that by imposing those restrictions the Act affects the right of free "trade or business" which the citizens enjoy under Art. 19(g) of the Constitution. This argument fails to take notice of the main purpose of the Legislature which is to tax goods and passengers carried by road. The subject of "trade and commerce within the State" falls under item 26 of List II of the Seventh Schedule of the Constitution and is quite distinct from item No. 56 of the said list relating to taxes on goods and passengers. The indirect effect of the taxation or the incidents thereof may be to interfere with the trade of motor transport. What has to be looked into is the pith and substance of the legislation and not the indirect effects thereof. It is well settled that the Legislature in framing the legislation on a particular subject may incidentally encroach upon certain other fields of legislation but that will not affect the 'vires' of the legislation so long as the legislature is acting within the bounds of the constitutional field allotted to it, and the primary object of the legislation falls within that bound. That is what is called the pith and substance rule: and the rule, in my opinion, applies with equal force to different subjects of legislation in the same list. Taxation is not a restraint on trade unless it is discriminatory in its character and is levied with the object of helping one person or party against the other. The Court will, therefore, be reluctant to declare a taxing statute unconstitutional merely because it is claimed that the legislation may result in some kind of interference with trade or commerce which may be indirectly the unavoidable consequence of all taxing statutes. If the subject of the legislation is within the taxing authority of the legislature concerned, that should be sufficient to sustain it; see, for instance, 'ERR v. C. T. DOREMUS', (1919) 249 U S 86 at 89 and 'J. W. BAILEY v. DREXEL FURNITURE CO.', (1922) 259 U S 20.

The question whether a particular object of the statute is direct or indirect has to be determined by a consideration of the nature of the statute itself and the character of the act and the transaction which it affects. In the present case the statute professes and in fact is an Act to tax 'goods and passengers' and does not profess to regulate 'trade or commerce'. The acts and the transactions on which it operates are not actually commercial dealings or the trade of transportation itself because no

one is prevented or restricted from going anywhere he likes by road or motor vehicle nor is any one prevented from transporting goods by such vehicles; nor is the owner of the vehicle prevented or obstructed in any manner from carrying on his trade of transportation. The statute has only come into being for the purpose of imposing a tax on such passengers and goods which are carried by motor vehicles and provides a machinery for the realisation and payment of the tax to the State Government thereby laying certain duties and creating certain obligations on individuals which were incidental and essential to the frame of the legislation itself. An illustration in point is a decision of the High Court of Australia in 'O. GILPIN LTD. v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS', 52 Comw L R 189.

The learned Government Pleader has also relied upon certain passages in the decision of the Supreme Court in 'GOPALAN v. STATE OF MADRAS', 1950 S C R 88, and so has Dr. Sultan Ahmad on behalf of the plaintiffs. The case deals with the subject of preventive detention, and, in that connection their Lordships dealt with the scope and application of Articles 19, 301 and 304 of the Constitution. It is, however, not necessary for me to enter into an elaborate examination of all those passages. For the purposes of the present discussion it would be enough to say that the real test in such cases should be to examine whether the legislation is directly in respect of any of the rights mentioned in Article 19. It is only then that the question whether that legislation is saved by appropriate saving clauses of Article 19 will arise. If, on the other hand the legislation is not directly in respect of these subjects, but by the operation of the statute incidentally or remotely some of the rights are affected or infringed, the application of Article 19 does not at all arise. As Kania, C. J. observed in that case:

> "The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid on the mode of the detenue's life."

I am further fortified in this view by another decision of the Supreme Court in 'STATE OF BOMBAY v. F. N. BALSARA', AIR 1951 S C 318 at p. 323:

> "The short question therefore to be asked is whether the impugned Act is in pith and substance a law relating to possession and sale etc. of intoxicating liquors or whether it relates to import and export of intoxicating liquors. If the true nature and character of the legislation or its pith and substance is not import and export of intoxicating liquor but its sale and possession etc. then it is very difficult to declare the Act to be invalid. It is said that the prohibition of purchase, use, possession, transport and sale of liquor will affect its import. Even assuming that such a result may follow, the encroachment, if any, is only incidental and cannot affect the competence of the Provincial Legislature to enact the law in question."

Dr. Sultan Ahmad has laid great stress on the Articles in Part XIII of the Constitution and has vehemently urged that the impugned Act is hit by the provision of that part of the Constitution. Part XIII of the Constitution deals with "Trade, commerce and intercourse within the territory of India". It provides that such trade shall be free, and it is open to Parliament only to impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest; subject to this that neither the Parliament nor the Legislature of any State shall have power to make any law giving or authorising preference to one State over another or any discriminatory legislation to that effect on account of the subjects relating to trade and commerce mentioned in the different Lists. This exception again is made subject to another condition that such preference or discrimination can be made by legislation where it is necessary for the purpose of dealing with the situation arising from scarcity of goods in any part of the territory of India.

The most important article, however, on which emphasis has been laid by the learned Counsel for the plaintiffs is Article 304(b) and the proviso to that article. Article 304(b) enacts that the State Legislature may by law impose "such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest": and the proviso says that

> "no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

The contention is that a law imposing restrictions on the freedom of trade or commerce "with or within the State" also falls within the scope of that article. Therefore, the law must fulfil two essential requirements as provided by that article. The first is that the restrictions must be reasonable and such as may be required in the interest of the public, and the second is that the bill for the purpose of making such a law must have received the previous sanction of the President before it was introduced or moved in the Legislature of the State concerned. It is argued that the second requirement was wholly absent in the present statute, and therefore it could not be regarded as a law at all, because the proviso creates a bar even to the introduction or moving of the bill in the State Legislature without the previous sanction of the President. It has been urged that Article 301 of the Constitution is analogous to section 92 of the Commonwealth Constitution of Australia and reliance has been placed upon the decision in 'JAMES v. COMMONWEALTH OF AUSTRALIA (1936) A C 578. The learned Counsel has also relied upon a decision of the Supreme Court in 'CHINTAMANRAO v. STATE OF MADHYA PRADESH', AIR 1951 S C 118 where their Lordships dealt with the question of reasonable restriction contemplated by Article 19 (6) of the Constitution and pointed out thus:

> "The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word, 'reasonable' implies intelligent care and deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the free-

dom guaranteed in Article 19(1) (g) and the social control permitted by cl. (6) of Article 19, it must be held to be wanting in that quality."

If Article 304 applied to the case there is no doubt that this law could not be regarded as a law at all, it not having satisfied the requisites demanded under that article; and further the question whether restrictions imposed were "reasonable restrictions" required in public interest would also have to be examined in the light of the tests laid down in the decisions on which the learned Counsel has relied. At the outset, however, it seems to me very doubtful if the words "trade and commerce with or within the State" as used in Article 304(b) apply to such trade and commerce which are carried on within the four corners of the State or they apply only to such trade and commerce with or within the State which have their inter-state ramifications throughout the territory of India or have inter-state importance. This latter view seems to be more in accord with the heading of Part XIII itself which relates to freedom of trade, commerce and intercourse within the territory of India. In regard to a trade of this character undoubtedly the primary authority to legislate is Parliament. This is further supported by item 42 of List I of the Union List in the Seventh Schedule of the Constitution which specifies "Inter-State trade and commerce". 'Prima facie', therefore, the trade and commerce within the State referred to in Article 304(b) of the Constitution appears to contemplate such trade and commerce with or within the State which has to be understood in the nature of an inter-State trade and commerce having its branches in different States. The States can by legislation regulate such trade and communication subject to the limitations imposed by Part XIII of the Constitution. It is, however, unnecessary to give any final decision on the point, because, in my opinion, Part XIII of the Constitution has no application whatsoever for the very reasons which have led me to hold that Part III of the Constitution has no application to the present case. I have already held that the impugned Act is a legislation directly dealing with the imposition of tax on goods and passengers and it does not profess to impose any restrictions whatsoever either on inter-State trade or on trade with or within the State. I would, therefore, hold that on this short ground the contentions of the learned Counsel based on Part XIII of the Constitution do not at all arise in the present case. Issues 2 and 3, therefore, have also to be decided against the plaintiffs and in favour of the validity of the impugned legislation.

(18) I shall now turn to the last issue which bears on the point of delegation. In this connection, the contention of the learned Counsel for the plaintiffs is that the Act provides that the "prescribed authority" shall determine the fair and equitable amount of tax as required by section 12(2) of the Act. The Act also requires that the payment of tax shall be at such intervals and returns shall be furnished by such dates as the said 'authority' might prescribe. The 'prescribed authority' is further empowered under section 13 to require the presence of the owner for the production of evidence in support of his return, and he is authorised to assess the tax due on the basis of such returns, and if he is not so satisfied about the correctness of the returns, he can compel the owner to produce further evidence in respect of the returns and assess the tax due. The Act also requires that applications for registration have to be made to the 'prescribed authority', and it is for him to grant a certificate of registration in a prescribed form, and in case the authority finds that an owner has wilfully failed to apply for registration though he was liable to pay tax, he may assess the tax to the best of his judgment and direct the owner to pay also a penalty in addition to the amount so assessed. The authority is also given the power to call for deposits of security and the owners are to furnish to the 'prescribed authority' a table of fares and freights and a table regulating timings of arrival and departure of vehicles with such other particulars as the 'authority' may require. These provisions, therefore, show that the 'prescribed authority' enjoys large powers under the Act for the purpose of assessing and collecting the tax but the rank or the status or the designation or even the qualifications of the 'prescribed authority' have not been defined in the Act at all. The State Government can thus entrust those duties to any officer who may be either worthless or incompetent to perform those duties or may perform them in an utterly highhanded and arbitrary manner thereby causing serious harassment to the owners of motor vehicles and subjecting them to the caprices of an official who may be utterly unfit for the responsibilities of the office.

(19) The next branch of the submission relates to the provision for appeal against the order passed under Part III of the impugned Act. Here again, it is submitted that the enactment only says that the appeal shall lie to any officer especially empowered by the State Government by notification to hear such appeals and the decision of that officer shall be final. The rank and status of the officer is not again mentioned and the State Government can by notification, therefore, appoint an officer of the meanest rank and status to discharge these responsible duties. Dr. Sultan Ahmad in support of his contention has cited a decision of the Calcutta High Court in 'KHAGENDRA NATH v. DISTRICT MAGISTRATE. DINAJPUR'. 55 Cal W N 53. The statute there under consideration was the West Bengal Security Act of 1950 which under section 21 gave power to the State Government to make order respecting movements or action of any person, if satisfied that he was doing or likely to do any subversive act. The question therefore, arose whether the restrictions put by the Act on the exercise of the rights mentioned in Article 19(1) (d) were reasonable restrictions and whether the procedure laid down in the Act also provided reasonable safeguards for the liberty of the citizen or it gave an unrestricted power to the Executive to interfere with the fundamental rights of the people. In that connection their Lordships relied upon the Supreme Court decision in 'DR. N. B. KHARE v. STATE OF DELHI'. 1950 S C R 519 where it was held that the Court must not only have regard to the nature of the restrictions imposed, but it must also have regard to the procedure by which those restrictions were imposed: and in that context they quoted the famous dictum of Kania, C. J.:

"While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily

exclude from the consideration of the Court the question of reasonableness of the procedural part of the law."

(20) In that light, their Lordships examined some of the provisions of the statute impugned before them, and they observed that one of the powers conferred by the Act was the power of making an externment order, and under section 38 of the Security Act in question Government could delegate that power to any officer or authority subordinate to the State Government.

"Officers or authorities subordinate to the State Government," their Lordships pointed out, " may be officers or authorities of a high standing or they may be officers or authorities of a comparatively lowly kind. The order before us was made by a District Magistrate who of course is the senior executive officer in a District. He is clearly an officer of Government, but so would be a Sub-Deputy Collector and this section clearly entitles Government to authorise a Sub-Deputy Collector to make an order of externment or indeed to make any of the other orders which the Government are empowered to make under this Act. A Commissioner of Police in the city of Calcutta or a Superintendent of Police in the Mofussil is, I think, clearly an officer or authority subordinate to the State Government and so is a Sub-Inspector. It appears to me that section 38 is framed wide enough to allow the Government to authorise a Sub-Inspector to make these orders. A Havildar is a lowly and humble officer of Government. He certainly is a servant of Government and I do not think that the term 'officer' has any precise meaning. Servants of Government are frequently classified as gazetted or non-gazetted officers or ministerial or non-ministerial officers. All are however officers, no matter what the qualifying adjective may be."

In that view, their Lordships held that section 38 of the Act was so widely framed as to permit Government to delegate their powers to officers who would be wholly unfit to be entrusted with the powers of making such orders. Legally, Government by a notification could delegate the power to the humblest class of officers subordinate to them within the sanction of the law, and therefore they held that such a provision was clearly unreasonable.

(21) The above case is no authority for the proposition that the statute in question was held to be 'ultra vires' on the ground of its being bad for delegation of statutory powers to bodies other than the Legislature itself. Section 38 of that Act was held 'ultra vires' on the ground that the procedure laid down in that section was unreasonable. Presumably, their Lordships did so because under the provisions of Article 19(5) of the Constitution they had to consider whether the restrictions imposed were reasonable restrictions. In the present case, we have to remember that the statute is merely a taxing statute and has nothing to do with any of the fundamental rights guaranteed under Part III of the Constitution. I have shown that this is the main object of the Legislation. Even in Khare's case, Kania, C. J. sounded a note of warning against any assumption that the Provincial Government would necessarily act improperly or without due regard to its sense of responsibility in entrusting its officers with responsible duties provided under the statute.

His Lordship said:

"Moreover, this whole argument is based on the assumption that the Provincial Government when making the order will not perform its duty and may abuse the provisions of the section. In my opinion, it is improper to start with such an assumption and decide the legality of an Act on that basis. Abuse of the power given by a law sometimes occurs; but the validity of the law cannot be contested because of such an apprehension."

(22) The constitutional legality of the Act, therefore, could not be decided on the assumption that the prescribed authorities, or the appellate authority under the impugned Act will be some one wholly unfit to discharge those responsibilities & too lowly or humble in his rank and position to wield the powers which the statute contemplates. There is no delegation of legislative powers if the choice of the officer is left by the statute to the State Government, and there is no constitutional limitation debarring the executive authorities from nominating such a person; see, for instance, 'EMPEROR v. BENOARI LAL', 72 Ind App 57 at 69 (PC).

(23) Our attention has been drawn to several other Provincial Acts where similar provisions have been made, and it has been left to the State Government to prescribe the authority to decide certain questions arising under those Acts, and where no rank and designation of the authority concerned have been indicated in the Act itself, yet there has been no complaint in regard to those statutes that Government had entrusted the powers to an officer of the meanest rank or an officer wholly unworthy to undertake those responsibilities. To leave the appointment of the 'prescribed authority' or the 'appellate authority' to the State Government does not involve a delegation of any essential legislative function to the Executive Government. In 'MOHAMMAD ANZAR HUSNAIN v. STATE OF BIHAR', AIR 1952 Pat 220 (SB) I pointed out in agreement with my other colleagues that the Legislature could not possibly provide for all the administrative details and eventualities that the Executive Government was likely to face in giving effect to the law, and it was, therefore, wise and expedient to leave a certain amount of discretion to the executive authorities. Even if there may be some risk involved, the growth of a democratic Government demands that the discretion of the executive should not be unduly hidebound and fettered & the citizens of the land can put their trust in the checks and balances which public opinion founded on a healthy criticism of government always provides for keeping the executive in its proper place and not indulging in abuse of powers. I agree that to avoid all criticisms it would have been better if the rank and designation of the authorities concerned had been indicated in the statute itself; but it is another thing to say that the 'vires' of the legislation can be attacked on the ground that the omission to do so tantamounts to delegation of legislative functions to executive hands.

(24) The other ground on which this question of delegation has been presented to us rests on the frame of section 26(g) of the Act. Section 26(g) says that the State Government

may make rules for securing the payment of tax and for the purpose of carrying into effect the provisions of this Part in respect of

"any other matter for which there is no provision or insufficient provision in this Part for which provision is, in the opinion of the State Government, necessary for giving effect to the purposes of this Part."

Apparently, this provision may be open to exception, but it is unnecessary to decide the point. In the first place, our attention has not been drawn to any specific rule framed by the State Government which could be held to be beyond the authority of the Act. In the second place, this provision in the law is severable from the other provisions of the statute.

(25) On a careful analysis of the arguments advanced on this question of delegation and for the reasons which I have stated above, I find it impossible to hold that the impugned Act is bad on the ground of delegation of legislative powers to the State Government, and this issue also must accordingly be decided against the plaintiffs.

(26) The net result of my discussions is that the plaintiffs are not entitled to any relief. The suits must, therefore, be dismissed with costs in favour of the State Government.

(27) DAS, J.: I agree with my learned brother Sarjoo Prosad, J. in the conclusions which he has reached on the various issues, for substantially the same reasons as have been so well and elaborately explained by him. No useful purpose will be served by repeating those reasons in different words.

(28) The only point on which I entertain a somewhat different view is as respects the meaning of Article 304(b) particularly, the expression "within that State" occurring therein. I am inclined to think that the expression is wide enough to include freedom of trade within the State. But the important point to note is that the impugned Act does not interfere with freedom of trade (I emphasise the word 'freedom') within the State, nor with the citizen's right to carry on any occupation, trade or business. It merely imposes a tax on passengers and goods; but does not profess to restrict, nor does it actually restrict, freedom of trade or the right to carry on any occupation, trade or business; therefore, Article 19 or Article 304 have no application.

(29) The suits must, in my opinion, be dismissed with costs.

(30) NARAYAN, J.: I also fully agree with the conclusions arrived at by my learned brother Sarjoo Prosad J. and with the reasonings which he has adopted in support of those conclusions.

(31) The Act with which we are concerned in this case cannot be regarded as an ably drafted Act, and the argument that it contains no specific provision sanctioning the collection of taxes by the owner from the passengers and with regard to the goods carried at first sight appears to be a quite plausible one. This is a serious lacuna in the Act and for sometimes I felt very much exercised over it. But if we look to the charging section which in this case is section 12(1) it will be plain and manifest that the tax is a tax on passengers and goods and not a tax on the owner or a tax on fares and freights.

The task of interpretation does not really arise when the language is plain and admits of only one meaning. It is a cardinal rule of construction to "intend the Legislature to have meant what they have actually expressed" and it is not permissible to interpret what has no need of interpretation. Another cardinal principle is that whatever be the consequences the meaning of the words must be given their full effect. The main object and intention of the Statute being clear, the draftsman's unskilfulness, which in this case is apparent, would not, in any way, alter the situation. The criticisms that have been levelled against the language used in sub-section (3) of section 12 are not absolutely unjustified, because the subsection says that every owner shall pay into a Government treasury the full amount of the tax 'due from him' under sub-section (1) or subsection (2) as the case may be and that he shall furnish return. Certainly, what is charged under sub-section (1) is not a tax due from the owner, and therefore the expression 'due from him' is a very unhappy expression. But still I am not able to agree with the counsel for the plaintiffs that the expression 'due from him' in any way nullifies the effect of the clear and the unambiguous language used in sub-section (1).

The preamble shows that a tax was to be levied on passengers and goods carried by public service vehicles and public carriers and subsection (1) of section 12 gives expression to this intention in clear terms. Sub-section (1) cannot be rendered a nullity on the ground that the Statute does not contain a distinct provision authorising the owner to collect the taxes. The person to be assessed is one who uses the carrier, and this obligation is really not transferred to the owner, who, as the language used clearly indicates has to collect the taxes and then deposit them in the Government treasury. The meaning that is being attributed to the other provisions and especially to sub-section (3) is not at all justified by the context, and for purposes of construction even rules of grammar have to yield to those of common sense. No human agency can be regarded as perfect, and a more extended or restricted meaning have at times to be given to particular words provided the context justifies it.

(32) In taxation we have to look simply at what is clearly said.

"There is no room for any intendment; there is no equity about a tax; .....you read nothing in; you imply nothing; but you look fairly at what is said and at what is said clearly and that is the tax."

(33) And the mode of assessment of a tax does not alter its character. As was observed by Broomfield J. in 'BYRAMJEE JEEJEEBHOY v. PROVINCE OF BOMBAY', ILR (1940) Bom 58 (FB), we have to discover what is the 'essential character' of the tax, what it is in 'pith and substance' apart from the machinery by which it is assessed, and we are to look mainly at the charging sections of the Act for this purpose. Kania J. (as he then was) quoted with approval the following observation made in 'PROVINCIAL TREASURER OF ALBERTA v. KERR' (1933) A C 710

"The identification of the subject--matter of the tax is naturally to be found in the charging section of the statute, and it will only be in the case of some ambiguity in the terms of the charging section that recourse to other sections is proper or necessary"

(34) I should like to quote another passage from this judgment which runs as follows:

"Generally speaking, taxation is imposed on persons, the nature and amount of the liability being determined either by individual units, as in the case of a poll tax, or in respect of the tax-payers' interests in property or in respect of transactions or actings of the tax-payers."

Here the person liable is the passenger or the individual who transports his goods. The imposition is in respect of his transactions or actings. Therefore, looking at the essential character of the tax from the legal point of view it cannot but be regarded as a tax on passengers and goods. A legislation with regard to it is certainly within the competence of the State Legislature.

(35) So far as the question of delegation is concerned, the most attractive argument advanced was that the rank, status and qualification of the "prescribed authority" which has been given such wide powers under the Act have not at all been indicated in the Act and that the taxpayers can be left even at the mercy of officials of a very inferior status who may be utterly unfit to discharge the responsibilities of such an office. In this connection, I would like to quote some passages from the recent decision of the Supreme Court in 'CONSTITUTION OF INDIA AND DELHI LAWS ACT, (1912) ETC.', 1951 S C R 747. His Lordship Kania C. J. differed from the majority view in this case, and the answers which he gave are that all the three sections mentioned in the three questions are ultra vires of the Legislatures, functioning at the relevant dates, to the extent power is given to the Government (executive) to extend Acts other than Acts of the Central Legislature. It is very important that even from the judgment of his Lordship the Chief Justice it appears that it is no delegation if the choice of the prescribed authority is left entirely to the State Government. His Lordship observed:

(1) "It is obvious that such authority 'is ancillary to legislation' and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail.....It was argued at the Bar that a Legislature committing important 'regulations' to agents or delegates effaces itself. That is not so. It retains its power intact and can whenever it pleases destroy the agency it has created and set up another to take the matter directly into his own hands. How far it shall seek the aid of subordinate agencies and how long it shall continue them are matters for the legislature and not for the Courts of law to decide.

(2) "While a legislature, as a part of its legislative functions, 'can confer powers to make rules and regulations for carrying the enactment into operation and effect', and while a legislature has power to lay down the policy and principles providing the rule of conduct and while it may further provide that on certain data or facts being found and ascertained by an executive authority, the operation of the Act can be extended to certain areas or may be brought into force on such determination, which is described as conditional legislation, the power to delegate legislative functions generally is not warranted under the constitution of India at any stage."

His Lordship Mahajan, J. did not also agree with the majority view, but there are certain important observations in the judgment of his Lordship as well which have got a bearing on the question raised before us. His Lordship quoted a passage from the judgment of Ranney J. of the Supreme Court of Ohio, and the quotation is in these terms:

"The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

There is another important quotation in his Lordship's judgment which runs as follows:

"To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know". The proper distinction the Court said was this: "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

His Lordship has further pointed out that delegation is incidental to the exercise of all power inasmuch as it is necessary to delegate for the proper discharge of the public duties.

"No public functionary can himself perform all the duties he is privileged to perform, unaided by agents and delegates, but from this circumstance it does not follow that he can delegate the exercise of his judgment and discretion to others."

Fazl Ali J. who delivered one of the leading majority judgments, summed up his views as follows:

"(1) The legislature must normally discharge its primary legislative function itself and not through others. (2) Once it is established that it has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law, and that it may utilize any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do. In other words, it can do every thing which is ancillary to and necessary for the full and effective exercise of its power of legislation. (3) It cannot abdicate its legislative functions, and therefore while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel legislature. (4) The doctrine of separation of powers and the judicial interpretation it has received in America ever since the American Constitution was framed, enables the American Courts

to check undue and excessive delegation but the Courts of this country are not admitted to that doctrine and cannot apply it in the same way as it has been applied in America. Therefore, there are only two main checks in this country on the power of the legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to 'abdication and self-effacement' ".

His Lordship also made some general observations on the subject of delegated legislation which, in my opinion, should be of great help to us in determining the question raised in this case.

"I wish to make a few general observations here on the subject of 'delegated legislation' and its limits, using the expression once again in the popular sense. This form of legislation has become a present day necessity, and it has come to stay—it is both inevitable and indispensable. The legislature has now to make so many laws that it has no time to devote to all the legislative details, and sometimes the subject on which it has to legislate is of such a technical nature that all it can do is to state the broad principles and leave the details to be worked out by those who are more familiar with the subject. Again, when complex schemes of reform are to be the subject of legislation, it is difficult to bring out a self-contained and complete Act straightway, since it is not possible to foresee all the contingencies and envisage all the local requirements for which provision is to be made. Thus, some degree of flexibility becomes necessary, so as to permit constant adaptation to unknown future conditions without the necessity of having to amend the law again and again. The advantage of such a course is that it enables the delegated authority to consult interests likely to be affected by a particular law, make actual experiments when necessary, and utilize the results of its investigations and experiments in the best way possible. There may also arise emergencies and urgent situations requiring prompt action and the entrustment of large powers to authorities who have to deal with the various situations as they arise. There are examples in the Statute books of England and other countries, of laws, a reference to which will be sufficient to justify the need for delegated legislation.....(after quoting certain instances his Lordship proceeds).....I have referred to these instances to show that the complexity of modern administration and the expansion of the functions of the State to the economic and social sphere have rendered it necessary to resort to new forms of legislation and to give wide powers to various authorities on suitable occasions."

His Lordship Patanjali Sastri J. (as he then was) quoted with approval the observations made in 'HODGE v. QUEEN', (1883) 9 AC 117 decided by the Privy Council in the year 1883, and I should like to quote that observation here again.

"It was further contended that the Imperial Parliament had conferred no authority on the local legislature to delegate those powers to the Licence Commissioners, or any other persons. In other words, that the power conferred by the Imperial Parliament on the local legislature should be exercised in full by that body, and by that body alone. The maxim 'delegatus non protest delegare' was relied on. It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and, that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in S. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by S. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme.....It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its power intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it can seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of law, to decide."

Mukherjea J. observed as follows:—

"As said already, it is within powers of Parliament or any competent legislative body when legislating within its legislative field, to confer subordinate administrative and legislative powers upon some other authority. The question is: what are the limits within which such conferment or bestowing the powers could be properly made? It is conceded by the learned Attorney-General that the legislature cannot totally abdicate its functions and invest another authority with all the powers of legislation which it possesses. Subordinate legislation, it is not disputed must operate under the control of the legislature from which it derives its authority, and, on the continuing operation of which its capacity to function rests. As was said by Dixon J. (Vide 'VICTORIA STEVEDORING AND GENERAL CONTRACTING CO. v. DIGNAN', 46 C.L.R. 73 at p .102), 'a subordinate legislation cannot have the independent and unqualified authority which is an attribute of true legislative power'. It is pointed out by this learned Judge that several legal consequences flow from this doctrine of subordinate legislation. An offence against subordinate legislation is regarded as an offence against the statute and on the repeal of the statute the regulations automatically collapse."

Das J. pointed out that the power of delegation was inherent in the legislative power itself and that, short of self-effacement the legislature may exercise the widest power of delegation.

(36) In my opinion, the above observations of their Lordships in 'In re Art. 143, Constitution of India, and Delhi Laws Act (1912) etc.,

A.I.R. 1951 S. C. 332 should go to demolish the argument that was advanced before us as to the delegation to the "prescribed authority". And the well-known decision of the Privy Council in 'SHANNON v. LOWER MAINLAND DAIRY PRODUCTS BOARD', (1938) A. C. 708 is also quite a relevant decision on this point. The scheme of the Natural Products Marketing (British Columbia) Act, 1936, was to enable the Lieutenant-Governor in Council to set up a central British Columbia Marketing Board, to establish or approve schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, to constitute Marketing Boards to administer such schemes, and to vest in those Boards any powers considered necessary or advisable to exercise those functions, including the power to fix and collect licence fees. This Act was regarded in pith and substance as an Act to regulate particular business entirely within the Province, and was therefore held intra vires of the Provincial Legislature under section 92 of the British North America Act, 1867, which has given the Provincial Legislature the exclusive right to legislate in relation to property and civil rights in the Province. Their Lordships pointed out that within its appointed sphere the Provincial Legislature was as supreme as any other Parliament and that it was unnecessary to try to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion and Imperial, had entrusted various persons and bodies with similar powers to those contained in this Act.

(37) The law thus is now quite clear on the subject, and if the impugned legislation is a valid legislation as contemplated by item 56 of the State List, then the powers which have been given to the 'prescribed authority' cannot be questioned. It is really no delegation if the choice of the prescribed authority is left entirely to the State Government.

(38) Though the learned Government Pleader had conceded in this case that the expression 'within that State' as used in Article 304 (b) of the Constitution of India includes freedom of trade within the State, my personal view has always been that it refers to trade, commerce or intercourse between other States or the citizens living under those States, and the State or the citizens of the State which under Article 304, has the authority to impose restrictions on the freedom of trade, commerce and intercourse. This appears to be manifest from the heading of Part XIII which runs as follows:— "Trade, Commerce and Intercourse within the territory of India". My learned brother Sarjoo Prosad J., has agreed with my view, but my learned brother Das J. differs from it. But even if the interpretation which my learned brother Das J. has put up on this Article be the correct interpretation, the position seems to be indisputable that a taxation of the nature contemplated by item 56 of the State List, does not interfere with trade or commerce. There may be some substance in the contention that transport business comes within the expression "Trade and Commerce", but the contention that the taxation will interfere with trade and commerce is absolutely devoid of substance and force. Taxation is sanctioned by the Constitution, and generally speaking a mere taxing Statute cannot be regarded as unconstitutional. There is no restriction put upon the business itself, everyone being free to travel and to transport goods by the vehicles mentioned in the Act. My learned brother has already referred to the decision of the Supreme Court in 'STATE OF BOMBAY v. F. N. BALSARA', AIR 1951 SC 318 and following the reasoning adopted in that case, the Act cannot be deemed to be unconstitutional even if it indirectly affects the business of transportation. I, therefore, hold, in respectful agreement with the views of my learned brothers, that all these suits must be dismissed with costs.

A/ K.S. Suits dismissed.

A. I. R. 1952 PATNA 373

RAMASWAMI AND SARJOO PROSAD JJ.

Dayanand Modi, Petitioner v. Union of India, Opposite Party.

Civil Revn. No. 271 of 1950, D/- 1-2-1952.

Civil P. C. (1908), Ss. 10 and 115 — Failure to exercise jurisdiction — Refusal to stay subsequent suit under S. 10 — Interference in revision.

Where the matter in issue in a subsequent suit between the parties is directly and substantially in issue in a previous pending suit in respect of the same contract the subsequent suit must be stayed under S. 10, Civil P. C. and if the Court trying the subsequent suit refuses to stay the suit, it amounts to a failure to exercise jurisdiction and the order is liable to be set aside in revision. (Para 2)

Anno: Civil P. C., S. 10 N. 2, S. 115 N. 5, 11.

Nandlal Untwalia, for Petitioner; Government Pleader, for Opposite Party.

ORDER: In support of this rule Mr. Nandlal Untwalia pointed out that the petitioner had instituted Money Suit No. 23 of 1947 against the opposite party claiming damages for breach of contract. The petitioner alleged that there was an agreement between the parties for supply of potatoes for the use of Military Department for a period of three years (months ?) from 1st July 1946 to 30th September 1946. The petitioner further alleged that the opposite party had rejected a large quantity of potatoes supplied by the petitioner without any justification, on account of which the petitioner suffered a loss to the extent of Rs. 29,593 and odd. The petitioner therefore claimed a sum of Rs. 19,601 and odd which was the balance of the price of the potato supplied and a sum of about Rs. 17,000 and odd being damages for the breach of contract. The defence of the opposite party was that the petitioner himself had broken the contract and had failed to supply potatoes according to the specifications in the agreement. The Subordinate Judge allowed the claim for the balance of price but he rejected the claim of the petitioner for breach of contract.

Against the decree of the Subordinate Judge, the petitioner has preferred an appeal which is pending in the High Court. The opposite party thereafter instituted a suit in 1949 claiming damages from the petitioner for breach of the same contract. The petitioner filed an application for stay of the suit on the ground that the matter in issue was directly and substantially same in the appeal pending before

the High Court. But the Subordinate Judge did not consider the provisions of section 10 of the Civil Procedure Code and directed the petitioner to "bring stay order from the Hon'ble High Court". The argument of Mr. Untwalia is that in passing this order the Subordinate Judge has failed to exercise jurisdiction vested in him by law.

(2) The argument advanced by Mr. Untwalia is well-founded. It was indeed conceded by the learned Government Pleader that the order of the Subordinate Judge could not be supported. Upon the admitted facts of this case, it is clear that the matter in issue in the present case is also directly and substantially in issue in the Money Appeal pending in the High Court and under section 10 C. P. C. the Subordinate Judge ought not to proceed with the hearing of the present suit. We therefore direct that the hearing of the present suit ought not to commence before First Appeal 180 of 1949 is finally disposed of in the High Court; but other proceedings of the court like filing of written statement, framing of issues and so on will not be stayed.

(3) There will be no order as to costs of this application. Let the hearing of First Appeal 180 of 1949 be expedited.

K.S. Revision allowed.

A. I. R. 1952 PATNA 374

SHEARER AND KHALEEL AHMAD JJ.

Samalia Bhuian, Petitioner v. State.

Criminal Misc. No. 195 of 1951, D/- 7-12-1951.

(a) Public Safety — Preventive Detention Act (1950) S. 7 — Vagueness of grounds — Detenu member of party not declared illegal — Activities of party may afford background for appreciation of acts attributed to detenu, which acts may by themselves be innocent — Grounds supplied held not vague.

The grounds supplied to the detenu must be such as would assist the detenu to know exactly what he has been charged with and to make a proper representation to which he is entitled both under the Act and under the Constitution. If they are not, there is violence of fundamental right and a contravention of the statutory provisions, which will make the order a void order. What is a ground contemplated under the Act to be given to a detenu for the purpose of his representation has been explained in the case of 'STATE OF BOMBAY v. ATMA RAM SHRIDHAR', AIR 1951 SC 157 by Kania C. J. The activities of a party, in general, which has not been declared illegal may not by itself be a ground for holding that any particular member is identified with any particular programme of that party. The activities of the party only afford background for an intelligent appreciation and weighing of the acts attributed to the particular member. In the light of this background many of the acts of the particular member, which are innocent and legal on the face of it, may be found to have a different implication behind them. Therefore, the ground that a particular act on the face of it is legal or innocent by itself is not sufficient to exonerate the individual for the purpose of preventive detention. His activities have to be weighed in the light of all the surrounding circumstances wherein he has voluntarily placed himself. The responsibility is his for placing himself in those surroundings, and he does it not without risks of being even sometimes truly misunderstood. The remedy of having been so misunderstood is in the right of explaining his acts in his representation and not a plea in Court for setting aside the order. AIR 1951 SC 157, Relied on.

Held on fact that the grounds supplied did afford sufficient facts to disclose the charge framed against the detenu and enable him to make a representation. (Para 5)

(b) Public Safety — Preventive Detention Act (1950), S. 3 — Detaining authority must be satisfied that it is necessary to detain person to prevent him for carrying on prejudicial activities — Grounds supplied not irrelevant — Court cannot enter into their sufficiency.

Before the Government can pass an order of preventive detention under the Act it must be satisfied with respect to the individual person that his activities are directed against one or other of the objects mentioned in the Act and that it was necessary to prevent him from acting in such a manner. If the ground by itself is not so convincingly irrelevant and incapable of bringing about satisfaction in any rational person the question whether such ground can give rise to the satisfaction required for making the order is outside the scope of the inquiry of the Court. AIR 1951 SC 157, Relied on. (Para 6)

Government Advocate, for the State.

REFERENCE..... /Para.

('51) 1951 SCR 167: (AIR 1951 SC 157: 52 Cri LJ 373) 5

AHMAD J.: This is an application from Jail under Article 226 of the Constitution of India by one Samalia Bhuian, who has been detained in custody under detention order, no. 300 C. D. dated the 8th April, 1950 passed against him under Preventive Detention Act, 1950. From his application it appears that even previously he had filed an application, which it is said in the application, was reported to him to have been dismissed by this Court. Against that order, he has appealed before the Supreme Court of India, which is most likely still pending for disposal. The copy of the grounds of detention served on the petitioner in pursuance of section 7 of the Act is dated the 26th April, 1950.

It discloses that the petitioner is an important member of the Communist Party of India. In the body of the grounds it is stated that in pursuance of an international plan of action, the Communist Party of India has adopted a highly secret programme of overthrowing through violence the Government of India as constituted by law. With this end in view, the organisation and the prominent functionaries of the party like Shri B. T. Randiva, Shri Chandra Sekhar Singh, Shri Samar Ray, Shri Prabir Mullick, Shri Chinmony Mukharji and others have been very active in putting the plan into operation. The underlying idea is to destroy the present social order

by simultaneously waging political and economic struggle so that a communist state as envisaged by the party could supplant the existing Government. On this line, it is stated, secret directions have also been issued to different communist cells, functioning in Bihar to build up illegally, as quickly as possible, large stock of fire arms and ammunition, to smuggle explosives on a large scale, especially from the industrial areas to collect iron bars and other implements for breaking jails and for capturing different service associations so that the services could be exploited at a critical moment to turn against Government and thereby to bring about a complete collapse of the administration. Kisan zamindar conflict has been intensified and efforts have been made to incite kisans to take forcible possession of zamindars' lands even when there is no semblance of any legal right and to use violence if necessary against the zamindars and the police and magistracy in the process of enforcing law and order. Likewise on the industrial front the party has been inciting workers to obtain what the party considers to be the right of the labourers even by resorting to violence, if need be. To accentuate discontentment among the masses, efforts have been made to bring about railway strike so that the supply of food, which is already in a precarious position, may be brought to a stand-still. In fact a number of leaflets under different headings were issued by and on behalf of the members of the party and the party itself to all sections to bring about that railway strike. Meetings were also held and secret directions on the line and policy of the party were given. Fortunately due to prompt action on the part of Government the attempt could not succeed. The party is, however, on the look out to divert its energy already mobilised in some different direction. Recently, it came to the notice of Government that violent attacks had been made on the police escorts, sometimes successfully, to rescue communists from custody and also to commit other acts of violence. Strict actions are taken against those who hesitate or are found reluctant to come in line with the policy of the party.

(2) In particular against the petitioner the allegation is that he continues to be a member of the Communist Party of India and therefrom an inference is suggested to be drawn that he is still an active communist and is actively participating in the programme indicated above, otherwise, he would have been by this time chucked out from the party. This inference, it is said, finds strong corroboration from the following facts: (1) He is a close associate of Samar Ray and Prabir Mullick. (2) He is a close associate of communist Chinmoy Mukherji. Documents recovered from the person of communist Chinmoy Mukherji indicated that the party members were to raise militants and to establish links with the R. C. P. I. (3). The name of the petitioner was found mentioned in the list of militants recovered from the possession of Chinmoy Mukherji. That list indicated that a meeting of such militants was also held on 15-6-49, when the Party members were advised to advance courageously and fearlessly. (4). The Petitioner contacted Samar Ray and another underground communist of Bengal at Howrah on the night of 30-10-49 when he received instructions from the aforesaid line. (5). The petitioner contacted absconder communist Anant Sharma on the night of 14-1-50 and received instructions to observe, 'Black Day' on the 26th January 1950.

(3) On the basis of the facts stated in relation to the activities of the communist party, in general, and in pursuance of the evidence found of the close association of this petitioner, in particular, with the said policy and programme of the party, Government has come to the conclusion that if he is allowed to remain at large he will indulge in activities to the prejudice of public safety and the maintenance of public order and for prevention of such activities his detention was considered necessary.

(4) The contention of the applicant in his petition is that the grounds are vague and as such he has been deprived of making a proper representation. Also it is contended that the grounds give no particulars or at least particulars of a kind which connect him with any specific act of violence said to have been incorporated in the international plan of action of the Communist Party with a view to overthrow through violence the Government of India as constituted by law, or even any other act which is not consistent with the fundamental rights provided in Part III of the Constitution, or is not permissible under law. In the absence of such particulars, therefore, it has been stressed that there was no ground for the detaining authority to arrive at the satisfaction to which, it is said, it did. The order, however, has not been challenged so far as it appears from his petition on the ground of mala fide. In other words it has not been contended that the grounds are so completely irrelevant as cannot satisfy any rational person about necessity for the order. What has been stressed is that the facts stated in the grounds, though there may be some rational connection between them and the order passed, are not sufficient to afford a complete chain of reasoning to arrive at the conclusion to which the detaining authority claims to have come to, nor the grounds are helpful to the detenu to know the charge framed against him.

(5) The question is whether the grounds are such as would assist the detenu to know exactly what he has been charged with and to make a proper representation to which he is entitled both under the Act and under the Constitution. If they are not, there is violence of fundamental right and a contravention of the statutory provisions, which will make the order a void order. What is a ground contemplated under the Act to be given to a detenu for the purpose of his representation has been explained in the case of 'STATE OF BOMBAY v. ATMA RAM SHRIDHAR', 1951 S C R 167 by Kania, C. J., in the following words:

> "By their very nature the grounds are conclusions of facts and not a complete detailed recital of all the facts. The conclusions drawn from the available facts will show in which of the three categories of prejudicial acts the suspected activity of the particular person is considered to fall. These conclusions are the 'grounds' and they must be supplied.....Ordinarily 'the grounds' in the sense of conclusions drawn by the authorities will indicate the kind of prejudicial act the detenu is suspected of being engaged in and that will be sufficient to enable

him to make a representation setting out his innocent activities to dispel the suspicion against him. Of course if the detenu is told about the details of facts besides the grounds he will certainly be in a better position to deal with the same. It is significant that the clause does not say that the 'ground' as well as details of facts on which they are based must be furnished."

What the vagueness of a ground was also discussed in that case. It was observed:

"The contention that the grounds are vague requires some clarification. What is meant by vague? Vague can be considered, as the antonym of 'definite'. If the ground which is supplied is incapable of being understood or defined with sufficient certainty it can be called vague. It is not possible to state affirmatively more on the question of what is vague. It must vary according to the circumstances of each case."

In the present case though it was desirable that better and further particulars should have been given in order that it may have been more definite and intelligible to the detenu, it cannot, however be said that the grounds supplied to the detenu, in this case, as they are, are however, so vague as not to convey any idea as to the charge framed against him. The activities of a party, in general, which has not been declared illegal may not by itself be a ground for holding that any particular member is identified with any particular programme of that party. The activities of the party only afford a background for an intelligent appreciation and weighing of the acts attributed to the particular member. In the light of this background, many of the acts of the particular member, which (are ?) innocent and legal on the face of it, may be found to have a different implication behind them. Therefore, the ground that a particular act on the face of it is legal or innocent by itself is not sufficient to exonerate the individual for the purpose of preventive detention. His activities have to be weighed in the light of all the surrounding circumstances wherein he has voluntarily placed himself. The responsibility is his for placing himself in those surroundings, and he does it not without risks of being even sometimes truly misunderstood. The remedy of having been so misunderstood is in the right of explaining his acts in his representation and not a plea in court for setting aside the order. In the present case, the grounds supplied do afford sufficient facts to disclose the charge framed against the detenu. Therefore, the allegation that the ground is vague is not sustainable.

(6) The next question for consideration is that before the Government can pass an order of preventive detention under the Act it must be satisfied with respect to the individual person that his activities are directed against one or other of the objects mentioned in the Act and that the detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. Kania, C. J. dealing with this point in the case referred to above observed:

"There can be no satisfaction if there are no grounds for the same. There may be a divergence of opinion as to whether certain grounds are sufficient to bring about the satisfaction required by the section. One person may think one way, another the other way. If therefore, the grounds on which it is stated that the Central Government or the State Government was satisfied are such as a rational human being can consider connected in some manner with the object which were to be prevented from being attained, the question of satisfaction except on the ground of mala fide cannot be challenged in a court. Whether in a particular case the grounds are sufficient or not, according to the opinion of any person or body other than the Central Government or the State Government, is ruled out by the wording of the section. It is not for the court to sit in the place of the Central Government or the State Government and try to determine if it would have come to the same conclusion as the Central or the State Government. As has been generally observed, this is a matter, for the subjective decision of the Government and that cannot be substituted by an objective test in a court of law. Such detention orders are passed on information and materials which may not be strictly admissible as evidence under the Evidence Act in a court, but which the law, taking into consideration, the needs and exigencies of administration, has allowed to be considered sufficient for the subjective decision of the Government."

Further on this very point he observed:

"Although the ground may be good there may be a certain indefiniteness in its statement. Proceeding on the footing that there is some connection, i.e., the ground by itself is not so convincingly irrelevant and incapable of bringing about satisfaction in any rational person the question whether such ground can give rise to the satisfaction required for making the order is outside the scope of the inquiry of the Court."

In the present case, as already stated by me, there is no contention that there is no rational connection between the ground given and the order passed. All that is said is that they are not sufficient. This question, according to the authority referred to above, is not open to the Court to go into. Therefore, this ground also fails.

(7) In the result, therefore, the application is dismissed.

(8) SHEARER, J.: I agree.

R.G.D. Application dismissed.

A. I. R. 1952 PATNA 376

DAS AND SINHA JJ.

Bodi Alam and another, Petitioners v. State of Bihar and others, Opposite Party.

Criminal Misc. Nos. 464 and 465 of 1951, D/- 21-12-1951.

Constitution of India, Art. 19 (1) (d) and (e) and (5) — Reasonable restrictions in the interests of General Public — (Public Safety — Bihar Maintenance of Public Order Act, 1949 (III (3) of 1950), S. 2 — Validity).

The test under Art. 19 (5) is a two-fold test: firstly, the restrictions imposed must be reasonable; secondly, they must be in the interests of the general public. The reasonableness of the restrictions has to be con-

sidered both with regard to substantive and procedural provisions. In the Bihar Maintenance of Public Order Act, there are provisions for communicating the grounds of the order to the externee. The externee has a right to make a representation, and the representation has to be considered by an Advisory Board. These are all safeguards which fulfil the test of reasonableness. The existence of a provision which prevents externment of a person from his usual place of residence is not an essential criterion for fulfilling the test of reasonableness. There may be good and valid grounds for keeping a person out from his usual place of residence as he may be doing greater mischief at that place than elsewhere. The expression "in the interests of the general public" is wide enough to cover serious and aggravated forms of public disorder which are calculated to endanger the security of the State as also other breaches of the peace of a purely local significance which endanger the public order. Public order is not excluded from the purview of clause (5) of Art. 19. Thus, the provisions of the Bihar Maintenance of Public Order Act, so far as they permit the passing of an order of externment, impose reasonable restrictions in the interests of the general public on the exercise of the rights conferred by clauses (d) and (e) of Art. 19 (1) of the Constitution: AIR 1950 SC 211, Foll; AIR 1951 Cal 322, Rel. on; AIR 1950 SC 124, disting. (Paras 5, 6)

Basanta Chandra Ghose and Amala Kanta Chaudhury, for Petitioners; Government Advocate and S. C. Chakraverty, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras

('50) AIR 1950 SC 124: (51 Cri LJ 1514) 6
('50) AIR 1950 SC 211: (52 Cri LJ 550) 5
('51) 55 Cal WN 94: (AIR 1951 Cal 322: 52 Cri LJ 327) 5
('50) 29 Pat 461: (AIR 1950 Pat 322: 52 Cri LJ 610 FB) 5

DAS, J.: These two applications have been heard together, and this judgment will govern them both. On the 29th of September 1951, the State Government of Bihar passed two externment orders, one against Sri Sadhan Gupta, petitioner in Criminal Miscellaneous No. 465 of 1951, and the other against Bodi Alam, petitioner in Criminal Miscellaneous No. 464 of 1951. The externment orders stated, 'inter alia' that in exercise of the powers conferred by clause (a) of sub-section (1) of Section 2 of the Bihar Maintenance of Public Order Act, 1949 (Bihar Act III of 1950), the Governor of Bihar was pleased to direct that the petitioners shall not, with effect from the date of service on them of the order, be in any place in the Dhanbad subdivision of the district of Manbhum in the State of Bihar. The grounds of the externment orders were drawn up on the same date, namely, the 29th of September 1951, and were communicated to the petitioners on the 2nd October 1951.

It is, I think, unnecessary to state the grounds in detail. The grounds may be summarised thus: (1) it was stated that on different dates from April 1951 to August 1951, the two petitioners incited colliery labourers at different coal mines to acts of violence against the management etc.; the collieries mentioned were Murlidih Colliery, Khas Dharmubad Colliery etc; (2) it was alleged that as a result of the incitement to violence several occurrences took place, and criminal cases were instituted; (3) it was further stated that the petitioners excited the labourers against a rival trade union, namely, I. N. T. U. C. Union; and (4) it was finally alleged that the petitioners disobeyed the orders passed under the preventing sections of the Code of Criminal Procedure, which again resulted in certain criminal cases against them.

(2) Both the petitioners, it appears, made representations to the State Government against the orders of externment. They say that they do not know what happened to those representations.

(3) On the 22nd November 1951, the petitioners filed applications to this Court under Article 226 of the Constitution of India. On the 28th of November 1951, we issued a Rule, and the Rules have been heard today.

(4) Mr. Basanta Chandra Ghose, appearing for the petitioners, has contended that the externment orders are bad, because they constitute a violation of certain fundamental rights of the petitioners, viz., the right to move freely throughout the territory of India, and to reside and settle in any part of the territory of India: vide clauses (d) and (e) of Article 19(1) of the Constitution of India. Mr. Ghose has also contended that the orders of externment passed against the petitioners are mala fide, because they were meant to prevent one of the petitioners, Sri Sadhan Gupta, from standing and working as a candidate in the ensuing election and to stifle his defence in the pending criminal cases.

(5) The first contention of Mr. Ghose is that the provisions of the Bihar Maintenance of Public Order Act, 1949 (Bihar Act III of 1950) so far as they relate to an order of an externment, constitute an infringement of the fundamental rights guaranteed to a citizen of India under Article 19 of the Constitution of India, and are accordingly void under Article 13 of the said Constitution. Mr. Ghose contends that clause (5) of Article 19 of the Constitution of India does not save those provisions. It is necessary to quote clause (5) in full:

> "(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

The question for decision is whether the provisions of the Bihar Maintenance of Public Order Act 1949, so far as they permit the passing of an order of externment, impose reasonable restrictions in the interests of the general public on the exercise of the rights conferred by clauses (d) and (e) of Article 19(1) of the Constitution. Mr. Ghose has drawn our attention to the decision of the Supreme Court in 'DR. N. B. KHARE v. STATE OF DELHI', AIR 1950 S C 211, where the question of the validity of an order of externment passed under the East Punjab Public Safety Act 1949, was under consideration. It was pointed out in that decision that the mere fact that under section 4 of the East Punjab Public Safety Act 1949, the power to make the order of externment

was given to the Provincial Government or the District Magistrate, whose satisfaction was final, did not, by itself, render the Act invalid. His Lordship Kania, C. J. said:

"The desirability of passing an individual order of externment against a citizen has to be left to an officer. In the Act such a provision cannot be made. The satisfaction of the officer thus does not impose an unreasonable restriction on the exercise of the citizen's right."

In the case of 'BRAJNANDAN SHARMA v. STATE OF BIHAR', 29 Pat 461 a different view was taken as to the effect of an Act which authorised an order of externment merely on the satisfaction of the State Government or of an officer under it. In view, however, of the decision of the Supreme Court in 'DR. KHARE'S CASE', cited above, that argument is no longer available. It was further pointed out in 'DR. KHARE'S CASE', that several safeguards were provided by the East Punjab Public Safety Act 1949. It was stated that the law imposing restrictions on the exercise of the right conferred by Article 19 has to be considered both with regard to the substantive provisions as well as procedural provisions in order to determine the reasonableness of the restrictions.

In the East Punjab Public Safety Act 1949, the safeguards were three in number: first of all, the grounds of the order had to be communicated to the externee so as to enable the externee to make a representation; secondly, there were provisions for consideration of the case by an Advisory Board; and thirdly, there was a provision in the Act that the State Government was not permitted to direct the exclusion or removal from the Province of a person ordinarily residing in the Province and similarly the District Magistrate was not permitted to order the exclusion or removal of a person ordinarily resident in a district from that district. It was pointed out that this was a great safeguard provided by the East Punjab Public Safety Act. Mr. Ghose has very strongly contended that by reason of the absence of this last safeguard from the Bihar Maintenance of Public Order Act 1949, in the matter of externment orders, the provisions of the Bihar Act do not impose reasonable restrictions in the interests of the general public. His argument is that a safeguard like the third safeguard in the East Punjab Public Safety Act, 1949, is essential for bringing the law within the saving clause, viz., clause (5) of Article 19 of the Constitution.

The learned Government Advocate has, on the contrary, urged that the decision of the Supreme Court in 'DR. KHARE'S CASE', did not lay down any such proposition that the existence of a safeguard like the third safeguard of the East Punjab Public Safety Act, 1949, must be a 'sine quo non' for the application of the saving clause, viz., clause (5) of Article 19 of the Constitution of India. In my opinion, the learned Government Advocate is right. What we have to consider is whether the law imposes reasonable restrictions in the interests of the general public. The test is a two-fold test: firstly, the restrictions imposed must be reasonable; secondly, they must be in the interests of the general public. The reasonableness of the restrictions has to be considered both with regard to substantive and procedural provisions. In the Bihar Act, there are provisions for communicating the grounds of the order to the externee. The externee has a right to make a representation, and the representation has to be considered by an Advisory Board. These are all safeguards which fulfil the test of reasonableness.

An argument similar to the one advanced by Mr. Ghose was referred to in 'ATAR ALI v. JOINT SECRETARY TO THE GOVERNMENT OF WEST BENGAL', 55 Cal W N 94. The following observations made in that decision are pertinent:

"In the first place the provisions in the Bengal Act now under consideration under which the movement of a person can be restricted are applicable to all concerned and the externed person may be a resident of the place or of the district from which he is externed. The petitioner in the present case is a resident of the district of 24-Parganas. Dr. Khare was not a resident of the East Punjab or of the particular State from which he was externed. It is not suggested that provisions for externing a person from the place where he is usually residing will by themselves be unreasonable. There may be good and valid grounds for keeping a person out from his usual place of residence as he may be doing greater mischief at that place than elsewhere. But if such wide powers are given, some procedure should be provided for the protection of the rights of such a person. But there is none so far as the (Bengal) Act is concerned."

It has been contended before us that Sri Sadhan Gupta and Bodi Alam resided usually in the Dhanbad Subdivision from which subdivision they were externed. It has been further stated by Mr. Ghose that the externment orders incorrectly stated that Bodi Alam was a resident of Noakhali, and Sri Sadhan Gupta of Dumraon. Even assuming that the two petitioners, Sri Sadhan Gupta and Bodi Alam, ordinarily resided in the Dhanbad Subdivision, I am unable to accept the contention that the absence of a provision like the one in the East Punjab Public Safety Act 1949, necessarily takes the Bihar Act out of the saving clause, viz., clause (5) of Article 19 of the Constitution of India. In other words, I do not accept as correct the argument that the existence of a provision which prevents externment of a person from his usual place of residence is an essential criterion for fulfilling the test of reasonableness. As was pointed out in the Calcutta decision, there may be good and valid grounds for keeping a person out from his usual place of residence as he may be doing greater mischief at that place than elsewhere. I must, therefore, overrule the first contention of Mr. Ghose that the Bihar Act imposes unreasonable restrictions on the exercise of the rights conferred by clauses (d) and (e) of Article 19(1) of the Constitution.

(6) The second argument of Mr. Ghose is based on the decision in 'ROMESH THAPPAR v. THE STATE OF MADRAS', AIR 1950 SC 124. That was a case in which the fundamental right of freedom of speech and expression guaranteed by sub-clause (a) of Article 19(1) of the Constitution was under consideration. It was pointed out in that decision that clauses (2), (3) and (4) of Article 19 of the Constitution (before the amendments made in 1951) made a distinction between 'security of the State" and "interests of public order". It was pointed

out that such a distinction was made even in Entry No. 3 of List III of the Seventh Schedule of the Constitution of India. On the basis of this distinction, it was stated that a boundary was drawn between serious and aggravated forms of public disorder which were calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance which came within the expression "public order".

In my opinion, that distinction has no bearing on the question before us. The question before us is, as I have already stated, whether the law imposes reasonable restrictions in the interests of the general public. Neither the expression "public order" nor the expression "security of the State" occur in clause (5) of Article 19. The expression which occurs is "in the interests of the general public". In my opinion, that expression is wide enough to cover serious and aggravated forms of public disorder which are calculated to endanger the security of the State as also other breaches of the peace of a purely local significance which endanger the public order. I think it is obvious that the interests of the general public demand that public order should be maintained in the State of Bihar or any other State. The orders of externment passed against the petitioners state that the orders have been passed to prevent the petitioners from acting in any manner prejudicial to the maintenance of public order. I do not think that public order is excluded from the purview of clause (5) of Article 19 of the Constitution of India.

(7) The third ground on which Mr. Ghose has challenged the orders of externment is that the orders are 'mala fide'. In substance, Mr. Ghose has contended that the orders of externment are not really for the maintenance of public order, but for some other ulterior purpose, such as preventing the petitioners from taking part in the ensuing election and stifling the defence in the criminal cases which are pending. Our attention has been drawn to a modification of the order of externment, the modification being made on the 8th of December 1951, after we had issued a Rule on the two applications. The modification stated that the directions contained in the original order of externment would not apply in so far as the appearance of the petitioner Sri Sadhan Gupta was required at Dhanbad for answering charges in the criminal cases pending against him. Mr. Ghose has contended that this modification itself shows that the original externment order was 'mala fide'.

The learned Government Advocate has stated before us that an application for transfer of the cases from Dhanbad to Purulia has been admitted by this Court, and the application is pending. The learned Government Advocate has further stated that the State Government will have no objection to the transfer of the cases against Sri Sadhan Gupta to a place outside the area from which Sri Sadhan Gupta has been externed. I do not think that from the facts stated above, it would be proper to draw the conclusion that the order of externment was 'mala fide' in the sense that it was intended to stifle the defence of the petitioner in the criminal cases pending against him. It is obvious that if the petitioner cannot appear in the court where the cases have to be heard, the trial cannot proceed in his absence. The State Government, it appears, is quite agreeable to the cases being tried at a place where the petitioner will have no difficulty in either arranging for his defence or looking after his interests.

The second ground that the orders are 'mala fide', because they are meant to prevent the petitioners from taking part in the ensuing election does not appear to be convincing. It appears that so far as one of the petitioners is concerned, his nomination paper has already been rejected. It is not necessary for us to consider whether the nomination paper has been rightly or wrongly rejected. Bodi Alam does not appear to be a candidate at the ensuing election. Therefore, it is not at all established that the externment orders were made for a purpose other than the purpose which is mentioned in the order itself.

(8) For the reasons given above, I am unable to hold that the externment orders are bad. I would accordingly dismiss the applications.

(9) SINHA, J.: I agree.

D.H. Applications dismissed.

A. I. R. 1952 PATNA 379

IMAM J.

Habib Khan and another, Petitioners v. State.

Criminal Revn. No. 698 of 1951, D/- 18-12-1951.

(a) Penal Code (1860), Ss. 340, 347 and 383 — Wrongful confinement for purpose of extorting money — 'Injury' in S. 383 need not be physical.

The accused who were chaukidar and daffadar charged the complainant with theft of an article belonging to a certain person. The complainant denied the charge. Thereupon, the accused said that they would take him to the police station. They accordingly tied him with a turban and took him towards the police station. On their way, they detained him in an orchard where they made a proposal of payment of Rs. 50 for his release. The complainant then got himself released by making the payment.

Held that (i) the action of the accused in keeping the complainant tied in the orchard was certainly an act which amounted to wrongful restraint in such a manner as to prevent that person from proceeding beyond certain circumscribing limits.

(ii) the word 'injury' in S. 383 Penal Code was not confined to physical injury. Even a terror of a criminal charge, whether true or false amounts to a fear of injury. 7 WR (Cr) 28 (Cal); (1824) 1 Car & P 479 Rel. on.

(iii) the accused by threatening to take the complainant to the 'thana' on a charge of theft had put him in fear of injury and therefore their act amounted to wrongful confinement for the purpose of extorting the complainant. (Para 2)

Anno: Penal Code, S. 340 N. 1; S. 347 N. 1; S. 383 N. 1.

(b) Criminal P. C. (1898) S. 197 — Chaukidar and daffadar committing act of extortion in discharge of their duty — S. 197 does not apply.

S. 197 Criminal P. C., has no application to a case where a public servant like a chaukidar or daffadar commits an act of ex-

tortion in discharge of his duties, firstly because it is no part of the duty of a public servant to commit an act of extortion and secondly because he is not a public servant as contemplated by S. 197 as he can be dismissed by a Sub-divisional Magistrate and certainly by an authority lower than the State Government. (Para 3)

Anno: Cr. P. C., S. 197, N. 4, 6.

Nakuleshwar Prasad, for Petitioners; Thakur Prasad, for the State.

REFERENCES: Courtwar/Chronological/ Paras
('67) 7 WR Cr 28 (Cal) 2
(1824) 1 Car & P 479: (171 ER 1282) 2

ORDER: The petitioners have been convicted under section 347 of the Indian Penal Code and sentenced to three months' rigorous imprisonment and a fine of Rs. 30 each. According to the prosecution, the complainant Ramdhari Ahir was told by the petitioners, who are choukidar and daffadar, that he had stolen the 'gagra' of Munesar Ahir. This the complainant denied. The petitioners, however, said that they would take the complainant to the police station. They accordingly tied the complainant with a turban and took him towards the police station. When, however, they reached an orchard some 20 bighas from the complainant's house, the petitioners told the complainant that if he would pay them Rs. 50/- he would be released. He complainant's son, Bhirgurasan (P. W. 8), who had followed his father, the complainant, to the orchard was sent to Sarabjit (P. W. 2) to arrange for the money. Sarabjit Ahir came to the orchard and after a great deal of persuasion the petitioners accepted Rs. 25 and released the complainant. The complainant after this went to the house of Munesar Ahir (P. W. 3) and asked him as to why he had told the petitioners that he had stolen his 'gagara'. Muneswar denied having said anything of the kind. The complainant then went to Bishwanath Tiwary (P. W. 7), who is the collecting Member Punch of Union No. ! of police station Bhore, and told him what had happened. This individual advised the complainant to file a complaint in court. This story of the prosecution has been accepted by both the courts upon the evidence led by the prosecution. In my revisional jurisdiction, I can find no reasonable ground for taking a view contrary to that of the courts of fact regarding the evidence of the prosecution witnesses.

(2) It was urged by the learned Advocate for the petitioners that on the facts found by the courts below, that is to say the story of the complainant, there could be no conviction under S. 347, Penal Code firstly because there was no wrongful confinement and secondly because there was no extortion. It was said that wrongful confinement as defined in S. 340. Penal Code will not cover the case. The complainant was merely being taken to the police station by the petitioners. There was accordingly no wrongful confinement. It seems to me, however, on the facts accepted by both the courts below that the petitioners had tied the complainant with a turban and compelled him to proceed in the direction of the police station but detained him at an orchard where they made a proposal of payment of Rs. 50 for his release. It seems to me that the action of the petitioners in keeping the complainant tied in the orchard was certainly an act which amounted to wrongful restraint in such a manner as to prevent that person from proceeding beyond certain circumscribing limits. As to whether there was extortion, it was said that extortion as defined in S. 383, Penal Code requires the person to be put in fear of any injury and that that injury must be physical. It has been ruled long ago not only by this Court but by various High Courts in India as well as by Courts in England that the word 'injury' in such circumstances is not necessarily physical. Even a terror of a criminal charge whether true or false amounts to a fear of injury—see the cases of 'QUEEN v. MOBARAK', 7 W R (Cr.) 28, and 'REX v. JAMES GARDENER', (1824) 1 Car & P 479. The petitioners had threatened to take the complainant to the thana on a charge of theft. They, therefore, had put him in fear of an injury. In my opinion, therefore, the act of the petitioners did amount to wrongful confinement for the purpose of extorting the complainant.

(3) It was next urged that there could be no prosecution of the petitioners in view of S. 197, Criminal P. C. This argument is untenable on two grounds. Firstly, that it is no part of the duty of a public servant to commit acts of extortion. The decisions of the Supreme Court, the Privy Council, and this Court in connection with bribery cases clearly indicate that S. 197, Criminal P. C. has no application where a public servant takes bribe. Secondly, S. 197, Criminal P. C. refers to a public servant who can only be dismissed by the State Government or some higher authority. A choukidar and a daffadar can be dismissed by the Subdivisional Magistrate and certainly by an authority lower than the State Government.

(4) It was next urged that there was enmity between the petitioners and prosecution witness No. 7 and that the petitioners have been implicated due to that. That matter was considered by both the courts of fact and the finding is that whatever the trouble may have been, it was not of a kind which would lead the courts below to think that the complainant had made a false charge at the instigation of prosecution witness No. 7.

(5) Lastly, it was urged that the sentence was severe. I do not think so. The petitioners are choukidar and daffadar. It is their business to assist in the protection of society and not to commit an offence against society of the kind which has been proved in this case.

(6) There is no merit in the application and it is dismissed.

K.S. Revision dismissed.

A. I. R. 1952 PATNA 380

RAI, J.

Kailash Singh, Petitioner v. Sheopujan Singh and another, Opposite Party.

Civil Revn. No. 266 of 1951, D/- 21-12-1951.

(a) Civil P. C. (1908), S. 115, O. 6, R. 17 and O. 41, R. 25 — Order of remand — Revision — Contract for sale — Decree for specific performance against Hindu widow — Death of widow pending her appeal — Reversioners substituted in her place — Order of remand by appellate Court directing investigation into question of legal necessity with liberty to amend pleadings and production of fresh evidence — Interference in revision.

A obtained a decree for specific performance of a contract for sale of certain property against a Hindu widow. During the pendency of her appeal, the widow died and the reversioners were substituted in her place. The appellate court remanded the suit with a direction that after the death of the widow it had become necessary to find out whether the contract for sale was for legal necessity so as to bind the reversioners. As this matter had not been gone into the parties were given liberty to amend the pleadings and to adduce fresh evidence on that point. A applied in revision against the order.

Held that (i) the order of remand passed by the appellate court was not without jurisdiction and was justified in the circumstances. The alleged contract for sale by the widow must be prima facie taken to be a contract for sale of her life interest only. The widow having died before the execution of the sale deed the plaintiff could not claim specific performance from the reversioners upon the basis of the original contract even if it be genuine. A reversioner cannot be asked to execute a sale deed in respect of the life interest of the widow after her death. The appellate court had every jurisdiction to take the view that the question of legal necessity had to be gone into before an effective decree could be passed against the reversioners: AIR 1943 Pat 433; AIR 1947 Mad 165; AIR 1947 Bom 307; AIR 1940 All 99 (FB); AIR 1943 Pat 206 (FB), dist. (Para 7)

(ii) The amendment was necessary to shorten the litigation. The reversioners could bring a separate suit for possession on ground that they were not bound by the sale by the widow. Thus the effect of the amendment was to decide that very matter in the present suit after giving opportunity to both the parties to adduce fresh evidence: AIR 1947 Mad 165, Diss from. (Para 8)

(iii) Even if the appellate court took an erroneous view of law the High Court would not be justified in interfering with the order in revision under S. 115, Civil P. C. (Para 10)

Anno: C. P. C., S. 115, N. 12, 13; O. 6, R. 17, N. 13; O. 41, R. 25, N. 2, 14.

(b) Civil P. C. (1908), S. 2 (11) — Reversioner is legal representative.

The word "legal representative" as defined in S. 2 (11) of the Code of Civil Procedure does include a reversioner also who does not claim under the limited owner but under the absolute owner. (Para 6)

Anno: C. P. C., O. 22, R. 3, N. 10.

S. P. Srivastava, for Petitioner; B. B. Sen, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras

('40) ILR (1940) All 153: (AIR 1940 All 99 (FB)) 7
('47) AIR 1947 Bom 307: (49 Bom L R 174) 7
('47) AIR 1947 Mad 165: (1946-2 Mad LJ 373) 7, 8
('43) 22 Pat 411: (AIR 1943 Pat 206 (FB)) 7
('43) AIR 1943 Pat 433: (217 Ind Cas 49) 7
('44) L. P. A. No. 24 of 1941, D/- 6-10-1944 (Pat) 9

ORDER:— This application on behalf of the plaintiff is directed against the judgment and order dated the 16th of January 1951 passed by the 2nd Additional Subordinate Judge, Chapra, remanding the suit for fresh trial with certain directions.

(2) The facts leading to the present petition may shortly be stated as follows. The plaintiff instituted a suit for specific performance of contract for sale said to have been entered into by one Musammat Jaimurta Kuer in respect of her properties, including the residential house, for a consideration of Rs. 3500/-. According to the case of the plaintiff, the terms of the agreement between the parties had been reduced into writing in a Mahadanama, exhibit I, on the records of the case.

(3) The defendant contested the suit on various grounds. She pleaded that she had not agreed to sell any portion of the properties inherited by her from her husband and that there was no necessity at all to enter into such an agreement. She further pleaded that the plaintiff had taken her to Chapra on several occasions for taking probate of the will of her husband and in that connection he had taken her thumb impression on several plain and stamped papers, one of which appears to have been converted into the alleged Mahadanama.

(4) The suit was decreed by the trial court. The order portion of its judgment ran as follows:

"The suit be decreed on contest with costs against the defendant.....
It is declared that the defendant did enter into an agreement for executing a sale deed in favour of the plaintiff for a consideration of Rs. 3500/- with respect to the lands and the house in question and it is further declared that in pursuance of that a Mahadanama was executed and the defendant has received Rs. 500/- by way of advance. The plaintiff is ordered to pay the balance of the consideration money to the defendant within one month of this order or deposit the same in court to the credit of the defendant. On such a deposit being made, the defendant is ordered to receive the said sum of Rs. 3000/- and execute a sale deed for the lands and the house in suit for a consideration of Rs. 3500/- in favour of the plaintiff within 15 days of the said deposit or the receipt of the said consideration money by the defendant. In the event of failure, the said sale deed will be executed by the court on behalf of the defendant. If the plaintiff fails to pay the deposit the balance of the consideration money within the period prescribed he will lose his right of getting the sale deed executed. Let a decree be prepared accordingly."

(5) The defendant went in appeal. During the pendency of her appeal she died, and the present opposite party were substituted in her place. I have been told that the sale deed in question has not yet been executed. The court of appeal below has remanded the suit for a fresh decision with a direction that after the death of the defendant it had become necessary to find out whether the alleged contract for sale was for legal necessity so as to bind the reversioners. As this matter had not been

gone into, the parties were given liberty to amend their pleadings and to adduce fresh evidence on that point.

(6) In this Court, the learned advocate for the petitioner contended that the Court below had erred materially in the exercise of its jurisdiction by remanding the case with liberty to introduce the question of legal necessity in the suit. He argued that the opposite party who were substituted in place of Musammat Jaimurta Kuer should not have been permitted to set up a plea of want of legal necessity to defeat the claim of the plaintiff which could not have been raised and pleaded by the original defendant. He submitted that the substituted legal representatives were entitled to carry on the litigation in the form it had originally started. He argued that the legal representatives of the original defendant, who had been substituted at the appellate stage should not have been permitted to set up their status as reversioners because they were not substituted qua reversioners. In my opinion, there is not much force in argument advanced on behalf of the petitioner. The word "legal representative" as defined in section 2 (11) of the Code of Civil Procedure does include a reversioner also who does not claim under the limited owner but under the absolute owner.

(7) Mr. Srivastava relied upon the cases of 'KAMESHWAR SINGH v. RAJBANSI SINGH', AIR 1943 Pat 433; 'ELAYA PILLAI v. RAMASAMI JADAYA', A I R 1947 Mad 165; 'DAREPPA v. MALLAPPA', A. I. R. 1947 Bom. 307; 'RAM UGRAH v. GANESH SINGH', I. L. R. (1940) All. 153 (F. B.) and 'SADHU SHARAN v. DEONATH SARAN', 22 Pat 411 (FB). In my opinion, the observations made in those cases regarding the right of substituted legal representatives do not apply to the facts and circumstances of the present case. Here the position is different. The plaintiff obtained a decree for specific performance of a contract for sale against the limited owner. There is no doubt that the alleged contract by the limited owner must be prima facie taken to be a contract for sale of her life interest only. Now, if she died before the execution of the sale deed, I doubt if any right was left in the plaintiff to claim specific performance from the reversioners upon the basis of the original contract even if it be genuine. A reversioner cannot be asked to execute a sale deed in respect of the life interest of Musammat Jaimurta Kuer after her death. In this view of the matter, the remand order by the court of appeal below cannot be said to be without jurisdiction. It had every jurisdiction to take the view that the question of legal necessity had to be gone into before an effective decree could be passed against the reversioners. I may, however, mention that I should not be taken to have expressed any opinion that a decree can be passed against the reversioners. It will be for the trial Court to decide.

(8) Mr. Srivastava strongly relied on the case of 'ELAYA PILLAI v. RAMASAMI JADAYA', A.I.R. 1947 Mad 165, but with all respect to the learned Judge who decided that case I do not subscribe fully to the view taken by him. My own view is that amendment should be allowed to shorten litigation. It is admitted by Mr. Srivastava that the opposite party have every right to bring a suit for possession on the ground that they are not bound by the action of Musammat Jaimurta Kuer. Thus, the effect of the amendment is to decide that very matter in the present suit after giving opportunity to both the parties to adduce fresh evidence.

(9) Mr. Srivastava has further directed my attention to an unreported decision of this Court in L. P. A. 24 of 1941 decided by my Lord the Chief Justice and Chatterji, J. on the 6th of October 1944 where their Lordships refused to allow additional evidence to be put in at the Letters Patent stage. In my opinion, that decision has no bearing on the present case.

(10) Now, even if the Court of appeal below took an erroneous view of law, I do not think that I am justified in interfering with its judgment in my revisional jurisdiction as contemplated by section 115 of the Code of Civil Procedure.

(11) The result is that the application fails and is dismissed with costs; hearing fee: one gold mohur.

K.S. Revision dismissed.

A. I. R. 1952 PATNA 382

RAMASWAMI AND SINHA, JJ.

Chhatradhari Mahton and others, Appellants v. Akleshwar Mahton and others, Respondents.

A. F. O. D. No. 144 of 1946, D/- 29-11-1951.

(a) Hindu Law — Partition proved — Party alleging some property having been left out has to prove his case.

Where there has been once a partition, either proved or admitted, the presumption is that it was a complete partition both as to parties and as to property and there is no presumption in such a case that any property was excluded from partition. The presumption, however, is rebuttable, and its strength must necessarily depend upon the circumstances of each case: 35 Bom 293; AIR 1923 Cal 18; AIR 1932 Pat 105; AIR 1932 Mad 207; AIR 1938 Bom 69; 29 Pat 980, Rel. on. (Para 4)

(b) Evidence Act (1872), S. 11 — Whether property in suit was kept joint inspite of partition, a fact in issue — Sudbharna bond executed by party in favour of third person reciting partition of suit property — Plaintiff not party to document — Recital though not binding on plaintiff is relevant under S. 11 (2). (Para 5)

Anno: Evid. Act S. 11 N. 6, 9.

(c) Hindu Law — Partition — Acquisition before partition — There is no presumption that such property was excluded from partition: AIR 1923 Cal 18, Rel. on. (Para 5)

(d) Hindu law — Partition — Reopening of — Partition not shown to be unfair or fraudulent — The fact that the division was unequal is no ground for re-opening it. (Para 5)

S. C. Misra, for Appellants; Umesh Chandra Sharma: K. K. Sinha and Guneshwar Prasad, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('11) 35 Bom 293: (10 Ind Cas 911) 5
('38) AIR 1938 Bom 69: (173 Ind Cas 403) 5
('22) 36 Cal LJ 434: (AIR 1923 Cal 18) 5
('32) 55 Mad 483: (AIR 1932 Mad 207) 5
('32) 11 Pat 50: (AIR 1932 Pat 105) 5
('50) 29 Pat 980

SINHA. J.: This is a plaintiffs' appeal in a suit for partition of plaintiffs' 5 annas 4 pies share in 34.80 acres of land.

(2) The genealogy given by the plaintiffs is undisputed. Their case is that the family continued joint with Ritlal Mahton, father of defendant No. 1, as the karta till 1338 Fasli. For the sake of convenience the family separated in mess in 1330 Fasli, but the properties of the family continued joint until 1338 Fasli when all the joint family properties except the property in suit were partitioned by metes and bounds. The parties, according to the plaintiffs, are in joint possession of the property in suit, but, as inconvenience was felt in maintaining joint possession and in payment of rent, they demanded partition of the suit lands, but, on the defendants' unwillingness to get the partition effected amicably, the plaintiffs were obliged to file the present suit. Two sets of defendants have been impleaded. The defendants 1st party only contested the suit, while the defendants second party filed a written statement substantially supporting the case of the plaintiffs. According to the major defendants of the defendants 1st party, it was about 32 years before the suit that a private partition in the family had been effected by which the several branches of the family separated in mess from one another and all the joint properties except their ancestral lands were partitioned by metes and bounds. It was in 1338 that their ancestral lands were divided by punches. After the division by metes and bounds in 1338, no property was left joint between the parties. It is alleged that properties acquired by each of the cosharers after the first partition, which took place about 32 years before the suit, remained his separate property with which the other cosharers had no concern. It is said that the properties mentioned in schedules 2 and 3 of the plaint are the separate and self-acquired properties of the defendants 1st party with which the plaintiffs or the defendants 2nd party have no concern, and it is further contended that the properties mentioned in schedule 1 of the plaint, which are part of the ancestral property, had already been partitioned. The minor defendants 1st party filed written statement through their guardian-ad-litem adopting the defence put forward by the major defendants 1st party.

(2a) The learned Subordinate Judge has held that, where partition is admitted or proved, the presumption is that all the properties were divided and a person alleging that some family properties remained joint has to prove his case, and that the onus of proof in this case, on the admitted facts, was very heavy on the plaintiffs and that it was for them to prove that the property in suit was excluded from partition and was left ijmal. After a very careful consideration of the evidence, the Court below came to the finding that the plaintiffs' story of exclusion of the suit lands from the previous partition was a myth and that the plaintiffs failed to prove that the lands in suit were left ijmal. It was also held that the lands set out in schedules 2 and 3 of the plaint were the separate and self-acquired properties of the defendants 1st party and that there was a complete partition between the parties in 1338 Fasli, as alleged by the defendants 1st party. Upon these findings, the learned Subordinate Judge dismissed the suit with costs.

(3) Mr. Misra, Counsel for the appellants, contended that the Court below was wrong in dismissing the suit and in holding that there was a complete partition in the year 1338 Fasli. He also challenged the finding of the learned Subordinate Judge that the onus of proof was upon the plaintiffs. It was further contended that the learned Subordinate Judge was misled in holding that there was a complete partition in 1338 Fasli because of the recitals in exhibit B(4) and also because of there having been certain criminal cases between the parties. Mr. Misra also argued that the Court below should have held that the plaintiffs' case regarding separation in 1330 Fasli was fit to be believed and that the properties acquired in the name of Ritlal Mahton, who was the karta of the joint family before the separation in the year 1330 Fasli, were the properties of the joint family and that, therefore, the properties mentioned in schedules 2 and 3, which are claimed by the defendants 1st party as their self-acquisition, should have been partitioned between the parties. Emphasis has been laid by the learned Counsel on the fact that before separation in 1330 Fasli, the defendants 1st party or their ancestor Ritlal Mahton had no other source of income and therefore any acquisition made by Ritlal before 1330 should have been held to have been made from out of the joint family funds.

(4) In the present case, in my opinion, the onus of proving that the properties in suit were excluded from the partition of 1338 Fasli was entirely upon the plaintiffs. The plaintiffs, therefore, had to discharge a double onus so to say the onus of proving that certain properties were excluded from partition was upon them and, being plaintiffs, they had to prove their case in order to enable them to get a decree. Where there has been once a partition, either proved or admitted, the presumption is that it was a complete partition both as to parties and as to property and that there is no presumption in such a case that any property was excluded from partition. The presumption, however, is rebuttable and its strength must necessarily depend upon the circumstances of each case.

(5) The first case which I like to mention in this connection is the case of 'ANANDIBAI v. HARI SUBA', 35 Bom 293 a judgment of Chandavarkar and Heaton, JJ. That case is an authority for the proposition that,

> "according to the Hindu law, he who alleged partition must prove it, because 'once is a partition made'. If it is proved that there has been a breach in the state of union, the law presumes that there has been a complete partition both as to parties and property. The presumption in question continues until it is rebutted by proof of an agreement....."

The next case to which reference should be made is the case of 'KAILASH CHANDRA v. BIJOY CHANDRA', 36 Cal L J 434, a judgment of Mookerjee and Cuming, JJ. It is laid down therein that if, after acquisition, there was a partition, among the members of a family, there is no presumption with regard to this or other property, that it was excluded from the partition and that the burden lies upon him who alleges exclusion to establish his assertion. The next case is the case of 'SMT. PURNIMA DEBYA v. NAND LAL', 11 Pat 50 which is also

an authority for the proposition that when a partial partition is proved or admitted to have taken place, the presumption is that there has been an entire partition both with reference to rights and properties. The case of 'KUMARAPPA CHETTI v. ADAIKKALAM CHETTY', 55 Mad 483 and that of 'NARMADABAI TULSIRAM v. RUPSING BHILA', AIR 1938 Bom 69 are also to the same effect. The latest case of our own Court is reported as 'RAMJUGESHWAR v. GAJADHAR', 29 Pat 980 where my Lord the Chief Justice delivered the judgment to which Reuben. J. agreed. The facts of that case were very much similar to the facts of the present case, and the authority of '55 Mad 483', and several other cases to which I have already made reference was approved. There is thus no doubt that the onus of proving exclusion of the properties in suit after once there has been a partition of the joint family properties was upon the plaintiffs. The plaintiffs had, therefore, to prove that. in spite of the partition in 1338 Fasli, the properties in suit still remained the joint property of the parties.

In my opinion, the plaintiffs have entirely failed to prove the same. There is no documentary evidence to prove that there was any agreement between the parties at the time the previous partition in 1338 Fasli was made to exclude the properties in suit from partition, and the oral evidence on behalf of the plaintiffs (P. W. 5 and some other witnesses) is unworthy of reliance. In their plaint, the plaintiffs merely alleged that in the year 1338 Fasli a private partition was effected in respect of the joint properties save and except those mentioned in schedules 1, 2 and 3 of the plaint (paragraph 5 of the plaint). There is no mention as to the reason or reasons why the properties in suit were excluded from partition. This gap in the pleadings was unsuccessfully sought to be filled up by the evidence. It was sought to be proved that these properties were left joint so that there might be convenience in payment of a certain debt of the family which amounted to Rs. 3,000 payable by the cosharers to one Gopal Chaudhuri. I have no hesitation in accepting the reasons given by the learned Subordinate Judge for disbelieving this story of the plaintiffs. This story. as has been observed by the learned Subordinate Judge. was most improbable and no Court could accept the same. It had been contended that the Court below was wrong in placing any reliance upon the recital in exhibit B(4). This document is a sudbharna bond executed by Pardip Mahton and others, defendants 2nd party, in favour of one Ratinath Pathak on the 2nd October. 1931. In paragraph 5 of the said document, it is recited that the defendants 2nd party, Ritlal Mahto, the ancestor of defendants 1st party and Vidaya Mahton of the plaintiffs' branch, who is since dead, that is, all the members of the joint family, who had for a few years been separate in mess. business and monetary transaction. had divided amongst themselves the ancestral and recently purchased nami and benami properties by virtue of a private partition and every one was in possession of his apportioned share, other persons having no concern therewith. In my opinion, the recital, though not binding on the plaintiffs, it not being a document inter partes, is still admissible in evidence being relevant under section 11, sub-clause (2) of the Evidence Act which runs as follows:

"Facts not otherwise relevant are relevant—

(1) .....

(2) If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable."

The fact in issue is whether the property in suit was kept joint between the parties even after the partition and the recital in this document, in my judgment, makes it probable that no property was excluded from the partition in 1338 Fasli. Mr. Misra tried to make a capital of the statement made by D. W. 3 to the effect that Ritlal, Chhatradhari or Ranglal had no source of income except cultivation. There is no evidence of any other witness to corroborate the same, and this witness appears to have had no concern with the family of the parties. But, apart from it, in the view which I have taken of the evidence given by the plaintiffs in regard to the exclusion of the properties in suit from the previous partition, this question or any other question raised by the learned Counsel is of no importance.

I am satisfied upon the evidence that the plaintiffs have failed to prove that the properties in suit were excluded from the partition of 1338 Fasli and that they were in joint possession of the same at the time when they brought the suit. Learned Counsel referred to exhibits C (5) and A (15) to show that some of the properties covered by the suit in village Bichhi were purchased before the separation of the joint family status in 1330 Fasli. That may be so, but the acquisitions having been made before the partition of 1338, there is no presumption that those properties, though acquired before partition, were excluded in the partition of 1338 Fasli '36 Cal L J 434', and the plaintiffs having failed to prove their joint possession over these properties, they cannot succeed.

It was also faintly argued that the division of property among the several branches was unequal. That may or may not be so, and even conceding that the division was unequal, the partition cannot be reopened in the absence of any proof by the plaintiffs of the circumstances in which such unequal division came to be made, and it is not possible for the Court to say, in the absence of evidence, that the partition. as effected in 1338 Fasli, was unfair and fraudulent or that by some mistake or error the properties in suit were excluded from partition.

(6) I would accordingly uphold the findings of the Court below and affirm its judgment and decree.

(7) In the result the appeal must be dismissed with costs.

(8) RAMASWAMI. J.: I agree.

R.G.D. Appeal dismissed.

A. I. R. 1952 PATNA 384

LAKSHMIKANTA JHA C. J. AND REUBEN J.

Jaipal Singh and others, Appellants v. Bharat Narain and others. Respondents.

Letters Patent Appeal No. 6 of 1950 D/- 18-12-1951. from decision of Narayan, J. D/- 25-11-1949.

Registration Act (1908). S. 49 — Unregistered deed which is compulsorily registrable — Use of — There is no distinction in use as sword or shield — Unregistered lease deed — Settlee entering into possession on basis thereof — He is a trespasser.

There is nothing in S. 49, to suggest the contention that an unregistered document, which is compulsorily registrable, may be used as a shield when the party is impleaded as a defendant. There is no distinction drawn between the use of the document by way of a sword and its use as a shield. Under the proviso to S. 49, however, it is admissible for a collateral purpose. That, compulsorily registrable documents which have not been registered can be so used, is clear from the section itself. Under the law, an unregistered written lease cannot vest a legal title in the settlees. Where the settlees have entered on the property under such document, they did it as trespassers. Therefore, even if the fact of these settlements by unregistered lease is established, the settlor would still be entitled to a decree for possession, when the evidence of the defendants that they have been recognised by the plaintiff as tenants and that rent was received from them, is disbelieved. The unregistered deed cannot be used as a shield by them. Such a deed cannot be taken as evidence of possession.

(Paras 3, 4, 5)

Anno: Registration Act, S. 49 N. 14 and 25.

Prem Lall and K. D. De, for Appellants; Bindeshwari Prasad Sinha and Chandreswar Prasad Singh for Shyam Nandan Sinha, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('19) 46 Ind App 285: (AIR 1919 PC 44) 4
('24) 3 Pat 349: (AIR 1924 Pat 641) 4
('26) 5 Pat 40: (AIR 1926 Pat 184) 4
('34) 13 Pat 111: (AIR 1934 Pat 127) 4
('39) 20 Pat LT 399: (AIR 1939 Pat 488) 4, 5
('40) AIR 1940 Pat 498: (187 Ind Cas 583) 4
('40) 21 Pat LT 1063: (AIR 1941 Pat 167) 4, 5
('45) 24 Pat 429: (AIR 1946 Pat 22) 4
('50) 29 Pat 628: (AIR 1951 Pat 277) 4
('51) AIR 1951 Pat 613 4

REUBEN J: This appeal by the defendants arises out of a suit for declaration of title to, and recovery of possession of certain lands in village Islampur Begampur, 'touzi' No. 10034, which was formerly owned in equal shares by Mt. Bibi Hazra and one Jamil Ahmad. Bibi Hajra transferred her share to the plaintiffs on the 18th of December 1941 at a time when it was in 'Zarpeshgi thika' with defendant No. 1. The plaintiffs deposited the zarpeshgi money after the purchase and got 'khas' possession. Subsequently, on the 15th of January 1942, defendant No. 1 purchased the eight annas share of Jamil Ahmad. The suit was filed by the plaintiffs claiming the suit lands as 'bakasht'. With respect to the lands in schedule 2. the claim is that they were purchased by Bibi Hajra and that the entire interest in them has now passed to the plaintiffs. As regards the lands in schedule 3. the claim is that they were purchased jointly by Jamil Ahmad and Bibi Hajra, and the plaintiffs have a share of eight annas in them. The claim of the plaintiffs was contested by some of the defendants, who pleaded that they have acquired 'raiyati' rights in them under settlements made by the original proprietors. The defence has succeeded as regards a portion of the suit property. We are concerned only with the lands of 'khatas' Nos. 245, 257, 258. and 263 which, according to the defence were settled with Noonoo Singh appellant on the 22nd of June 1934 and of 'khatas' 278, 249 and 247 alleged to have been settled jointly with Hazari Singh deceased and Sital Dhanuk appellant, by Bibi Hajra and Jamil Ahmad on the 15th of June 1937. The sons of Hazari Singh are appellants. The defence story has not been accepted by the Courts below so far as these lands are concerned and to that extent the suit has succeeded.

(2) The only point which arises in this case is whether the decision of the Courts below is affected by the exclusion from evidence of the unregistered 'hukumnamas' by which the settlements of these lands are said by the defence to have been made.

(3) It is admitted that, under clause (d) of sub-section (1) of S. 17, Registration Act, these 'hukumnamas' were compulsorily registrable, but, it has been contended that non-registration merely prevents a party from going to Court as a plaintiff and seeking to establish his title on the unregistered document; it may, however, be used as a shield when the party is impleaded as a defendant. I see nothing in the provisions of section 49, Registration Act, to support the contention. The section provides that such a document shall not (a) affect any immovable property comprised therein, or (b) confer any power to adopt, or (c) be received as evidence of any transaction affecting such property or conferring such power. There is no distinction drawn between the use of the document by way of a sword and its use as a shield.

(4) There is more force in the contention that the Courts below erred in excluding the 'hukumnamas from the record because, under the proviso to section 49, they are admissible for a collateral purpose. That compulsorily registrable documents which have not been registered can be so used is clear from the section itself, and what is "collateral use" has been explained in several reported decisions. It may be used to prove the nature and character of possession 'VARADA PILLAI v. JEEVARATHNAMMAL', 46 Ind. App. 285 (PC); 'JANKIKUER v. BIRJ BHIKHAN', 3 Pat. 349 or to prove separation and the status of parties 'BESAR KUER v. RAMHIT SINGH', 21 Pat. L T. 1063. From the argument before us, it appears that it is not for any such purpose that the appellants now want to rely on these documents. Both the Courts of fact have disbelieved all the admissible evidence given on behalf of the defendants to support the story of the settlements. It is urged that, it is possible that they might have accepted this evidence if the two 'hukumnamas' had been brought on the record. In other words, the appellants want that the 'hukumnamas' should be taken as evidence of the settlements. This would appear to be contrary to the provisions of clause (c) of S. 49, Registration Act, and is not supported by any of the decisions to which reference has been made, in all of which possession was either admitted or was proved on other evidence. This was so in the three cases which I have mentioned above. It was also the case in 'KUER RAI v. BABU RAM KUER', AIR 1940 Pat. 498, where it was explained that an unregistered 'patta' may be used to explain the nature of possession. The unregistered documents were found to have been used for this limited purpose in 'BALDEO SINGH v. MUHAMMAD AKHTAR', 20 Pat. L. T. 399. The other cases which have been cited before us really have no bearing on the matter. 'LOKNA-

TH v. CHHOTAN,' 24 Pat 429 is merely an authority that an agricultural lease may be created by a registered 'kabuliyat' executed by a lessee and accepted by the landlord. 'SMT. PEARI DAI v. NAIMISH CHANDRA', 5 Pat. 40 was decided on considerations of equity, and in 'JAGDEO SAHU v. MAHABIR PROSAD', 13 Pat. 111 the unregistered document was merely used to prove a collateral agreement. In 'NARAYAN PRASAD v. RAJKISHORE', A. I. R. 1951 Pat. 613, I held that the document in question was not compulsorily registrable and merely observed that, if it had been, it would still be admissible to explain the nature of the possession of the plaintiffs. Similarly, the question of the use of an unregistered partition deed did not arise in 'GIRIJA v. GIRDHARI', 29 Pat. 628 as their Lordships found that the finding of separation in status and partition by metes and bounds was based on evidence independent of the unregistered document. In the course of his judgment, Sarjoo Prosad, J. considered the extent to which an unregistered partition deed may be used, and came to the conclusion that it may be used for a collateral purpose.

(5) The view I am inclined to take is supported by the observation in 'BESAR KUER'S CASE', (21 Pat. L. T. 1063) ('supra') that an unregistered partition deed is inadmissible to prove partition or possession of property on partition." It also finds support in the observation of Varma, J. in 'BALDEO SINGH'S CASE', (20 Pat. L. T. 399.) (supra):

> "Had the Court below taken the date of the unregistered sale deed as the starting point of the adverse possession there might have been something to be said on behalf of the plaintiffs".

A further discussion of the point, however, is academical in view of the fact that both the documents relied on, are within the period of limitation for bringing a suit in ejectment. Under the law, an unregistered written lease cannot vest a legal title in the defendants. Therefore, even if settlements were made as alleged, the settlees entered on the property as trespassers. Their evidence that rent was subsequently received from them and that they have been recognised as tenants has been disbelieved by both the courts. Therefore, even if the fact of these settlements by unregistered leases, had been established, the plaintiffs would still have been entitled to a decree.

(6) The appeal fails and is dismissed with costs.

(7) LAKSHMIKANTA JHA C. J. :— I agree.

R. G. D. Appeal dismissed.

A. I. R. 1952 PATNA 386

LAKSHMIKANTA JHA C. J. AND CHATTERJI J.

Lachhman Prasad Bhagat, Petitioner v. Government of Bihar and others, Opposite Party.

Supreme Court Appeal No. 4 of 1951, D/- 22-11-1951.

(a) Constitution of India, Art. 226 — Writ of mandamus — Application under S. 13 of Police Act — Prayer in application refused — Issue of writ — (Police Act (1861), S. 13).

Section 13, Police Act, gives statutory protection to the Police Officers named therein if any of them deputes, subject to the general direction of the Magistrate of the district, any additional police force to keep the peace at any place within the general police district, on the application of any person at his cost. But if the authorities named in the section, in the exercise of their discretion, do not consider it necessary to depute additional police force for the maintenance of peace and order, the person aggrieved or interested cannot claim protection as of right, even if he shows the necessity for the same and undertakes to meet the cost. If the prayer is not granted the petitioner can seek protection of his right under the provisions of Criminal P. C., or seek remedy in a civil Court, and as another remedy is open to him a writ in the nature of mandamus cannot be granted. (Para 3)

Anno: C. P. C. Appendix III; Constitution of India, Art. 226 N. 11; Police Act, S. 13 N. 1.

(b) Constitution of India, Arts. 132 (1) and 133 (1) (c) — "It shall be lawful" in S. 13, Police Act — Wrong interpretation of — Leave to appeal — (Police Act (1861), S. 13).

The Police Act was enacted to reorganize the police and to make it a very efficient instrument for the prevention and detection of crime, and S. 13 gives a statutory protection to the authorities if they act in the manner provided therein. It imposes no obligation on any of them to exercise the power if they do not consider it necessary to do so. It cannot, therefore, be contended that the use of the expression "It shall be lawful" in S. 13 of the Police Act makes it obligatory on the officers concerned to act in the manner indicated in the section and failure to act in such a manner entitled the person aggrieved to ask for a writ. But assuming that the contention is right, the question involved is one of interpretation of S. 13 of the Police Act; and even if the High Court be held to have rejected the application of the petitioner for the issue of a writ of mandamus on a wrong interpretation of the statute, leave to appeal cannot be granted under the provision of Art. 132(1) of the Constitution because no question of law as to the interpretation of the Constitution arises. Nor can leave be granted under Art. 133 (1) (c) of the Constitution, because the High Court has not passed any order in a civil proceeding nor is any matter of wide public importance involved in the case. (Para 4)

Anno: C. P. C., Appendix III; Constitution of India, Art. 132 N. 1; Art. 133 N. 6.

Gopal Prasad and T. R. Bajaj, for Petitioner; Lalnarayan Sinha, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras

('50) 29 Pat 491: (AIR 1950 Pat 387: 51 Cri LJ 1509 FB) 3

('51) 30 Pat 287: (AIR 1952 Pat 23) 3

ORDER: The petitioner moved this Court under Art. 226 of the Constitution and prayed for issue of writ or direction in the nature of mandamus to the opposite party, but the application was summarily dismissed by a Division Bench. We are asked to certify under Article 132 (1) of the Constitution that the case involves a substantial question of law as

to the interpretation of the Constitution, or, at any rate, to certify that it is a fit case for appeal to the Supreme Court within the meaning of Article 133 (1) (c) of the Constitution.

(2) The facts material to the point raised before us are shortly these: The petitioner claims to have raised, as 16 annas landlord, paddy and rabbi crops on his 'bakasht' and 'ghairmazrua' land measuring about 100 bighas in village Kathra, police station Bahera, in the district of Darbhanga. His case is that in spite of a civil court decree in his favour in respect of the land and delivery of possession thereof the refractory tenants of the village removed the paddy crop from a portion of the land on the 1st December 1949. Apprehending further trouble on account of the highhanded act of the tenants, he moved the District Magistrate of Darbhanga on the 2nd December 1949, to give him protection under the Police Act. The District Magistrate ordered the Subdivisional Officer to proceed to the spot immediately and maintain the peace.

The Subdivisional Officer deputed a Magistrate to proceed to the spot and requisitioned additional police force from the Superintendent of Police, but in spite of the order of the District Magistrate and of the Subdivisional Officer no additional police force was deputed, with the result that lawlessness continued in the village and paddy and timber worth about Rs. 20,000 were damaged and looted away from the petitioner's bakasht land. The petitioner's contention is that failure of the police and the executive authorities to give legitimate protection by deputing an additional police force was a breach of statutory duty on their part and as such the petitioner was entitled to ask for a writ in the nature of mandamus on the opposite party and that this Court was wrong in summarily rejecting the application of the petitioner under Article 226 of the Constitution. Reliance has been placed in support of this contention on Section 13 of the Police Act, 1861 (Act V of 1861) which runs as follows:

"It shall be lawful for the Inspector-General of Police, or any Deputy Inspector-General, or Assistant Inspector-General, or for the District Superintendent, subject to the general direction of the Magistrate of the district, on the application of any person showing the necessity thereof, to depute any additional number of police-officers to keep the peace at any place within the general police-district, and for such time as shall be deemed proper. Such force shall be exclusively under the orders of the District Superintendent and shall be at the charge of the person making the application.

Provided that it shall be lawful for the person on whose application such deputation shall have been made, on giving one month's notice in writing to the Inspector-General, Deputy Inspector-General, or Assistant Inspector-General, or to the District Superintendent, to require that the police-officers so deputed shall be withdrawn; and such person shall be relieved from the charge of such additional force from the expiration of such notice."

(3) We think there is no substance in this contention. Section 13 gives statutory protection to the police officers named therein if any of them deputes, subject to the general direction of the Magistrate of the district, any additional police force to keep the peace at any place within the general police district, on the application of any person at his cost. But if the authorities named in the section, in the exercise of their discretion, do not consider it necessary to depute additional police force for the maintenance of peace and order, the person aggrieved or interested cannot claim protection as of right, even if he shows the necessity for the same and undertakes to meet the cost. In the case before us, although the attention of the District Magistrate as also of the police officers and other authorities was repeatedly drawn to the situation, it was not considered necessary by the officers concerned to grant the prayer of the petitioner. If the prayer was not granted, the petitioner could seek protection of his right under the provisions of the Code of Criminal Procedure or seek remedy in the civil court. It has been held repeatedly by this Court that if another remedy is open, a writ in the nature of mandamus cannot be granted: Vide 'BUKHTIARPUR BIHAR LIGHT RLY. CO. LTD. v. DISTRICT BOARD, PATNA', 30 Pat. 287 and 'BAGARAM v. STATE OF BIHAR', 29 Pat 491 (F.B.).

(4) It is contended that the use of the expression "It shall be lawful" in Section 13 of the Police Act makes it obligatory on the officers concerned to act in the manner indicated in the section and failure to act in such a manner entitles the person aggrieved to ask for a writ. There is, in our view, no substance in this contention. Act V of 1861 was enacted to reorganize the police and to make it a very efficient instrument for the prevention and detection of crime, and Section 13 gives, as already stated, a statutory protection to the authorities if they act in the manner provided therein. It imposes no obligation on any of them to exercise the power if they do not consider it necessary to do so. But assuming that the contention is right, the question involved is one of interpretation of S. 13 of the Police Act; & even if this Court be held to have rejected the application of the petitioner on a wrong interpretation of the statute, leave to appeal cannot be granted under the provision of Article 132 (1) of the Constitution because no question of law as to the interpretation of the Constitution arises. Certificate is accordingly refused under Article 132 (1) of the Constitution. Nor can leave be granted under Article 133 (1) (c) of the Constitution, because this Court did not pass any order in a civil proceeding, nor is any matter of wide public importance involved in the case. The application is accordingly dismissed with costs; Hearing fee five gold mohurs.

A/ V.R.B. Application dismissed.

A. I. R. 1952 PATNA 387

JAMUAR AND RAI JJ.

Gaurishankarji and another, Appellants v. Radha Gobind Singh, Respondent.

A. F. A. D. No. 2019 of 1950, D/- 17-4-1952.

Deed — Construction — Lease — Right to minerals.

A lease provided as follows "That you, together with your sons, grandsons, etc. and representatives in succession, shall enjoy and

possess the entire leasehold land, as you like, by holding khas possession thereof, by settling the same with tenants, by reclaiming the 'patis' lands to culturable lands, by constructing kutcha and pucca houses, well, tanks, 'bandh', bricks, brick kiln, lime kiln, etc., in the lease hold land as you like or by getting the same done (by others) and by installing machinery and factory houses, according to necessity and be competent to gift away and sell the same according to your sweet will". At the end of the document, however, the following condition was imposed: "You (the lessee) shall have no concern with the underground minerals, stones, etc. of the leasehold land".

Held that, on the true construction of the lease, the lessee had not been given any right in the underground minerals, stones etc. The right to make bricks, brick kilns and lime kilns as granted in the lease was limited to the making of bricks and brick kilns for domestic purposes, that is, for use in the construction of houses on the leased land, and that it was not an unrestricted or unlimited right to manufacture bricks for commercial purposes and to take them out of the land and dispose them of to strangers: AIR 1943 Pat 31, AIR 1941 Pat 13, AIR 1917 PC 163 Rel. on. (Paras 10, 11)

B. C. De and R. Chaudhury, for Appellants; S. C. Mazumdar and S. K. Mazumdar, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('18) 45 Cal 87: (AIR 1917 PC 163) 10
('32) 59 Cal 80: (AIR 1931 PC 162) 9
('41) 20 Pat 96: (AIR 1941 Pat 13) 9
('43) AIR 1943 Pat 31: (203 Ind Cas 442) 9

JAMUAR, J.: This is an appeal from a judgment and decree of the Additional District Judge of Purulia, dated the 7th August 1950, decreeing the plaintiff's suit and thus reversing a decision of the Additional Subordinate Judge of Purulia, dated the 11th September 1948, by which the suit had been dismissed.

(2) The defendants are the appellants. The plaintiff is mukarraridar of village Kapali. He had granted a darmukarrari lease to Ramdasji, the father of the defendants, by executing a deed on the 22nd December 1918, with respect to 2100 bighas odd of land at an annual rental of Rs. 530/- besides cess. It is the plaintiff's case that the defendants have been contravening certain terms of the darmukarrari lease. The suit was, therefore, brought for a declaration that the defendants have no right to the mines, minerals and sub-soil in the lands given in darmukarrari, and for the issue of a permanent injunction restraining them from manufacturing bricks and making brick kilns and lime kilns on the land for commercial purposes and from taking away stones, moram etc., by removing the same and selling them. There was a further claim for damages in respect of the bricks, stone chips, etc., already removed from the land and sold.

(3) The defendants' case was that in their darmukarrari lease, there is an express grant made to the effect that they have the unrestricted right of manufacturing bricks and preparing brick kilns, lime kilns etc., for commercial purposes. They alleged that they had been preparing bricks in this manner since 1919, and had been selling them to the Tatas. They also claimed a right to collect stones, moram etc. and to work the same by quarries and to appropriate them.

(4) The learned Additional Subordinate Judge, who tried the suit, held that the defendants had been preparing bricks on the land and selling them not since the year 1919, as alleged by them, but since some four years prior to the institution of the suit. The learned Additional Subordinate Judge further held that, under the terms of the darmukarrari lease, the defendants have a right to manufacture bricks for commercial purposes; but the claim of the defendants that they have a right to collect and sell stone chips and moram was denied. On these findings, the learned Additional Subordinate Judge dismissed the suit.

(5) On appeal to the Court below, the learned Additional District Judge decreed the suit declaring the plaintiff's right to the mines, minerals and sub-soil in the property in dispute, and permanently restraining the defendants from manufacturing bricks or preparing brick kilns or lime kilns on the land for commercial purposes or from taking away stone, moram, etc. by removing the same. He further ordered that the amount of damage suffered by the plaintiff on account of the defendants having manufactured bricks for commercial purposes and having sold stones and moram if any, shall be determined in a subsequent proceeding.

(6) The only point which was argued in this appeal was whether, on the terms of the darmukarrari lease granted to the defendants, the defendants can claim a right to manufacture bricks upon the land leased out to them for commercial purposes. Obviously, this question must depend upon the interpretation of the lease itself.

(7) The lease is in Bengali language; but we have before us a translation of it in English. The correctness of this translation is not challenged. The relevant portions of this document are these. One passage is as follows:

"That you, together with your sons, grandsons, etc., and representatives in succession, shall enjoy and possess the entire leasehold land, as you like, by holding khas possession thereof, by settling the same with tenants, by reclaiming land (?) the 'patis' lands to culturable lands, by constructing kutcha and pucca houses, well, tanks, bandh, bricks, brick kiln, lime kiln, etc., in the leasehold land as you like or by getting the same done (by others) and by installing machinery and factory houses, according to necessity and be competent to gift away and sell the same according to your sweet will".

(8) At the end of the document, however, the following condition is imposed: "You (the lessee) shall have no concern with the underground minerals, stones, etc., of the leasehold land". Mr. B. C. De, for the appellants, argued that in the absence of a definite restriction imposed upon the lessee forbidding him from manufacturing bricks for commercial purposes, the plaintiff can have no right to restrain the lessee or his successors in interest from doing so and selling bricks to persons residing even outside the premises leased. He urged that the lease granted to the lessee the

right to use the land demised in whatever manner he chose, including the right to construct brick kilns, lime kilns etc. In that view of the matter, he contended, the appellants are entitled to prepare bricks on the leasehold property, and sell them to the Tatas as they are doing.

(9) We have read and re-read the document constituting the lease, and we have to decide the question as to what is the true interpretation of the terms of the lease. Bearing in mind the law regarding sub-soil rights, the right of a tenant to make bricks for his own domestic or agricultural purposes, that is, for his own use on his tenure or holding, cannot be questioned; but it is a different thing for a tenure-holder to claim the right to dig earth for the manufacture of bricks and to take them away and sell them to strangers: this the tenure-holder cannot claim to do as a matter of right. In the case of 'PURNENDU NARAYAN v. NARENDRA NATH', A. I. R. 1943 Pat. 31 the law was stated as follows:

> "The legal position with respect to sub-soil rights in a tenure is that these will be assumed not have been granted unless an express grant is made.....Of course, the right of a tenant to make bricks for his own domestic or agricultural purposes, i.e., for his own use on his tenure or holding, is not questioned; and a right of quarrying, it seems, can be acquired by adverse possession: vide 'BHUPENDRA NARAYAN v. RAJESWAR PROSAD', 59 Cal. 80 (PC). But unless the tenant has acquired by grant or by adverse possession a right of ownership in the sub-soil, the digging of earth for bricks to be taken away from the area of the tenure and disposed of to strangers, is an appropriation of the corpus of the grant which in India a tenure-holder is not entitled to make".

That case referred to the case of 'KUSUM KAMINI v. JAGDISH CHANDRA', 20 Pat 96 in which it was also pointed out that, apart from statute, a lease which does not in terms give to the lessee rights in the sub-soil gives to the latter no proprietary right in the soil. Construing the lease in the present case, in my judgment the lessee had not acquired any right in the sub-soil on the terms of the lease. The lessee, not having been given the proprietary right in the sub-soil, cannot claim any right to dig the sub-soil, and to make use of it in whatever manner he likes.

(10) Mr. De also contended that, if there was any ambiguity in the interpretation of the lease, it should be interpreted in a way favourable to the lessee, and in this connection he referred to paragraph 327 at page 260, Volume 10, of Halsbury's Laws of England (Hailsham Edition). The paragraph commences with the following words:

> "If a doubt arises upon the construction of a grant and the doubt can be removed by construing the deed adversely to the grantor, this will be done. The words of a deed, executed for valuable consideration are to be construed, as far as they properly may, in favour of the grantee".

Reading the document in question, I do not think that there is any question of any doubt arising in its construction or in the construction of the intention of the parties to the lease. If the appellants are given the unrestricted right to dig the sub-soil and prepare bricks for commercial purposes, in course of time the surface of the property demised will be subjected to so many excavations that the property will become entirely useless, and thereafter the lessee may abandon or surrender the property causing irreparable damage to the lessor. This could never have been the intention of the parties at the time of the grant of the lease. As was pointed out by their Lordships of the Judicial Committee in the case of 'GIRIDHARI SINGH v. MEGH LAL', 45 Cal 87 (PC):

> "It must be borne in mind also that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear".

Where a person wishes to take lease of a piece of land for the purpose of making bricks, and that too for commercial purposes, such a term should be the subject of a special agreement between the parties. The lease should be read as a whole, so that no part is inconsistent with the other, and I am of the opinion that, on the true construction of the lease, the lessee had not been given any right in the underground minerals, stones etc. In the same case before their Lordships of the Privy Council, it was also pointed out that it must be presumed that the mineral rights remain in the zamindar, in the absence of proof that he had parted with them.

(11) In view of all these considerations, I am of the opinion that the learned Additional District Judge was right in his conclusion that the right to make bricks, brick kilns and lime kilns as granted in the lease is limited to the making of bricks and brick kilns for domestic purposes, that is, for use in the construction of houses on the leased land, and that it is not an unrestricted or unlimited right to manufacture bricks for commercial purposes and to take them out of the land and dispose them of to strangers.

(12) I would accordingly dismiss this appeal with costs.

(13) RAI, J.: I agree.

C/ D.H. Appeal dismissed.

A. I. R. 1952 PATNA 389

DAS J.

Mahadeb Mukherjee, Petitioner v. Jagannath Prasad Sinha, Opposite Party.

Criminal Revn. No. 1006 of 1951, D/- 16-1-1952.

Criminal P. C. (1898), S. 197 — "While acting or purporting to act in the discharge of his official duty."

The test is not merely the official character of the person doing the act, but the test is whether the nature of the act is such as to lie within the scope of the doer's official duty. One S filed a petition in the Court of the Subdivisional Magistrate of Purulia. 'S' said in his application that he was in great difficulties and the paddy crops would be destroyed if he were not allowed to take water from certain tanks in the village. One of

the tanks in question was called Bhubirsair. At the time when the aforesaid application of S was moved, the complainant was present in Court. He was a co-sharer owner of the said tank. The Subdivisional Magistrate asked the complainant to allow S to irrigate his paddy crop from the said tank & give his permission in writing so that S might irrigate his paddy crop from the tank in question. The complainant said that he could not do so without consulting his co-sharers. The Subdivisional Magistrate became furious, and in the presence of several persons threatened the complainant in the following words "I shall give orders for shooting if you do not allow water. You are taking a dog-in-the-manger policy. I shall not give you a single grain at the time of Government help, and I know that you will be in need of foodgrains surely. I shall send armed force; I shall ruin your family, though I know my order is illegal".

Held that it was not part of the official duty of the Subdivisional Magistrate of Purulia to pass any order for the irrigation of the paddy crop of a private person from a tank which belonged to a private person. Secondly, even if the Subdivisional Magistrate had authority to pass an order for irrigation of the paddy crop of S from the tank of the complainant, it was no part of the Official duty of the Subdivisional Magistrate to use the words which he used against the complainant: Case law discussed. (Paras 3, 4)

Anno: Cr. P. C. S. 197 N. 6.

Basanta Chandra Ghose and S. K. Mazumdar, for Petitioner; K. P. Varma, for Opposite party.

REFERENCES: Courtwar/Chronological/ Paras

('48) 75 Ind App 41: 1948 FCR 19: (AIR 1948 PC 128): 49 Cri LJ 503 3

('49) AIR 1949 PC 117: (50 Cri LJ 395) 3

('39) 1939 FCR 159: (AIR 1939 FC 43): 40 Cri LJ 468 3

('44) 1944 FCR 262: (AIR 1944 FC 66: 45 Cri LJ 755) 3

('45) 1945 FCR 227: (AIR 1946 FC 25: 47 Cri LJ 838) 3

('46) 1946 FCR 123: (AIR 1946 FC 9: 48 Cri LJ 155) 3

('51) Chun Chun Pathak v. State of Bihar, D/- 4-10-1951 (S.C.) 3

('34) AIR 1934 All 978: (36 Cri LJ 331) 3

ORDER: This application in revision, is directed against an order of the learned Deputy Commissioner of Manbhum, dated the 20th of February 1951 by which order the learned Deputy Commissioner dismissed a petition of complaint, which had been filed by the present petitioner against the Subdivisional Magistrate of Purulia, on the ground that no cognizance could be taken of the offence except with the previous sanction of the State Government. The principal question for consideration and decision on the present petition is whether the courts below were right in holding that the previous sanction of the State Government was necessary under the provisions of Section 197 of the Code of Criminal Procedure, before cognizance could be taken on the petition of complaint filed by the petitioner.

(2) The short facts out of which the present petition arises are these. On the 31st October 1950 one Satya Kinker Banerji, a Mukhtear, filed a petition in the court of the Subdivisional Magistrate of Purulia in which he alleged that an order had been passed by the Magistrate on a previous application of his for the irrigation of his paddy lands from certain private tanks in village Nadiha, police station Para. Satya Kinker Banerji said in his application that he was in great difficulties and the paddy crops would be destroyed if he were not allowed to take water from certain tanks in the village. One of the tanks in question was called Bhubirsair. The petitioner before me is another mukhtear practising in the courts at Purulia. It appears that at the time when the aforesaid application of Satya Kinker Banerji was moved, the present petitioner was present in court. He was a co-sharer owner of the said tank.

The learned Subdivisional Magistrate asked the petitioner to allow Satya Kinker Banerji to irrigate his paddy crop from the said tank. There was some discussion or conversation between the present petitioner and the Subdivisional Magistrate about the matter. Apparently, there is a divergence of opinion as to what transpired at the discussion or conversation. As the courts below did not consider the petition of complaint on merits and gave no finding as to what transpired at the discussion or conversation, I am not in a position to express any opinion on that matter. The petition of complaint was dismissed on a legal ground only, and I shall confine myself to that legal ground. The allegation of the petitioner was that the Subdivisional Magistrate asked the petitioner to give his permission in writing so that Satya Kinker Banerji might irrigate his paddy crop from the tank in question. The petitioner said that he could not do so without consulting his co-sharers.

On this, it is said, the learned Subdivisional Magistrate became furious, and in the presence of several persons threatened the petitioner in the following words:

> "I shall give orders for shooting if you do not allow water. You are taking a dog-in-the-manger policy. I shall not give you a single grain at the time of Government help, and I know that you will be in need of foodgrains surely. I shall send armed force; I shall ruin your family, though I know my order is ilegal."

The contention of the petitioner is that the words were defamatory and amounted to criminal intimidation. It appears that the petitioner first moved the Bar Associations of Purulia and then made an application to the Chief Secretary to the Government of Bihar for sanction to prosecute the Subdivisional Magistrate. The petitioner did not, however, get a satisfactory reply from the Chief Secretary, and on the 13th of February 1951, the petitioner filed a written complaint to the Deputy Commissioner of Manbhum.

In this complaint, the petitioner stated that the words used by the Subdivisional Magistrate against him amounted to offences under Sections 506, 504, and 500. Indian Penal Code, and that he was advised that no sanction under Section 197, Code of Criminal Proce-

dure, was necessary. The learned Deputy Commissioner did not examine the petitioner on oath, as he wished to examine the question whether the previous sanction of the State Government under the provisions of Section 197, Code of Criminal Procedure, was necessary or not. The learned Deputy Commissioner heard the petitioner's advocate and the Assistant Public Prosecutor on the 14th of February 1951, and on the 20th February 1951, he dismissed the petition of complaint under Section 203, Code of Criminal Procedure, on the ground that the previous sanction of the State Government was necessary. The petitioner then moved the learned Sessions Judge of Purulia, who also held that the previous sanction of the State Government was necessary under the provisions of Section 197, Code of Criminal Procedure. The petitioner has now moved this Court for setting aside the orders of the courts below.

(3) Mr. Basanta Chandra Ghose, appearing for the petitioner, has contended that the courts below were wrong in holding that the previous sanction of the State Government was necessary before cognizance could be taken of the offences alleged by the petitioner against the Subdivisional Magistrate of Purulia. Mr. K. P. Verma, appearing for the State of Bihar, has contended that the Courts below were right in their view of the provisions of Section 197, Code of Criminal Procedure. Section 197 of the Code of Criminal Procedure, so far as it is relevant for our purpose, is in these terms:

"197. (1)—When any person who is a Judge within the meaning of Section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a State Government or the Central Government, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction—

(a) in the case of a person employed in connection with the affairs of the Union, of the Central Government; and

(b) in the case of a person employed in connection with the affairs of a State, of the State Government."

The Courts below principally relied on a decision of the Allahabad High Court in 'SUKHDEO v. EMPEROR', A.I.R. 1934 All. 978, where the test laid down was whether the officer at that particular moment was actually engaged in or purported to be engaged in the discharge of his official duty. In my opinion, the test laid down in the aforesaid decision has not been accepted as correct by the Privy Council, the Federal Court of India and our Supreme Court. The provisions of Section 197, Cr. P. C. with particular reference to the expression occurring therein, "While acting or purporting to act in the discharge of his official duty", have been the subject-matter of examination in several decisions of the Privy Council, the Federal Court of India and the Supreme Court of India. In view of these decisions, it is unnecessary to examine the decisions of the various High Courts in India.

The test that has been laid down by the Privy Council and accepted as correct by the Federal court of India and the Supreme Court of India, can best be expressed in the words of their Lordships of the Privy Council in 'GILL v. KING', 75 Ind App 41 (PC). Their Lordships said:

"A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act; nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office."

In the case of 'CHUN CHUN PATHAK v. STATE OF BIHAR', decided on the 4th October 1951 (SC), his Lordship Mahajan J. of the Supreme Court of India quoted with approval the observations made above, and said:

"Unless there is something in the nature of the act complained of that attaches to it the official character of the person doing it, the case would not fall within the ambit of the provisions of Section 197 of the Code of Criminal Procedure".

Therefore, the test is not merely the official character of the person doing the act, but the test is whether the nature of the act is such as to lie within the scope of the doer's official duty. There is a long line of decisions now affirming the above principle. I shall merely refer to those decisions, as I do not think it is necessary to examine each one of them separately.

The first in point of time is the classic case of 'HORI RAM SINGH v. THE CROWN', 1939 F.C.R. 159. That was a case which involved the interpretation of Section 270 (1) of the Government of India Act, 1935, which was in terms somewhat similar to the terms of Section 197 of the Code of Criminal Procedure. Their Lordships noticed the decisions of the various High Courts given under Section 197 of the Code of Criminal Procedure, and his Lordship Varadachariar, J. said that those decisions might be roughly classified as falling into three groups: in one group of cases, it was insisted that there must be something in the nature of the act complained of that attached it to the official character of the person doing it. In another group, more stress was laid on the circumstance that the official character or status of the accused gave him the opportunity to commit the offence. In the third group of cases, stress was laid almost exclusively on the fact that it was at a time when the accused was engaged in his official duty that the alleged offence was said to have been committed.

His Lordship accepted the test in the first group of cases as the correct view of the provisions of Section 197 of the Code of Criminal Procedure. His Lordship said:

"While I do not wish to ignore the significance of the time factor, it does not seem to me right to make it the test."

The same view was again affirmed in 'H. T. HUNTLEY v. EMPEROR', 1944 F.C.R. 262 (FC), and 'SARJOO PRASAD v. EMPEROR',

1945 F.C.R. 227 (FC). The case of 'SARJOO PRASAD', 1945 F.C.R. 227 (FC) is important in the sense that there a Station master resisted and abused the complainant. Then come the decisions in 'GILL v. EMPEROR', 1946 F.C.R. 123 (FC) which went up to the Privy Council in 'GILL v. THE KING', 1948 F.C.R. 19 (PC). I have already quoted an extract from the observations of their Lordships in that decision. There is another decision of the Privy Council in 'PHANINDRA CHANDRA v. KING', A.I.R. 1949 P.C. 117, where their Lordships again affirmed the principle that the test is if the act is such as to lie within the scope of the official duty of the person doing it.

(4) I have summarised above the recent decisions of the Privy Council, the Federal Court and the Supreme Court of India, and it seems clear to me that the act of the Subdivisional Magistrate of Purulia as alleged by the petitioner does not fulfil the test laid down by their Lordships of the Privy Council & affirmed by their Lordships of the Federal Court and the Supreme Court of India. Firstly, I find it difficult to understand how it was part of the official duty of the Subdivisional Magistrate of Purulia to pass any order for the irrigation of the paddy crop of a private person from a tank which belonged to a private person. Secondly, even if the learned Subdivisional Magistrate had authority to pass an order for irrigation of the paddy crop of Satya Kinker Banerji from the tank of the petitioner, it was no part of the official duty of the learned Subdivisional Magistrate to use the words which, it is alleged, he used against the petitioner. In my opinion, the Courts below were wrong in holding that Section 197, Code of Criminal Procedure, stood in the way of taking cognizance of the offences alleged by the petitioner.

(5) For the reasons given above, I must allow the application & set aside the order of the learned Deputy Commissioner, dated the 20th February 1951. The learned Deputy Commissioner must now examine the petitioner on oath, and then proceed to deal with the petition of complaint in accordance with law. I have already stated that the learned Deputy Commissioner did not deal with the petition of complaint on merits. He threw it out on the legal ground that Section 197, Code of Criminal Procedure, applied. It will be open now to the learned Deputy Commissioner to consider the petition of complaint on merits, and to find out whether there is any prima facie evidence in support of the allegations made by the petitioner. It must be clearly understood that I have advisedly refrained from making any observations on the merits of the petition of complaint. The Rule is accordingly made absolute.

C/ D.H. Application allowed.

A. I. R. 1952 PATNA 392

LAKSHMIKANTA JHA C. J. AND AHMAD J.

Badridas, Appellant v. Gour Chandra, Respondent.

A. F. A. D. No. 800 of 1949, D/- 7-3-1952.

Civil P. C. (1908), O. 32, R. 3 — Gross negligence of guardian.

A suit for a declaration that a decree was obtained against him on account of the gross negligence on the part of the guardian and, as such, it is not binding on him is maintainable: AIR 1950 Pat 97 FB, Foll. (Para 2)

Anno: C. P. C. O. 32 R. 3 N. 12.

K. D. Chatterji and S. K. Sarkar, for Appellant; S. C. Mazumdar, for Respondent.

REFERENCE..... /Para.
('48) 27 Pat 441: (AIR 1950 Pat 97 FB) 2

LAKSHMIKANTA JHA C. J.:— This appeal arises out of a suit for a declaration that an ex-parte mortgage decree obtained against the plaintiff, while he was a minor, is not binding on him. The trial Court decreed the suit and its judgment has been affirmed by the Court of appeal below. Hence this second appeal by the defendant.

(2) Three brothers, Ajodhya, Jugal and Bhusan, constituted at one time a joint Mitakshra family. The plaintiff's case is that Jugal left his home sometime in the year 1927 and since then he has not been heard of. This case of the plaintiff has been accepted by the Courts below. In April 1934, Ajodhya and Bhusan executed an instalment mortgage bond in favour of the defendant-appellant, mortgaging a property in which Jugal had interest as a member of the joint Mitakshra family. This mortgage bond was not executed by anyone on behalf of the minor nor was there any recital as to the purpose for which the loan was raised.

In 1941 the defendant instituted Mortgage Suit No. 21 of 1941 against Ajodhya, Bhusan and the plaintiff as a minor under the guardianship of Ajodhya. Ajodhya or Bhusan did not file any written statement, nor did Ajodhya take any step on behalf of the minor. The Court, therefore, appointed one Mr. Phanindra Nath Chakravarty, a pleader, as guardian on behalf of the minor by his order dated the 14th July 1941. It appears that the guardian-ad-litem wrote a registered letter to Ajodhya asking him to give instruction for filing written statement, but he did not respond, and thereupon the pleader-guardian reported to the Court that he could not get any material for filing a written statement and prayed that the plaintiff may be put to the strict proof of his case. He, however, did not file any written statement calling upon the plaintiff to prove his case against the minor.

The suit was taken up ex parte for hearing on the 11th November 1941 and decreed. Later on, execution was taken out and the property was sold and auction-purchased by the decree-holder in Execution Case No. 63 of 1943. On attaining majority, the plaintiff instituted the suit on the 19th January 1946 for a declaration that the decree was obtained against him on account of the gross negligence on the part of the guardian, and, as such, it is not binding on him. The Full Bench in 'KAMAKSHYA NARAIN SINGH v. BALDEO', 27 Pat 441 (FB) held:

"A decree passed against a minor can be avoided by him on attaining majority on the ground of gross negligence on the part of his next friend or guardian-ad-litem by bringing a subsequent suit....."

Therefore, in view of the Full Bench decision the present suit is maintainable. The only question, therefore, left for decision is one of

fact, namely, whether the guardian was guilty of gross negligence. The learned Subordinate Judge, on a review of the materials before him, has held that the guardian-ad-litem did not act properly in looking after the interest of the minor in that suit. On this finding, I do not think we shall be justified in setting aside the decision of the Court of appeal below, which, in my opinion, has fully analysed the evidence in the case. The appeal is accordingly dismissed with costs.

(3) AHMAD J.: I agree.

C/ D.H. Appeal dismissed.

A. I. R. 1952 PATNA 393

REUBEN AND DAS JJ.

Dalmia Jain and Co. Ltd., Appellant v. Kalyanpore Lime Works Ltd. and others, Respondents.

A. F. O. D. Nos. 99 and 137 of 1951, D/- 27-3-1952.

(a) Contract Act (1872), S. 55 — Time when of the essence of contract — Reconstruction of contract — Power of Court.

The doctrine that equity does not ordinarily regard time as of the essence of the contract applies only where a party to a contract which is complete in all its terms has delayed in performing his part of the contract. In certain circumstances the Court of Equity will condone the delay and enforce the contract. The Court has no power, however, to make a new contract between the parties. Thus where the parties agree that a contract of lease for twenty years should commence on a certain date, to ask for a lease of twenty years from a subsequent date is to substitute a different lease for the original one which the Court has no power to do. The doctrine does not apply to such a case. (Paras 36, 37)

Anno: Contract Act, S. 55, N. 1.

(b) Specific Relief Act (1877), S. 18 (a) — Scope — Contract of lease from certain date — Court cannot sanction lease for full period from new date.

Section 18 requires the vendor to make good "the contract" out of such interest as he may have subsequently acquired. That is to say, the Court can enforce the contract which the parties entered into, to the extent that is possible. There is nothing in S. 18 to sanction the grant of a lease for the full period originally agreed on commencing from a new date. Such a lease is a different lease and not an enforcement of the original lease: Case law referred. (Paras 41, 42)

Anno: Sp. R. Act, S. 18 N. 2.

(c) Contract Act (1872), S. 20 — Mistake regarding title of contracting party — Mistake is one of fact.

A State Government granted a lease of certain quarries to A, which contained a clause against alienation by the lessee entailing forfeiture of his interest. A transferred his interest in the lease but the transfer was not legally effective owing to the want of registration. The Government however believing that A had contravened the clause forfeited A's lease and believing that it could lawfully release the properties, agreed to release them to B.

Held that contract with B was void under S. 20 as the parties had contracted under a mistake regarding the Government's title to the quarry, which was a mistake of fact. (1867) LR 2 HL 149, Rel. on. (Para 50)

Anno: Cont. Act, S. 20 N. 1.

(d) Evidence Act (1872), S. 91 — Contract binding on Government — Proof of — Plea that there is no such contract — Can be raised in second appeal — (Civil P. C. (1908), Ss. 100-101).

Where a party has to establish that there is a particular contract binding on the Government, and, a written document executed in a particular manner is required by law for such a contract, it can only be proved by such a document under S. 91, Evidence Act. The question whether such a contract exists is one of evidence and concerns the manner in which the particular contract set out by the party can be proved. The plea that there is no such enforceable contract can therefore, be taken by the Government for first time even in a second appeal. (Paras 54, 55)

Anno: Evi. Act, S. 91, N. 13; Civil P. C., S. 100, 101 N. 35, 56.

(e) Government of India Act (1915), S. 30 — Essentials of contract enforceable against Government — Held, there was no such contract — (Constitution of India, Art. 299) — (Contract Act (1872), S. 10).

Section 30 requires firstly a contract in the name of the Secretary of State in Council and secondly that the contract to be enforceable must be executed, that is to say, there must be a written contract.

Quaere: Whether a formal document is necessary or a contract can be spelt out from the correspondence in which the negotiations for the contract have been conducted: Case law Referred.

Held that no such contract was established in the case. (Paras 54, 57)

(f) Specific Relief Act (1877), Ss. 15, 18 — Scope of S. 15 — May be extended to incapacity in time — Contract for lease for twenty years — Performance may be granted for six years.

There is no reason why S. 15 should be read as restricted to an incapacity in space and not to extend to an incapacity in time. (Para 63)

A agreed to grant lease to B for twenty years from 15-4-1934 believing that a prior lease in favour of C had terminated by forfeiture. C's lease, however, was proved to be legally subsisting till 1948. In a suit by B against A for the specific performance of the contract:

Held (1) that under S. 18, Specific Relief Act, B was entitled to claim performance of the original contract namely of a lease from the 15th April 1934, and not of a fresh lease for 20 years from any subsequent date,

(2) that B was entitled under S. 15, to the specific performance only as regards the remaining portion of time of the original contract, namely to a lease for six years from 1948 to 1954, provided he relinquished

all his claims to further performance.
(Paras 63, 64)

Anno: Sp. Rel. Act, S. 15 N. 2; S. 18 N. 2.

(g) Specific Relief Act (1877), S. 23 (g) — Applicability — Contract by private company — Transfer of assets and business to public limited Company — Enforcement of contract for benefit of latter company — Not allowed.

Clause (g) of S. 23 is confined to the case of an amalgamation of public companies. Where therefore a private company enters into a contract of lease and then transferring all its assets and business to a subsequently formed public limited company, seeks to enforce the contract for the benefit of the latter company, Clause (g) cannot apply to the case and no specific performance can be allowed as it would be forcing upon the lessor a lessee other than the person who had entered into the contract. (Paras 76,77)

(h) Specific Relief Act (1877), S. 22 — Suit for specific performance — Plaintiff's readiness and willingness to perform his part — Extent.

Specific performance may be refused on the ground that the plaintiff has not been "ready and willing throughout" to perform his part of the contract. Such readiness must continue to the date of the decree. AIR 1928 PC 208, Ref. (Paras 78, 79)

(i) Specific Relief Act (1877), S. 28 (c) — Misapprehension — Meaning.

The word 'misapprehension' occurring in Clause (c) of S. 28, in the juxtaposition of the words before and after it, must mean something more than a mere mistake of fact.

Held that the misapprehension in the case was the erroneous belief on the part of lessor Government that it had the right and authority to grant the lease in question.
(Para 84)

Anno: Sp. Rel. Act, S. 28 N. 1.

S. M. Bose, S. K. Mukharji and R. P. Katriar, for Appellant; Advocate General and A. B. Saran, Jaleshwar Prasad, A. K. Prasad, C. S. Prasad and K. N. Chaturvedy, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('80) 5 Cal 932: (7 Ind App 107 PC) 16
('15) AIR 1915 PC 27: (42 Cal 1029) 25
('18) 45 Ind App 219: (AIR 1918 PC 168) 83
('28) 55 Ind App 360: (AIR 1928 PC 208) 78
('38) 65 Ind App 45: (AIR 1938 PC 20) 6
('38) 17 Pat 770: (AIR 1938 PC 295) 6, 51
('41) AIR 1941 PC 128: (21 Pat 243) 6
('01) 23 All 119: (1901 All WN 11) 38, 41
('41) AIR 1941 All 377: (ILR (1941) All 741) 55
('12) 36 Bom 510: (16 Ind Cas 570) 38, 83
('34) 58 Bom 660: (AIR 1934 Bom 277) 55
('37) AIR 1937 Bom 449: (172 Ind Cas 451) 55
('38) AIR 1938 Bom 168: (174 Ind Cas 316) 55
('78) 2 Cal LR 382 38, 40
('18) 27 Cal LJ 289: (AIR 1918 Cal 419) 38, 39
('27) AIR 1927 Cal 889: (55 Cal 285) 16
('29) AIR 1929 Mad 177: (114 Ind Cas 358) 51
('38) AIR 1938 Mad 749: (183 Ind Cas 839) 55
('49) AIR 1949 Nag 83: (ILR (1948) Nag 815) 38, 39
('36) 15 Pat 460: (AIR 1936 Pat 372) 5
('37) 16 Pat 159: (AIR 1937 Pat 65 SB) 6, 51
(1815) 34 ER 576: (19 Ves Jun 429) 16
(1867) LR 2 HL 149: (16 LT 378) 50
(1878) 7 Ch D 555: (47 LJCh 243) 16
(1881) 18 Ch D 670: (50 LJ Ch 697) 16
(1882) 19 Ch D 233: (51 LJ Ch 329) 36

REUBEN J.: These appeals are directed against a decision of the Additional Subordinate Judge of Sasaram decreeing a suit for specific performance of an agreement to lease two limestone quarries. The appellant in Appeal No. 137 is the State of Bihar who has been directed to execute the leases. The appellant in Appeal No. 99 is Messrs Dalmia Jain & Co., hereafter referred to as Dalmia Jain, in whose favour the limestone quarries in suit were leased by the State of Bihar on the 10th of August 1949 for a period of one year. The decree directs that the leases will commence from the 1st April 1948 and that the plaintiff-respondent Messrs Kalyanpore Lime Works Limited, hereafter referred to as the Lime Company, will get compensation from the appellants for the period commencing from the 1st April 1948 till recovery of possession of the leasehold properties.

(2) The main facts are undisputed. The properties in question are situated side by side on Murli Hill in the Sasaram Subdivision of the Shahabad district. One of them forms a portion of the Rehal Khasmahal and appertains to tauzi No. 4769. It occupies the upper portion of the hill and I will refer to it as Upper Murli. The other property appertains to the Banskatti Mahal and bears tauzi No. 4771. The Government besides certain rights in respect of the surface has the right to quarry limestone within this 'mahal.' I shall refer to this property as Lower Murli.

(3) The suit properties were originally leased by the Government to the Kuchwar Lime and Stone Co. Ltd. (hereafter referred to as Kuchwar Co.) for a period of twenty years commencing from the 1st April 1928. Among other terms, the leases forbade on penalty of forfeiture the transfer without the assent of the Board of Revenue of the leases or any right or interest thereunder. In September 1933, Kuchwar Co., which had gone into voluntary liquidation in the earlier portion of the year, entered into an unregistered agreement with one Subodh Gopal Bose for a consideration of Rs. 6,000 to transfer to him the entire interest under the two leases. The agreement stipulated that the assignment would be made after obtaining the assent of the Board of Revenue. By the same agreement, in anticipation of the transfer, Bose was appointed the local agent of Kuchwar Co. and subject to furnishing security for the payment of Government dues was authorised to work the quarries on his own account (Exhibit A (1), p. 47). The Kuchwar Co. then applied to the Board of Revenue for its assent to the proposed transfer and in the meantime Bose began to work the quarries in accordance with the agency agreement. The Government treated the transaction as being a transfer of the leases or at least a sub-lease and by an order dated the 27th March 1934 sanctioned the forfeiture of the two leases. (Annexure A: Exhibit 3A, page 106). Thereafter, Government re-entered into possession of the quarries.

(4) In the meantime, the Lime Company, in anticipation that Kuchwar Co. having gone into liquidation the property would be open to resettlement, had applied for a settlement of it by an application dated the 25th January 1934 (Exhibit A, page 1) which was recommended by the local officers. The proposal to lease these properties to the Lime Company was approved by the Board on the 31st March

1934 (Exhibit 3Z (26), page 106) and the Lime Company entered into possession on the 15th April 1934 (Annexure C). There followed correspondence between the Lime Co. and the local officers and the Board of Revenue in the course of which the drafts of the leases to be granted to the Lime Co. were settled. Before the leases could be executed, however the Kuchwar Co. on the 29th September 1934 instituted Title Suit No. 39 of 1934 in the court of the Subordinate Judge of Sasaram against the Secretary of State for India in council challenging the validity of the forfeiture and claiming damages. The Lime Company was not impleaded in this suit. The Subordinate Judge dismissed the suit on the 7th March 1935 holding that the transaction between Kuchwar Co. and Bose was in substance a sublease and was in breach of the covenant against transfer without assent. The Kuchwar Co. appealed against this decision in First Appeal No. 68 of 1935.

(5) By now the drafts of the leases proposed to be given to the Lime Company were nearly ready but by an order of temporary injunction issued by the High Court on the 25th April 1935 in First Appeal No. 68 and made absolute on the 25th July 1935 the Government was restrained from executing the leases pending the decision of the appeal. The appeal was decided on the 7th February 1936 and is reported in 'KUCHWAR LIME AND STONE CO. LTD. v. SECY. OF STATE', 15 Pat 460. The High Court reversed the decision of the Subordinate Judge, holding that Bose was at best a licensee, that the agreement between Kuchwar Co. and him did not amount to a sublease or a transfer of any other interest in the property, and that, even if it did, it would be void for want of registration. It accordingly decreed the suit giving the Kuchwar Company an injunction restraining the Government "from interfering with the plaintiff's leases on the basis of the forfeiture". This decision was upheld by the Judicial Committee on the 19th November 1937 on different reasoning, holding that the transaction sought to create an agency coupled with an interest but was not effective as a transfer for want of registration 'SECRETARY OF STATE v. KUCHWAR LIME & STONE CO. LTD.', 65 Ind App 45 (PC).

(6) The Lime Company meanwhile had continued to work the two quarries. After the decision in First Appeal No. 68 the Solicitors of Kuchwar Co. approached the Collector of Shahabad to eject the Lime Company and to restore possession to Bose as Kuchwar Co.'s agent (Exhibit 3 (Z) (16), page 212) and, on the Collector expressing his inability to eject the Lime Company (Annexure T), a petition in contempt was filed in the High Court on 4-6-36 (M. J. C. 42 of 1936), (Exhibit I, p. 216) against the Secretary of State in Council, the Collector of Shahabad, Mr. S. N. Banerji, Managing Director of the Lime Company and S. N. Bose, Manager of the Lime Company. The petition was allowed by a Special Bench of the High Court on the 9th October 1936 in a judgment which is reported in 'KUCHWAR LIME & STONE CO. v. SECY. OF STATE', 16 Pat 159 (SB). This decision was subsequently reversed by the Judicial Committee in its decision which is reported in 'S. N. BANERJEE v. KUCHWAR LIME AND STONE CO. LTD.', 17 Pat 770 (P.C.), pointing out that the Government not being in possession it was for the Kuchwar Co. which had the immediate right of possession, to eject the Lime Company if ejection was to be effected and that the Lime Company not having been impleaded in Title Suit No. 68 its right to possession if it was to be tested must be fought out on an issue properly framed against that Company. The Lime Company, however, after the High Court's decision in the Contempt Case, had relinquished possession of the Lime quarries and the Kuchwar Company had entered into possession of them. An attempt by the Lime Company to recover possession was made by a petition to the High Court under Sections 144 and 151 of the Code of Civil Procedure but was unsuccessful, 'S. N. BANERJEE v. KUCHWAR LIME AND STONE CO. LTD.', AIR 1941 P. C. 128, and the Kuchwar Co. continued to work the quarries undisturbed.

(7) On the 8th May 1947, when the leases in favour of Kuchwar Co. were due to expire, the State Government called for applications for fresh leases. In response thereto, the Lime Company submitted an application for a settlement for twenty years from the 1st April 1948 offering a minimum royalty of Rs. 10,000 or such amount as might be fixed by Government. It forwarded this application with a letter in which it purported to reserve such right as it had already acquired to the quarries by the transactions it previously had with the Government(Exhibit 1 (a), page 285). The limestone quarries were settled with Dalmia Jain which fact was communicated to the Lime Company by a letter from the Board of Revenue dated the 31st May 1949 (Exhibit 3 (a), page 294) and hence the present suit.

(8) In its plaint, the Lime Company pleads the relevant facts. It alleges that the contract between it and the Government was entered into by an offer made by the Board of Revenue by its letter dated the 31st March 1934 accepted by the Company by its letter dated the 15th April 1934. The terms of the indentures of lease according to it were settled subsequently and copies of the draft indentures are annexed to the plaint as Annexures V and W. The plaint alleges that the Company has all along been willing to perform its part of the contract and seeks the following reliefs:

"A decree for specific performance of contract in terms of the agreement and as claimed hereinbefore with a direction that the defendant No. 1 through his authorised agent to execute the necessary documents for completing the title of the plaintiff for 20 years lease.

* * * *

A decree for compensation to be ascertained in further proceedings.

Any other or further relief to which the plaintiff may be entitled".

(9) The State of Bihar in its written statement has substantially admitted the pleadings of fact. It denies that the terms of the contemplated leases were finally settled between the parties and that after the expiry of the Kuchwar leases the Lime Company approached the State for performance of the contract in suit. Messrs. Dalmia Jain in an argumentative written statement denies certain details of the facts pleaded which are not of particular importance in the case. Like the State of

Bihar, it denies that the terms of the contemplated leases were finally settled. Both written statements take certain pleas in bar, particularly limitation, acquiescence and waiver.

(10) The parties went to trial inter alia on the following issues:

"2. Is the suit barred by limitation?
3. Was there any legal, valid and binding contract between the plaintiff and defendant No. 1 and can any such contract be enforced?
4. Was the agreement between the plaintiff and the Government defective for lack of settlement of any essential term as alleged by the defendants, and was it bad for uncertainty or vagueness?
9. Is the plaintiff entitled to specific performance of agreement? If so, how and for what period?
10. Is the plaintiff entitled to any compensation as obtained and to an enquiry into the same?
12. Is the suit barred by estoppel, waiver and acquiescence?"

(11) The subordinate Judge found that there was a concluded contract between the parties for the grant of leases in accordance with terms embodied in draft leases, Exhibits 22 and 22A, forwarded by the Lime Company to the Subdivisional Officer, Sasaram, with its letter dated the 4th/8th May 1935 (Annexure M), excepting the terms relating to the date of commencement and the distribution of royalty. According to him, the leases were to commence from the date of execution. Relying on the provisions of Section 18, clause (a) of the Specific Relief Act, he directed the execution of leases in the terms found by him, the leases to commence from the 1st April 1948, the date on which the State was in a position to have executed them.

(12) The points urged before us may be formulated as follows:

1. Was there a concluded contract in fact, that is, were the parties ad idem as regards the terms, particularly with respect to royalty, duration and commencement?.
2. If the answer to point No. 1 is in the positive, is this the contract of which specific performance is being sought?
3. Is the suit barred under Article 113 to the Limitation Act?
4. Is the alleged contract enforceable?
5. If the contract is enforceable, is it one of which specific performance should be granted?
6. Can the plaintiff get relief under Section 18 of the Specific Relief Act?
7. Is the plaintiff entitled to relief under Section 15 of the Specific Relief Act?
8. Can Messrs Dalmia Jain be made liable for compensation from the 1st April 1948?

(13) POINT NO. 1: Was there a concluded contract? Mr. Mahabir Prasad, on behalf of the plaintiff-respondent, has contended that on the pleadings this point does not arise. He urges that the contract pleaded in paragraph 6 of the plaint has been admitted in paragraph 12 of the written statement filed by the State of Bihar. The contract pleaded is one on "the existing terms and conditions" in the Bihar and Orissa Waste Lands and Mineral Concessions Manual 1926, concluded by an offer made by the Board of Revenue in a letter dated the 31st March 1934 accepted by the Lime Company in its letter dated the 15th April 1934. As I shall show below, these letters and the provisions in the Manual are not sufficient to determine the terms of the contract. Reading the admission in the written statement in the light of the plaint, there is no force in this contention. On the contrary there are distinct pleas in paragraph 18 of the written statement of the State Government and in paragraphs 9 and 10 of the written statement of Dalmia Jain that there was *no* final contract between the parties.

(14) On the 25th January 1934, the Lime Company applied (Exhibit A, page 1) to the Collector of Shahabad offering to take a settlement of the Limestone quarries stating:

"We are prepared to guarantee for this property alone a minimum royalty of Rs. 10,000 per annum, if that may satisfy you."

Apart from this, there is no reference to any of the terms of the proposed lease. On the 14th March 1934, the member of the Board granted an interview to Mr. S. N. Banerji, the Managing Director of the Lime Company (Exhibit A(5), page 5). At that time the proposed cancellation of the Kuchwar leases was before the Government. The member of the Board approved of the Lime Company as a lessee but directed that orders should not issue until the Government order cancelling the Kuchwar leases was received. There is no note on record of what transpired at this interview and Mr. S. N. Banerji who is alive and available as a witness has not been examined to depose about it. The Board's letter of the 31st March 1934 (Exhibit 3Z (26), page 106) issued on receipt of Government orders cancelling the Kuchwar leases does not refer to any terms as agreed on at the interview. It intimates that the Board approves of the proposed leases:

"On the existing terms and conditions as set forth in Chapter V of the Bihar and Orissa Waste Lands and Mineral Concessions Manual, 1926, on the understanding that after the lease is executed the question of royalty will be re-examined by the Board provided it is well understood that any reduction, if made, would be a matter of grace."

(15) According to the finding of the Subordinate Judge, which is in the alternative the Lime Company's application of the 26th January 1934 and the Board's letter of the 31st March 1934 between them constituted the offer and acceptance which gave rise to a concluded contract. This finding is not in accordance with the plaint which calls the Board's letter of the 31st March 1934 the offer and the Lime Company's letter of the 15th April 1934 the acceptance (Annexure C). In this letter, the Manager of the Lime Company intimates to the Collector that having received the Board's sanction through the Subdivisional Officer for working the Murli properties, the Company has taken possession. The Manager asked the Collector to direct his office "to send the draft leases embodying the existing terms and conditions" to enable the Company to execute them, evidently referring to the Board's letter of the 31st March 1934. There is nothing to show that the Manager was empowered to enter into a contract on behalf of the Company so that his letter could be treated as an acceptance.

(16) Be that as it may, the correspondence shows that up to this stage apart from the refer-

ence to a minimum royalty of Rs. 10,000 the only terms mentioned were "the existing terms and conditions" in Chapter V of the Waste Lands Manual. The rules referred to specify certain conditions which must form part of every lease for the quarrying of limestone. These conditions are embodied in the prescribed form in appendix 6 of the Manual. But under rule 6, the Collector is authorised to incorporate in the lease "such conditions and stipulations" as he may in each case consider necessary. In another respect, the rules are not definite, namely, the term of the lease. This may be twenty years or such shorter term as the applicant may desire (rule 4) and the applicant is required in his application to state the period he desires (rule 2). As the correspondence stands so far, the contract and the agreement were not yet definite. It is true that there may be a binding contract in general terms, 'GOURLAY v. SOMERSET', (1815) 34 E.R. 576; 'HAMPSHIRE v. WICKENS', (1878) 7 Ch. D. 555; 'RAM SUNDAR SAHA v. KALI NARAIN SEN', A.I.R. 1927 Cal. 889 and it is the duty of the Court to ascertain the terms if it is possible, 'NEW BEERBHOOM COAL CO. v. BULARAM MAHTA', 5 Cal 932 (P C) but the Court is powerless where the completion of the contract depends on the decision of an individual, 'HART v. HART', (1881) 18 Ch. D. 670. Here rule 6 leaves some of the conditions and stipulations of the lease to the discretion of the Collector and I find it difficult to hold as the learned Subordinate Judge has done that the Lime Company impliedly agreed to such conditions and stipulations as the Collector might impose, and therefore, there was a concluded contract. And, in another respect, the contract was incomplete. The parties contemplated that a minimum royalty should find a place in the leases and the sum of Rs. 10,000 was suggested by the Lime Company. Up to now there was no clear acceptance of it, and the amount had not been distributed between the two leases.

(17) That the terms of the proposed leases were still in a fluid state appears from the letter of the Lime Company dated the 19th April 1934 (Annexure F) submitting draft leases on the model of "existing lease obtained from the S. D. O.'s office" and asking the Collector to "approve the same with such modifications as you may desire." We have not before us copies of the existing leases supplied by the Subdivisional Officer and can only conjecture that they were copies of the prescribed form. In the next letter dated the 23rd April 1934 (Exhibit 3M, page 107) the Collector informs the Commissioner that he has instructed the Subdivisional Officer of Sasaram to take steps for the execution of "the new lease" by the Lime Company. Apparently, at this time the draft leases submitted by the Lime Company to the Subdivisional Officer had not reached the Collector, for. in his next letter dated the 13th/14th May 1934 (Annexure E) we find him telling the Lime Company that he has submitted to the Board of Revenue "the draft leases". Had the conditions on which the leases were to be granted been settled this would not have been necessary. This letter was written in reply to one from the Lime Company asking for the Collector's permission to start work at once (Annexure G) and the Collector says in his reply,

> "having been granted a lease for Limestone concession in the upper and lower Murli areas, you are lawfully entitled to start work in them at once."

(18) Much has been made of the use of the word "lease" in this letter and the use of this word and the derived words "lessee" and "lessor" in subsequent letters and in Court proceedings by Government or the Lime Company in describing the relations between themselves. Evidently, the words were used loosely. Everyone knew that the legal relationship of lessor and lessee had not yet been established and steps were being taken to get the leases executed. The Lime Company was described as lessee because the execution of the leases was regarded as merely a matter of time. The use of the words did not indicate that the terms on which the leases were to be granted had been finally settled.

(19) The next letter in the series which is on the record is from the Board of Revenue and is dated the 19th of January 1935 (Annexure H). The Board disapproved of certain terms and conditions suggested by the Collector and the Government Pleader of Shahabad and approved of the draft leases submitted subject to certain modifications;

> "(1) Lease I relating to the Banskati portion of the Murli Hill.
> (i) In clause 2 of the following proviso should be added at the end: 'provided that a minimum royalty of rupees two thousand and five hundred shall be payable in each and every year whether the aggregate royalty calculated according to the above scale falls short of that amount or not'. If, however, the Collector considers this amount high he is authorised to reduce it to any sum that would appear to be necessary and add the difference between Rs. 2,500 and the amount so reduced to the amount of minimum royalty (Rs. 7,500) suggested in a similar proviso to the corresponding clause 2 of the other draft leases relating to the Rehal Government Estate.
> (ii) In accordance with past precedents, cl. 8 should be amplified as follows: 'The lessees authorise the aforesaid Dehri Rohatas Light Railway to supply the Collector cr any officer authorised by him with full particulars of all lime and limestone carried for him and shall make no objection to the books of the Railway being examined for the purpose of checking the quantity of material exported by them.'
> (2) Lease II relating to the Rehal Government Estate.
> (i) The preamble should be amplified as indicated therein so as to make it clear that the area in question appertains to the Rehal Government Estate.
> (ii) In clause 2 a proviso should be added similar to what has been suggested above in regard to the other lease. The total amount of minimum royalty recoverable for both the leases should not exceed Rs. 10,000 as already decided.
> (iii) In accordance with past precedents clause 9 should be amplified as indicated above in respect of the corresponding clause 8 of the other lease."

(20) That this letter disposed finally of the matter so far as the Board was concerned is clear from the direction that "a copy of each

of the leases as executed" should be forwarded to the Board for record. The matter of the minimum royalty, however, was placed within the discretion of the Collector. Annexure I, dated the 16th February 1935 from the Subdivisional Officer to the Manager of the Lime Company stating that the District Officer had sent amended draft leases and had asked him to obtain six "fair copies of the leases (one on stamped paper and other five on plain papers) from you", indicates that the Collector exercised this discretion and sent on to the Subdivisional Officer the amended drafts for getting the leases ready for execution. The Subdivisional Officer informed the Manager that the amended draft leases would be available for inspection in his Khasmahal Office. A copy of this letter was passed on by the Manager to the Managing Director, Mr. S. N. Banerji (Exhibit 3Z (8), page 180.)

(21) The next communication dated the 3rd April 1935 (Annexure J) from Mr. S. N. Banerji sends the Subdivisional Officer, "two fair copies of the amended draft leases for favour of your perusal and return if approved" promising that on approval six fair copies would be supplied. It has been argued from the fact that the approval of the Subdivisional Officer was asked for that the conditions on which the leases were to be taken were still unsettled. It is evident, however, that all that was asked for was a clerical check in order to see that the amended draft leases as submitted by the Lime Company were in order. Apparently, they were in order and in his letter dated the 9th April 1935 (Annexure K) the Subdivisional Officer returned the two draft leases submitted by the Lime Company for the submission of six fair copies. The fair copies with the corresponding number of plans were supplied by the Lime Company by a letter dated the 4th/8th May, 1935 addressed to the Subdivisional Officer of Sasaram (Annexure M). The letter mentions that the Company stamp and the signatures of the two directors have been put on all the copies and an enquiry is made as to the stamps required for the execution of the leases and for registration. There seems little doubt that the draft leases (Exhibits 22 and 22A, pages 199 and 203) which bear the Subdivisional Officer's office seal of the 10th May 1935 and which were obtained from the Board's office file relating to these proposed settlements are one of the six sets of copies submitted with this letter of the Lime Company.

(22) Some stress has been laid on the fact that there was no compliance with the Subdivisional Officer's request that one of the fair copies should be on stamped paper. Between the two letters last mentioned, however, the High Court had issued its order of temporary injunction on the 25th April 1935. The question of immediate execution of the leases, therefore, could not arise and this omission on the part of the Lime Company cannot be treated as showing unwillingness to complete the transaction and a refusal of the offer made by the Government. Far from it, the Lime Company had throughout shown eagerness to enter into the contract, to the extent of entering into possession of the property and leaving it to the Government to propose such conditions as might to it seem proper. In exhibit 22, relating to Upper Murli, the minimum royalty is stated at Rs. 8,000/- and in Exhibit 22A relating to the Lower Murli it is fixed at Rs. 2,000/-. Evidently the Collector in exercise of the discretion vested in him by the Board of Revenue had varied the minimum royalty proposed within the limits of his discretion. The term of the proposed leases according to these two documents is twenty years and the date of commencement is stated as the 15th April 1934. There was now an agreement between the parties complete in all details.

(23) It has been argued that there is no evidence on the record to show that Exts. 22 and 22A are correct copies of the draft leases which were sent by the Collector to the Subdivisional Officer. That they were correct copies may, however, be inferred from the fact that they are produced from the office of the Board of Revenue. Before reaching that office, they had to pass through the offices of the Subdivisional Officer, the Collector and the Commissioner and we may properly presume that these officers did their duty and checked the documents to see that they were in order. That some sort of check was exercised is indicated by the fact that by his letter dated the 25th May 1935 (Annexure N) the Subdivisional Officer asked for revised plans which were supplied on the 26th May 1935 (Annexure O) and were forwarded by the Subdivisional Officer to the Collector on the 17-6-1935 after being checked by the Kanungo (Annexure S). On this correspondence regarding the supply of revised plans the argument was put forward that there was still no final agreement. I am not impressed with this contention. The property had already formed the subject of leases in favour of the Kutchwar Co. It is elaborately described in the drafts Exhibits 22 and 22A. There can therefore be no doubt that the parties knew what they were negotiating about and were agreed as to its extent. All that the correspondence was necessary for was to ensure that the property was correctly shown on the plans accompanying the leases which were to be executed.

(24) There is one document in this series to which I have not yet referred, namely, Annexure E, dated the 13th May 1935, a letter from the Commissioner of the Patna Division to the Board of Revenue referring to the proposed lease of the Murli Hill quarries. He states that in view of the Board's order dated the 31st March 1934, sanctioning the leases,

> "the leases should take effect from April 1st. 1934, instead of the 15th April 1934, as suggested by the Collector."

When the Commissioner sent this letter the approved leases had already been fair-copied by the Lime Company and the fair-copies had been given to the Subdivisional Officer. It does not appear from anything on the record or in the rules that the Commissioner as such had any authority to settle or alter the conditions of the proposed leases, and the suggestion made by him does not seem to have been accepted. I say this because the Exhibits 22 and 22A which came from the Board's Office bear dates of commencement from the 15th April 1934 and no action appears to have been taken by the Board to get the date of commencement modified. A memorandum endorsed on the Commissioner's letter, Annex-

ure D, shows, however, that a copy was forwarded to the Collector for information and necessary action and it is possible that the Commissioner's opinion was brought to the notice of the Lime Company. This explains why in Annexures V and W, which according to the plaint incorporate the terms as finally agreed upon, the date of commencement is shown as the 1st April 1934.

(25) Mr. Mahabir Prasad has contended that the contract between the parties was concluded on the 14th March 1934 in the interview which the member of the Board of Revenue gave to the Managing Director, Mr. S. N. Banerji, and that all that happened subsequently was the working out of the details of a contract entered into on that date. The contention is not consistent with the plaint which makes no mention of the interview and according to which the contract was concluded by an offer of the Board in its letter dated the 31st March 1934 and an acceptance by the Lime Company in its letter dated the 15th April 1934. Alternatively, Mr. Mahabir Prasad has contended that the contract was concluded by the Board's letter of the 31st March 1934 accepting, according to him, the offer of the Lime Company in its application of the 25th January 1934. This again is inconsistent with the plaint. Further, as I have indicated above, at this stage the terms of the proposed leases were still indefinite. It was not as in the case of 'RAM KANAI SINGH v. MATHEWSON', A. I . R. 1915 P. C. 27, a case in which the proposed transaction in all its essential particulars had been settled and in which subsequent proceedings were merely to give effect to the agreement by the preparation of appropriate deeds. There is more force in the further alternative contention of Mr. Mahabir Prasad that there was a concluded contract between the parties when the Lime Company indicated its acceptance of the final terms offered by submitting fair copies of the draft leases containing the final terms, or at least on the 17th June 1935 when it submitted revised copies of the plans for these draft leases. This is substantially in accordance with the alternative finding of the Subordinate Judge.

(26) As regards the terms of the proposed leases they are set out in detail in the draft leases, Exhibits 22 and 22A. The Subordinate Judge has held these documents to be incorrect as regards the distribution of the royalty which he holds to have been in accordance with the original proposal of the Board, namely, Rs. 2,500/- and Rs. 7,500/-. His reason is that there is nothing on the record to show that the Collector agreed to a decrease in the minimum royalty for Lower Murli and a corresponding increase in the minimum royalty for Upper Murli. I do not agree. The course of the correspondence leaves no doubt that the Collector exercised the discretion which was vested in him, and that the change in the amounts proposed by the Board was made by him. The proposal of the Board passed to the Subdivisional Officer through the Collector, and the fair-copied draft leases, Exhibits 22 and 22A, must, in the ordinary course, have passed through his office to the Board. We are justified, therefore, in drawing the inference that the alterations in the amounts proposed for minimum royalty were made by the Collector.

(27) As to another important term, namely, the date of commencement of the proposed leases, the Subordinate Judge holds that the draft leases, Exhibits 22 and 22A, did not represent the agreement between the parties. In coming to this conclusion, he seems to have been influenced by the fact that, whereas Exhibits 22 and 22A mention the proposed date of commencement as the 15th April 1934, the date given in Annexures V and W annexed to the plaint is the 1st April 1934. He refers to the letter of the Commissioner addressed to the Board of Revenue suggesting that the leases should commence from the 1st April 1934 and not from the 15th April 1934 as proposed by the Collector, and observes that in the absence of execution of Exhibits 22 and 22A by an authorised agent of the Government it cannot be said that Government accepted the date of commencement as mentioned therein. I have dealt with this matter above.

(28) The Collector in passing on the draft leases to the Subdivisional Officer was merely sending on the terms approved by the Board of Revenue with a modification as regards the minimum royalty. These terms must have included the date of commencement which appears in Exhibits 22 and 22A. The parties were therefore agreed as to this. The Commissioner's letter merely represents his opinion as to what would be the proper date for the commencement of the proposed leases. There is nothing to indicate that his suggestion was accepted by the parties at that time. On the contrary, the fact that the date of commencement still appears as the 15th April 1934 in Exhibits 22 and 22A which have been produced from the office of the Board of Revenue indicates that his suggestion was not accepted. The subsequent insertion of the Commissioner's date in Annexures V and W prepared for the purposes of this suit cannot affect a term finally agreed upon by the parties.

(29) For the reasons I have given I would hold that the parties came to a final agreement on all the essential terms of the proposed leases on or before the 10th May 1935, and these terms are embodied in the fair copies, Exhibits 22 and 22A.

(30) POINT NO. 2: If the answer to Point No. 1 is in the positive, is this the contract of which specific performance is being sought?

According to the plaint, Annexures V and W embody the terms which were finally agreed upon between the parties. Annexure V relates to Lower Murli and corresponds to Exhibit 22A. Annexure W relates to Upper Murli and corresponds to Exhibit 22. One difference between the Annexures and Exhibits 22 and 22A relating to the date of commencement of the proposed leases has been noticed and explained. The other differences to which reference has been made before us relate to cls. 9, 10 and 12 of Annexure W, as compared with the corresponding clauses of Exhibit 22.

(31) Clause 9 of Exhibit 22 provides that:

> "all stone and lime shall be exported 'via Dehri Rohtas Light Railway' and Dehri-on-Sone Railway Station" (the italics (here in inverted commas) are mine).

and authorises the Dehri-Rohtas Light Railway to supply the Collector or any officer authorised by him with full particulars of lime and limestone carried for the

lessees. The intention is that the Government might be in a position to ascertain full particulars of lime and limestone exported from the leased property. In clause 9 of Annexure W the words in italics (here in inverted commas) are omitted although the authority to the Dehri-Rohtas Light Railway to disclose particulars of exports is given. There is a similar provision as regards Lower Murli in clause 8 of Exhibit 22A and the words which have been omitted in Annexure W are duly included in the corresponding clause 8 of Annexure V.

(32) Clause 10 of Ext. 22 requires the lessee to allow certain Government Officers to enter the premises to inspect them, "and for the purpose of checking the accounts of export". The words relating to entry for the purpose of checking accounts have been omitted from the corresponding clause of Annexure W. Again we find a similar provision in clause 9 of Exhibit 22A which has been properly included in clause 9 of Annexure V. Clause 12 of Exhibit 22 requires the lessee to pay

> "road and public work cess leviable under Cess Act IX (B. C.) of 1880 or any other 'which may hereafter be imposed by law in addition to the rent and' royalty to be paid."

(33) The words which I have put in italics (here in inverted commas) have been omitted in the corresponding clause of Annexure W. As in the case of the other discrepancies, we find that the corresponding clause appearing in Exhibit 22 has been reproduced in clause 11 of Annexure V. The explanation is obvious. Draft leases sent by the Lime Company were sent by the Collector to the Board of Revenue. They came back with alterations approved by the Board and were shown to the representative of the Lime Company at the Subdivisional Officer's khasmahal Office. This representative made notes on the basis of which fair copies were prepared. As the two leases were identical in most of their terms, it is probable that the representative did not make his notes fully in respect of each draft. At that time when his memory was fresh, the omission in respect of the other draft would not matter and the fair copies were made in accordance with the approved drafts. Apparently the notes taken were fuller in the case of Lower Murli than of Upper Murli. When, therefore, Annexures V and W were prepared later for the purposes of this case omissions occurred in Annexure W, but not in Annexure V. For these reasons, I would not attach much importance to the discrepancies pointed out as between Exhibit 22 Annexure W and would, if the occasion had arisen, have been prepared to consider an application for an amendment of the plaint.

(34) There is a more serious objection relating to the date of commencement of the leases which the Lime Company is seeking to obtain. The relief sought is for

> "specific performance of contract in terms of the agreement and as claimed hereinbefore with a direction that the defendant no. 1, through his authorised agent to execute the necessary documents for completing the title of the plaintiff for twenty years' lease."

(35) According to the agreement, as I have found it, the leases were to run for twenty years from the 15th April 1934. According to Annexures V and W, the date of commencement would be the 1st April 1934. In either case the leases would expire in the year 1954. The previous leases in favour of Kuchwar Co. expired on the 31st March 1948. So, when Government was again in a position to grant the leases to the Lime Company only six years remained of the period agreed upon and Government was not in a position to grant a twenty years' lease. The Subordinate Judge has interpreted the relief claimed as one for a twenty years' lease commencing from the 1st April 1948 and his interpretation has been supported by Mr. Mahabir Prasad, who has been prepared to concede that the Court may readjust the period by deducting the period of two years and a few months, during which the Lime Company remained in possession. According to him in claiming this relief the Lime Company is not asking for specific performance of a contract other than that agreed on between the parties. His contention is that what the parties agreed on were leases for a period of twenty years and that the time of commencement of the leases was not of the essence. He points out that in the Exhibits 22 and 22A, time is not stated to be of the essence, that the Lime Company was not consulted before the date 15th April 1934 was fixed, and that the Commissioner proposed a change of that date when consulting the Lime Company.

(36) The answer is that the 15th April 1934 as the date of the commencement of the lease was obvious from the Lime Company's own letter of that date stating that it had entered into possession of the property. From that time onwards, the Lime Company spoke of itself as the lessee and Government on its part treated it as such and received royalty from it in that capacity. The intention that the leases should commence from the 15th April 1934 was thus clear and this was the date incorporated in the draft leases which were sent down to the Subdivisional Officer for acceptance by the Lime Company. As regards the suggestion of the Commissioner, it was merely an expression of his opinion and it does not appear that his suggestion was given effect to. I do not think that the doctrine that equity does not ordinarily regard time as of the essence of the contract has any application. It applies only where a party to a contract which is complete in all its terms has delayed in performing his part of the contract. In certain circumstances, the Court of Equity will condone the delay and enforce the contract. The Court has no power, however to make a new contract between the parties. There can be no contract to lease without the parties being agreed as to the date of its commencement (MARSHALL v. BARRIDGE', (1882) 19 Ch. D. 233).

(37) In the case before us, the parties were agreed on the point and the Lime Company was actually put in possession of the property. The agreement was for lease of twenty years from that date. A lease for twenty years or for a period of seventeen and odd years from the 1st April 1948 would be a different lease altogether. In these circumstances, I am unable to accept the contention of Mr. Mahabir Prasad that in asking for a twenty year lease, the Lime Company was asking for specific performance of the contract entered into between the parties.

(38) Even so, Mr. Mahabir Prasad has urged that the Court's power to enforce a contract after the time agreed on for its performance

has passed implies the power to reconstruct the contract, and so the relief asked for can be granted. In support of this, he has referred to 'MAGNIRAM VITHURAM v. BAKUBAI', 36 Bom 510; 'PUNDLIK DARYAJI v. JAINARAYAN MALIRAM SHOP', AIR 1949 Nag 83; SURENDRA NATH v. RAJENDRA CHANDRA', 27 Cal L J 289; 'LOOTNARAIN SINGH v. SHOWKEE LALL', 2 Cal L R 382; and 'SURAJ PRASAD SINGH v. WAZIR ALI', 23 All 119. 'MAGNIRAM VITHURAM'S CASE', 36 Bom 510 was not one of specific performance. The plaintiff claimed the suit land under a sale deed executed by the defendant when by reason of an execution proceeding pending before the Collector the defendant, under Section 325(a) of the Code of Civil Procedure of 1882, had no power to sell the property. The defendant's power to transfer the property having been subsequently restored by the closing of the proceedings in attachment, the High Court held that the plaintiff was entitled to a declaration that he was a full owner by purchase of the suit property, relying on Section 43 of the Transfer of Property Act and applying the principle enunciated in Section 18 of the Specific Relief Act.

(39) In 'PUNDLIK DARYAJI'S Case', AIR 1949 Nag 83 the defendant in whose favour certain property was knocked down at a sale for arrears of land revenue agreed before the confirmation of sale to sell the property after confirmation and the Court enforced the contract after the sale was confirmed. In 'SURENDRA NATH DEY'S CASE', 27 Cal L J 289, a Ghatwal mortgaged certain property which was subject to restrictions on his right of alienation. These restrictions were subsequently removed and the High Court held that the mortgage operated as an executory agreement operating in equity to transfer the beneficial interest to the mortgagee as soon as the restrictions were removed. In each of these cases, the Court gave effect to the original contract entered into between the parties, and no question of reconstruction as to any material term arose.

(40) 'LOOTNARAIN SINGH'S CASE', 2 Cal L R 382, was a case of mortgage of a mahal by way of a 'zuripeshgi' lease. At the time when the lease was granted the mortgagor had a ghatwali right in the mahal. After the lease was granted, the ghatwali interest was extinguished as a result of ouster by the zamindar in execution of a decree obtained by him against the mortgagor. Some years later, the zamindar granted the mortgagor a perpetual mokararri lease of the mahal. The High Court held that the mortgage would operate on the mokararri interest. In coming to this conclusion, the High Court acted on the principle embodied in Section 18 of the Specific Relief Act that, where a person contracts to sell or let property in which he has an imperfect title and later acquires some interest in it, he must "make good the contract" out of that interest. The same principle finds place in Section 43 of the Transfer of Property Act which makes a fraudulent transfer of property operative at the option of the transferee against such interest as the transferor may subsequently get in that property. This is not an instance of reconstructing a contract in the sense of making a new contract between the parties. It is an enforcement of the original contract to the extent that such enforcement is possible.

(41) 'SURAJ PRASAD SINGH'S CASE', 23 All 119 is more in point. S, having agreed to lease certain property to W for 15 years, executed a lease of the same property for two years in favour of N, who had no knowledge of the agreement to lease to W. A suit by W for specific performance after setting aside N's lease having failed against N for want of knowledge on his part, the Court of first instance gave W a lease of the property for 15 years commencing after the expiry of N's lease. This decision was upheld by the High Court, relying on the principle of Section 18 of the Specific Relief Act. It is obvious that Section 18 had no application, as S had a perfect title when he entered into agreement with W. But their Lordships reasoned that his position could not be better than if he had had an imperfect title when he entered into the agreement. With respect, I would submit that there is nothing in section 18 to sanction the grant of a lease for the full period originally agreed on commencing from a new date. Section 18 requires the vendor to make good "the contract" out of such interest as he may have subsequently acquired. That is to say, the Court can enforce the contract which the parties entered into, to the extent that is possible. The fact that a lease from a later date for the full period originally agreed upon is a different lease was not averted to.

(42) For these reasons, I consider that the contract of which specific performance is asked for in the plaint is not the contract which the parties entered into.

(43) This finding is sufficient to dispose of the appeal, but it is necessary that I should deal briefly with the other points raised and indicate my opinion about them.

(44) 'Point No. 3. Is the suit barred under Article 113 to the Limitation Act?'

Under Article 113, time runs for three years from

> "the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused."

Here, no date was fixed for performance. So the second alternative date is relevant. The question of a refusal on the part of Government to execute the leases does not arise prior to the decision of First Appeal No. 68 of 1935 by the High Court on the 7th February 1936. Up to the 25th April 1935, the negotiations were in progress between the Government on one side and the Lime Company on the other to settle the terms of the leases and to get the necessary documents executed. On that date, the execution of leases was stayed by a temporary injunction which continued throughout the pendency of the First Appeal. It is urged that the permanent injunction granted by the High Court decree in the First Appeal restrained the Government from "interfering with the plaintiff's leases on the basis of the forfeiture", thus leaving it open to Government to grant the leases with effect from the expiry of the Kutchwar leases, a date which must be taken as certain, as no covenant for renewal of the leases in favour of Kutchwar Co. has been pleaded. The argument is that a refusal to execute the leases must be taken to have occurred when the leases were not executed within a reasonable period after the 7th February 1936.

(45) The question is: what was a reasonable period in the circumstances? The leases, if

executed, could not be given effect to till after the 31st March 1948. There was therefore no urgency in the matter. And, even in the absence of a renewal clause, the date of termination of the Kutchwar leases was not certain. Kutchwar Co. was in liquidation, and it was possible that it might surrender the leases before the 31st March 1948, a possibility which the Lime Company had in view when it filed its memorial (Exhibit B, page 31) to the Prime Minister in December 1937 (vide Annexure V dated the 21st January 1938). On the other hand, Government had shown itself to be wholly on the side of the Lime Company. It had contested the suit filed by Kutchwar Co. up to the Privy Council decision on the 19th November 1937, and, in reply to the memorial Exhibit B had assured the Lime Company that

> "the claims put forward by you will receive full and sympathetic consideration." (Annexure V dated the 21st January 1938).

(46) In its memorial of December 1937 (Exhibit B, page 31) the Lime Company spoke of Kutchwar Co. as intending to approach Government to sanction the transfer to Bose or, in the alternative to accept a surrender from it and resettle the quarries with Bose. It requested Government not to agree to either proposal. Apparently, the expected move on the part of Kutchwar Co. did not materialise and in a memorial dated the 31st January 1939 (Ext. A(7), page 39) the Lime Company suggested that Kutchwar Co. being under liquidation, it would expedite a surrender of the leases if Government conveyed to the liquidators a formal refusal to sanction a transfer to Bose. It reminded the Revenue Secretary to the Government about this matter on the 6th April 1939 (Exhibit A (3), page 58). Government evidently did not accede to the suggestion, as we find the Lime Company enquiring on the 16th May 1939 if a decision has been arrived at (Exhibit A(2), page 57) and informing the Legal Remembrancer on the 20th June 1940 (Exhibit A(4), page 59) that in proceedings before the Calcutta High Court the agent of the liquidators of Kutchwar Co. had stated that Kutchwar's application of the 9th October 1933 asking the Board of Revenue to assent to the assignment of the leases was still pending.

(47) It seems that, whatever the agent of the liquidators may have said in Calcutta, Kutchwar Co. did not approach Government, and we can understand Government refraining from taking action of its own accord aimed at bringing the Kutchwar leases to an untimely end. This reluctance would not necessarily indicate an unwillingness to lease the quarries to the Lime Company in the event of the Kutchwar leases terminating. Hence, merely because a considerable time elapsed after the 7th February 1936 without the leases being executed it would not follow that there was a "refusal" within the meaning of Article 113. On the one hand, the Lime Company did not ask for the execution of leases, and there was no express refusal. On the other hand, there was no reason to think that Government would be unwilling to lease the quarries to the Lime Company, as soon as it was free to do so. The first intimation that Government might not be prepared to consider the Lime Company as a possible lessee was the newspaper advertisement of the 8th May 1947 calling for applications for the settlement of the quarries for fresh terms on the expiry of the existing leases. This is within three years of the filing of the present suit.

(48) 'Point No. 4': Is the alleged Contract enforceable?

The first ground on which the enforceability of the alleged contract is attacked is that it is void under Section 20 of the Contract Act, by reason that both parties were under a mistake of fact as regards the title of Government to the subject-matter of the proposed leases. It has been strongly urged that this objection does not arise on the pleadings. It was raised in the Court of the Subordinate Judge before whom one of the draft issues was:

> "Was the contract alleged by the plaintiff bad due to mutual mistake of law and fact?"

On the objection of the Lime Company, the issue was deleted by the Subordinate Judge's Order No. 40 dated the 29th November 1950 and was substituted by the issue:

> "Whether the letters which are Annexures D, E and F of the plaint are based upon misappreciation of facts and law and are binding upon Defendant no. 2?"

an issue the finding on which is of no help to a decision of the suit. In spite of this, it is difficult to resist the objection under section 20. The whole case has proceeded on the basis that Government, believing that Kutchwar Co. had contravened a clause of the leases which entailed forfeiture, forfeited the leases and, believing it could lawfully re-lease the quarries, agreed to lease them to the Lime Company, who believing on their side that the Kutchwar leases had been legally forfeited entered into the agreement. In paragraph 10 of the plaint, the Lime Company expressly pleaded mistake:

> "That the plaintiff was not aware of any defect in the exercise of the right of forfeiture by Government, nor of the fact that the transfer deed by Kuchwar Ltd., had not been registered, nor had any such fact been disclosed by the Govt. It was rather confidently and assuringly alleged by the Government that the leases had rightly been forfeited and, as a matter of fact, the Government entered into Khas possession of the lease-hold and represented to the plaintiff that they were entitled to grant fresh leases to the plaintiff."

(49) At first sight, this reads as if there is an attack against the good faith of Government, but reading the plaint as a whole the impression seems to be incorrect and, at the trial and before us, there was no suggestion that Government did not honestly believe that the Kutchwar leases had been legally forfeited. In the written statements filed by the defendants, paragraph 10 of the plaint is traversed in general terms and in particular it is pleaded that the Lime Company was fully aware of the relevant facts, including the non-registration of the transfer deed and that no assurance was given by the Government as alleged. There was no suggestion that either the Lime Company or the Government or both knew that in law the forfeiture was defective and that the Kutchwar leases had not been terminated, and this as I have observed is the basis on which the case has proceeded throughout.

(50) The parties clearly contracted under a mistake regarding Government's title to the quarries. The interest which a person has in a particular property partakes of the nature of the property and its existence is a question of fact, even though it has to be determined by

applying the general law to the facts. Here, wrongly applying the law regarding the registration of instruments transferring immoveable property, the parties thought the title in the quarries had reverted to the Government. The mistake was one of fact. I am supported by the observations of Lord Westbury in 'COOPER v. PHIBBS', (1867) L R 2 H L 149:

"It is said, 'Ignorantia juris haud excusat'; but in that maxim the word 'jus' is used in the sense of denoting general law the ordinary law of the country. But when the word 'jus' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake."

(51) This was accepted as an authority by the Special Bench in 'KUCHWAR LIME & STONE CO., LTD. v. SECY. OF STATE', 16 Pat 159 (S. B.). The decision was reversed by the Privy Council on another ground in 'S. N. BANNERJEE v. KUCHWAR LIME & STONE CO., LTD', 17 Pat 770 (PC). In 'A. M. APPAVOO CHETTIAR v. S. I. RY. CO.', AIR 1929 Mad 177 Ramesam and Jackson, JJ. opined that the general words used by Lord Westbury must be read in a restricted sense as relating to cases where the mistake is the combined effect of a person's "view of the law and the facts". With respect I would suggest that there is no difficulty if a wrong view of facts has contributed to the mistake. Their Lordships were concerned with a claim under section 72 of the Contract Act to recover a payment made under a mistake of law as to the liability to pay. This is different from an interest in immoveable property, which is a right of a concrete nature, capable of forming the subject of possession, prescription, transfer, and so on.

(52) In this view, it is unnecessary to refer to clause (c) of section 28 of the Specific Relief Act which provides that specific relief of a contract cannot be enforced against a party whose assent was given under the influence of "mistake of fact, misapprehension, or surprise". This section becomes relevant only if I am wrong in thinking that the mistake under which the parties contracted is a mistake of fact for, in that case, it may be contended that the mistake is a misapprehension within the meaning of this section.

(53) The next ground on which the enforceability of the contract is assailed is based on Section 30 of the Government of India Act, 1915. I reproduce this section:

"(1) The Governor-General in Council and any local Government may, on behalf and in the name of the Secretary of State in Council, and subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting of the Council of India, prescribes, sell and dispose of any real or personal estate whatsoever in British India, within the limits of their respective governments, for the time being vested in His Majesty for the purposes of the Government of India, or raise money on any such real estate by way of mortgage, and make proper assurances for any of those purposes, and purchase or acquire any property in British India within the said respective limits, and make any contract for the purposes of this Act.

(2) Every assurance and contract made for the purposes of this section shall be executed by such person and in such manner as the Governor-General in Council by resolution directs or authorises, and, if so executed, may be enforced by or against the Secretary of State in Council for the time being.

(3) All property acquired in pursuance of this section shall vest in His Majesty for the purposes of the Government of India."

(54) It is emphasised that the section requires 'firstly' a contract in the name of the Secretary of State in Council and 'secondly' that the contract to be enforceable must be executed, that is to say, there must be a written contract. Once again, it is urged on behalf of the Lime Company that the objection, which was raised for the first time in appeal, does not arise on the pleadings. The answer is that the question is one of evidence and concerns the manner in which the contract set out by the Lime Company can be proved. The existence of a contract binding on the Government has been denied. As I have shown, the Lime Company pleaded the negotiations for the grant of a lease with reference to the correspondence in which the negotiations were carried on. This was substantially admitted by the Government, but with reference to paragraph 14 of the plaint in which the plaintiff spoke of having signed "documents incorporating the terms of the lease as approved by Government" the Government pleaded:

"It is not a fact that the terms were finally settled between the parties for a lease. If the plaintiff had put their signature on any document it is not binding on the defendant."

In view of this pleading, it was for the plaintiff to establish that there is a contract binding on the Government, and, if a written document executed in a particular manner is required by the law, the contract can only be proved by such a document under Section 91 of the Indian Evidence Act.

(55) On the provisions of Section 30, the conclusion seems unavoidable that a contract in order to be enforceable against the Government must be in writing and executed. There is general agreement as to this but the Courts are not agreed as to whether a formal document is necessary or a contract can be spelt out from the correspondence in which the negotiations for the contract have been conducted. The view that a formal document is required was taken in 'MUNICIPAL CORPORATION OF BOMBAY v. SECY. OF STATE', 58 Bom 660 which was followed in 'KRISHNAJI NILKANT v. SECY. OF STATE', AIR 1937 Bom 449. The same view was expressed in 'SANKARA MINING SYNDICATE LTD., NELLORE v. SECY. OF STATE', AIR 1938 Mad 749. The contrary view finds expression in 'DEVI PRASAD SRI KRISHNA PRASAD LTD. v. SECY. OF STATE', AIR 1941 All 377 which followed 'SECY. OF STATE v. BHAGWANDAS GOVERDHANDAS', AIR 1938 Bom 168. For the purposes of the present case, it is not necessary to determine which is correct view, and to decide finally who is the person authorised to execute contracts of this kind on behalf of the Secretary of State in Council. In rule 7 at

page 12 of the Waste Lands Manual, 1926, the authority is traced back to a notification under Section 2 of the East India Contracts Act, 1870 (33 and 34 Vict. Cap. 59), which notification was preserved by Section 130 of the Government of India Act, 1915. The notification No. 713-734 dated the 2nd June 1913 published at page 1195 of the Supplement to the Gazette of India dated 7th June 1913 was issued in exercise of the Governor-General in Council's power under Section 2 of the East India Contracts Act, 1870. In respect of the Province of Bihar and Orissa, it specifies the officers authorised to execute various classes of documents. The relevant clauses are:

"2. Contracts and other instruments in matters connected with the lease of land —

(a) If the lease be permanent...	By Collectors and Deputy Commissioners.
(b) If otherwise ...	By Settlement Officers, Collectors, Deputy Commissioners, and Subdivisional Officers.
3 (a) Contracts and other instruments in matters connected with the hire or purchase of land or buildings or with the sale of Government land or with the lease or sale of Government buildings, or with prospecting and exploring licenses and mining leases. ...	By Collectors and Deputy Commissioners.
(b) Contracts instruments, and engagements specified above when the value or amount of such contract, instrument or engagement does not exceed Rs. 500/- ...	By Assistant Commissioners, Joint Magistrates, and Sub-divisional Officers.
4. Contracts and other instruments not included in Article 3 in matters connected with the lease of ferries, fisheries, and other benefits arising out of land. ...	By Collectors, Deputy Commissioners, and Subdivisional Officers."

(56) I have cited all these clauses because, at least as regards Lower Murli, the surface right in which does not belong to Government and in which Government has merely the right to quarry limestone, the contract sought to be enforced is not a lease of land. Ignoring a discrepancy between the notification and rule 7 at page 12 of the Waste Lands Manual, we may take it under clauses 2 and 4 of the notification that the contracts in question could have been executed in this case either by the Collector or by the Subdivisional Officer.

(57) Let us consider now if there is on the record any document or set of documents satisfying the conditions of section 30. One of the conditions is satisfied by Exhibits 22 and 22A, which are expressed to be on behalf of the Secretary of State for India but they are signed only on behalf of the Company. The subdivisional Officer having received them must have sent them on to the Collector who in his turn must have forwarded them to the Commissioner for transmission to the Board of Revenue. The forwarding letters are not before us and we do not know who signed them. Also, the letters were sending (sic) on these documents for purposes of record, the parties having already come to terms finally. Therefore, the signatures affixed to those letters were not affixed with the intention of binding the Government. This intention can only be attributed, if at all, to the letters forwarding the offer of Government in the shape of the approved drafts, of which Exhibits 22 and 22A are the fair copies. It is these approved drafts and forwarding letters which, with Exhibits 22 and 22A, may be said to comprise the contract sought to be specifically performed in this suit. Neither the draft lease nor the forwarding letters are before us. The Lime Company has therefore failed to establish the contract of which it is seeking specific performance.

(58) In this view, it is not necessary to consider the final objection under this head, namely that the contract as evidenced by these documents is an "agreement to lease" within the meaning of clause (7) of Section 2 of the Indian Registration Act and is inadmissible in evidence for want of registration under Clause (d) of sub-section (1) of section 17 of the Act.

(59) POINT NO. 6: Can the plaintiff get relief under section 18 of the Specific Relief Act?

POINT NO. 7: Is the plaintiff entitled to relief under section 15 of the Specific Relief Act?

It will be convenient to consider these points together. I reproduce below Sections 15 and 18 of the Act, so far as they are relevant:

"15. Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant."

18. Where a person 'contracts' to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this Chapter) has the following rights:

(a) if the vendor or lessor has subsequently to the 'sale or lease' acquired any interest in the property, the purchaser or lessee may compel him to make good 'the contract' out of such interest."

(60) It has been urged with some weight that section 18 clause (a) applies only to cases in which the party with the imperfect title has executed the sale or lease. I have placed in italics (here in inverted commas) the words which support this contention. The section begins "where a person 'contracts' to sell or let". Here the word 'contract' may refer either to the agreement to sell or lease, or to executed sale or lease. The section then fixes a point of time with reference to "the sale or lease". It goes on to provide that if after "the sale or lease" the vendor or lessor acquires an interest in the property, the purchaser or lessee may compel him to make good "the contract" out of that interest. Having used the words "sale or lease" the section goes back to the word "contract". Thus the words "sale or lease" appear to be used in contrast to the

word "contract". (I do not attach much importance in this connection to the use of the words "vendor" or "lessor" and "purchaser" and "lessee", because these words have been used loosely elsewhere in the Act to indicate persons entering into a contract to sell or a contract to lease, vide Section 25).

(61) Read in this light, the section seems to overlap S. 43 of the Transfer of Property Act, under which a transfer made fraudulently or on an erroneous representation operates against any interest which the transferor may subsequently acquire in the property. It is not necessary to consider and explain the necessity for and the exact effect of the provision in clause (a) of Section 18, because it is conceded that apart from it, the purchaser in a contract to sell or lease entered into in such circumstances is entitled to sue for specific performance against such interest as the vendor may afterwards acquire in the property. Fry on Specific Performance, Fifth Edition, says in Article 994:

> "It is not necessary to the specific performance of a contract, that it should be one which the parties at the time of entering into it had the power of carrying into effect, nor one with regard to which it depends on themselves alone whether they would ever be able to perform it. For, where a party enters into a contract without at the time having the power of performing it, and afterwards acquires that power, he is bound to perform the contract he entered into."

(62) Here, at the time when Government entered into the contract, the leases in favour of Kutchwar were subsisting and Government was unable to execute the leases in favour of the Lime Company. The barrier being now removed and a suit for specific performance not being barred by time the Lime Company is entitled to sue for that relief. What it must sue for however is to enforce "the contract". This is in keeping with section 18 which provides for making good "the contract" and with Section 43 of the Transfer of Property Act under which "the transfer" operates against the subsequently acquired interest.

(63) I have rejected above the contention that the Court may reconstruct the contract so as to give the Lime Company the period originally contracted for or that period minus the period in which the Lime Company was in possession of the property. The contract is for leases from the 15th April 1934 for a period of twenty years and specific performance if granted can be only for the portion of that period which remains. This is how Section 15 comes in. Government is unable to perform a portion of its part of the contract, and under Section 17 of the Act specific performance can be decreed only under one or other of the Sections 14 to 16. Sections 14 and 16 have no application. It has been urged that Section 15 also does not apply. It refers, it is urged, to an inability to perform a portion of the contract at the time when the contract is entered into. Both the illustrations to the section relate to a deficiency in the area contracted to be transferred. In such event, the purchaser can enforce the sale in respect of the remaining area. I do not see why the section should be read as restricted to an incapacity in space and not to extend to an incapacity in time. It is possible that the incapacity in space may be conditioned by time. Thus in illustration (a), A may subsequently to the contract have acquired 25 bighas of the land from the stranger. In that case, he would have been liable under the section to sell 75 bighas to B. A person who, having agreed to give a lease for twenty years, can do so only for six years is unable to perform the whole of his part of the contract, and the contract comes within the scope of Section 15.

(64) In order to get relief under Section 15, however, the plaintiff must relinquish:

> "all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant."

The application filed by the Lime Company on the 18th February 1952 for relief under Section 15 is in these terms:

> "That without prejudice to the submissions made by the petitioner under Section 18 of the Specific Relief Act the petitioner alternatively claims relief under Section 15 of the Specific Relief Act and claims a decree for specific performance of contract for the period after the expiry of the lease of Kuchwar Lime and Stone Co. Ltd., that is from 1-4-48 to 31-3-1954 on the usual covenants as mentioned in Waste Land Mineral Concessions Manual with such compensation as may be permissible. He further relinquishes all claims to further performance and all right to compensation either for the deficiency or for the loss or damages sustained by him for default of the defendant for the period prior to 1-4-1948."

(65) The reference to the submissions made under Section 18 of the Specific Relief Act, relates to the argument that the Court in granting specific performance may reconstruct the contract. The Lime Company has therefore not relinquished all claim to "further performance" though it professes to do so in the last sentence of the petition. Also, as regards compensation the petition relinquishes it only "for the period prior to 1-4-1948". Such a limitation is not sanctioned by the terms of Section 15.

(66) For these reasons, I think that the plaintiff company is not entitled to specific performance under Section 18 or Section 15 of the Specific Relief Act.

(67) POINT NO. 5.: If the contract is enforceable, is it one of which specific performance should be granted?

The first ground urged as a reason why specific performance should be refused is that of hardship. It is pointed out that the demand for limestone has increased since the agreement was entered into with the Lime Company, and that whereas under the agreement with them the total of the minimum royalty for the two leases is Rs. 10,000 the total minimum royalty under the leases in favour of Dalmia Jain is Rs. 75,000. I am not certain that there is any merit in fact in this contention. The question of minimum royalty only arises when the quantity of Limestone removed falls so low that the royalty payable at the rates specified in the leases is less than the minimum royalty. If the demand for limestone has gone up, as indicated by the minimum royalty agreed to by Dalmia Jain, the average removal of the limestone is likely to be big enough to cover that amount. It is not necessary to investigate the point, however. The

consideration urged might be of some weight if specific performance was to be granted for a period after the 14th April 1954 as has been done by the Subordinate Judge. I have indicated above that this cannot be done. If the decree for specific performance is confined to the period originally agreed on, the question of hardship does not arise. The Government and the Lime Company negotiating on an equal basis and in full knowledge of all the relevant facts agreed on Rs. 10,000 as a proper minimum. Circumstances have altered since then, and in a lease given now a lessee would agree to a higher minimum royalty. But this does not make it a hardship for Government to have to perform the contract which it entered into with the Lime Company.

(68) The second ground urged under this head is delay. I have dealt with this in considering the question of limitation. While the parties thought they were free to contract and the Government was not restrained by an injunction, steps were taken for obtaining leases. After the High Court decreed Title suit No. 39 of 1934 the urgency of getting the leases executed vanished and there were reasons why the Lime Company should prefer to wait till the Government was again free to execute leases in its favour. Another line of argument proceeds thus. If the Lime Company had sued in 1935 for specific performance it would have failed, at first by reason of the injunction in First Appeal No. 68 of 1935 and, after the decree of the High Court, because the Court could not direct specific performance in conflict with the Kutchwar leases. How can the lapse of time improve the Lime Company's position and entitle it now to sue for specific performance? The argument presupposes a suit to enforce the contract for the period prior to the 1st April 1948. It is not certain that the hypothetical suit would have failed if the relief sought had been confined to the period of the contracted term from the 1st April 1948 to the 14th April 1954. As I have suggested, there were reasons why the Lime Company might have preferred to wait.

(69) Next it is suggested that the suit ought to fail on the ground of want of mutuality, for a suit by Government to enforce the contract would have failed. This is no reply to a suit confined to the period from the 1st April 1948 to the 14th April 1954 if such a suit is maintainable under section 15, Specific Relief Act. This section expressly provides that the contract, to the exent that it is possible to enforce it, can be enforced only by one of the parties.

(70) A more substantial reason why specific performance should be refused is that the Lime Company is not the real plaintiff. The Lime Company was a private Company consisting of two share-holders S. N. Banerjee and K. N. Banerjee, each holding 250 shares of Rs. 100 each (Exhibit 21, page 85, Proceedings Book of Directors' meetings of the Lime Company, minutes of meeting held on the 1st July 1930, and Exhibit 21 (b), Proceedings Book of the Shareholders' meetings of the Lime Company, minutes of meeting held on the 30th December 1930). Both of them were Directors of the Company, S. N. Banerjee being the Managing Director (Exhibit 21, 17-8-30). This was the constitution of the Company when it entered into the suit contract and the signatures of the two Banerjees appear on Exhibits 22 and 22A. On the 10th June 1937, the Lime Company resolved that steps be taken to register a Public Limited Company and to transfer to it after its incorporation the properties and business of the Lime Company (Exhibit 21). A new Company, the Kalyanpore Lime and Cement Works, Limited (hereafter referred to as the Cement Company) was formed and registered with an authorised capital of Rs. 25,00,000 divided into 7000 preference shares of Rs. 100 each, 16000 ordinary shares of Rs. 100 each and 8000 deferred shares of Rs. 25 each. Among the promoters of the Company were the Banerjees, each holding 10 ordinary shares. Foremost among the objects of the new Company was the acquisition as a going concern of the business and good will of the Lime Company (Exhibit E, page 26, Memorandum of Association of the Cement Company dated the 11th August 1937).

(71) On the 28th November 1938, an agreement (Exhibit F, page 37) was entered into between the Lime Company on one side and the Cement Company on the other, under which the Lime Company agreed to sell and the Cement Company to buy

> "the undertaking of the 'Lime Company' which expression shall be deemed to include all the lands, buildings, hereditaments, goods, Chattels, moneys, credits, debts, bills, notes, good-will, things in action, contracts, agreements, securities & other assets whatsoever and wheresoever of the Lime Company' ".

(72) As part of the consideration, the Cement Company agreed to meet all obligations of the Lime Company and to indemnify it against all claims in respect thereof. Further, if the Lime Company within a certain time went into voluntary liquidation the Cement Company agreed to bear all the costs of liquidation and to meet all demands against the Lime Company in respect thereof. This contingency did not arise as the Lime Company did not go into liquidation. As further consideration, the Cement Company agreed to pay Rs. 2,00,000 in the form of 8000 of its own deferred shares of Rs. 25 each. The agreement was ratified by the Lime Company in a Share-holders' meeting on the 1st December 1938 (Exhibit 21 (b)). There was some delay in the execution of the deed of transfer and in an extra-ordinary General Meeting of the Shareholders on the 3rd July 1939 the Lime Company decided that all the assets and liabilities of the Company

> "excluding the leases for quarrying Limestone in Murli Hill properties"

be transferred as early as practicable to the Cement Company, and that thereafter

> "the Kalyanpur Lime & Cement Works Ltd., be requested to delegate such authority and provide such funds as may be necessary to enable this Company to function in the interest of the Cement Company." (Exhibit 21(b).)

(73) It was further resolved that the accounts of the Lime Company be closed from the date of the conveyance. At this time, the Privy Council had confirmed the decree of the High Court in First Appeal 68 of 1935 and the appeal against the High Court's order dismissing the Lime Company's petition for restitution of possession was pending before the Privy Council. The meaning of the resolutions is obvious. After the conveyance the Lime Company would exist only for the purposes of the Cement Com-

pany. The sale deed (Exhibit D, page 50) was executed on the 13th July 1939. It is expressed to be in pursuance of the agreement of the 28th November 1938. By the deed, the Lime Company for the consideration agreed on in November 1938 transferred to the Cement Company 'firstly'

> "all goods, chattels, moneys, credits, debts, bills, notes, goodwill of the business of the vendors, with the exclusive right to use the name of the Kalyanpur Lime Works Ltd., in any business which the purchasers may decide to carry on hereafter, and or trade-mark in connection therewith, things in contracts, agreements, securities and other assets whatsoever and wheresoever of the vendors' (pages 51-52) and 'secondly' the properties set out in the Schedule annexed to the deed, together with all the rights of the Lime Company in relation thereto.

(74) The deed further recited that besides the properties set out in the Schedule it had been agreed between the parties as regards the Murli Hill quarries that

> "the transfer of the said rights in the said property should be deferred until the title thereto is perfected and the necessary permission from the Secretary of State for India for the transfer thereof is obtained."

The deed further recites that the Lime Company has made over all the transferred properties to the Cement Company, and, on the 13th August 1939, the shareholders of the Lime Company recorded a resolution making over to the Cement Company the Lime Company's assets and liabilities according to its balance sheet of that date (Exhibit 21(b)). Of the deferred shares which the Lime Company got by this transaction, 3000 were transferred to each of the Banerjees to be held by them in their own right under a resolution of the shareholders of the Company dated the 20th March 1943 (Exhibit 21(b)). The remaining 2000 shares were sold under a resolution of the Directors dated the 4th December 1945 and the proceeds of Rs. 50,000 were invested in the Cement Company as an advance bearing interest at two per cent per annum (Exhibit 21 and Exhibit H page 63, the Balance Sheet of the Cement Company as at the 31st December 1945). At the same time, all the shares in the Lime Company were purchased by the Cement Company, partly in the name of the Cement Company and partly in the names of three 'benamidars'. The benami nature of the purchase was denied by K. M. Rakshit (P. W. 2) but was not contested before us. The transfer was made in the books of the Lime Company under the resolution of the Directors dated the 4th December 1945 (Exhibit 21, page 96) and the shares find entry in the Balance Sheet of the Cement Company as assets (Exhibit H, page 62).

(75) After this, the Banerjees cease to have any connection with the Lime Company, the shareholders in which are the Cement Company and its benamidars, K. M. Rakshit, D. N. Choudhary and C. P. Sinha. From this time, the assets of the Lime Company consist of the investment of Rs 50,000 and the annual interest of Rs. 1,000 on it is its sole income (Vide the evidence of K. M. Rakshit, Director of the Lime Company, P. W. 2 at page 65). Rakshit deposes further that under its agreement with the Cement Company the Lime Company is bound as soon as it gets the leases to transfer them to the Cement Company without receiving any further consideration and that this suit has been instituted for the benefit of the Cement Company (P. W. 2, pages 65-66). In fact, the Lime Company exists only in name and the real plaintiff is the Cement Company.

(76) On the ground that under Section 23, clause (g) of the Specific Relief Act, a new company formed by the amalgamation of the contracting Company with another Company can sue for specific performance of the contract, it has been argued that it cannot matter that the contracting Company seeks for specific performance for the benefit of another Company. It is noticeable however that clause (g) is confined to the case of an amalgamation of public companies. Also, the argument loses sight of clause (b) of the section which disentitles a transferee from enforcing a contract if it contains a provision against assignment. Alternatively, it is urged that there is nothing to prevent the Lime Company from working the quarries on its own account.

(77) I have shown above that the Lime Company exists only in name. Its shares have been acquired by the Cement Company and it continues to exist merely for the advantage of the Cement Company. Its sole assets are Rs. 50,000 invested in the Cement Company, earning an annual income of Rs. 1,000. These assets must be considerably reduced now, for we are told by K. M. Rakshit that the expenses of the present litigation are being debited against the invested sum of Rs. 50,000, and they had already mounted to Rs. 12,000 when the witness was deposing (P. W. 2, page 65). In these circumstances, I do not think the Lime Company has the resources necessary for the undertaking. Exhibits 22 and 22A both contain a covenant against transfer without the assent of the Board of Revenue. So the Murli Property will be of no value as security for a loan; and it is not likely that the Lime Company will be able to raise the funds necessary for working the quarries itself. There is no doubt that, if the contract is enforced, the quarries will be worked by the Cement Company in the name of the Lime Company. In other words, the Court will be forcing on the Government a lessee other than the person with whom it contracted.

(78) Yet another ground on which specific performance should be refused is that the plaintiff company has not been "ready and willing throughout" to perform its part of the contract. Such readiness must continue to the date of the decree, 'ARDESHIR H. MAMA v. FLORA SASSOON', 55 Ind App. 360 (PC). The contract in this case was for leases from the 15th April 1934 to the 14th April 1954. In December 1937, in the memorial submitted to the Prime Minister (Exhibit B, page 31) the Lime Company requested Government after the expected surrender of the leases by Kuchwar Co. to execute in the Lime Company's favour "the leases already settled and sanctioned". To this request, there can be no objection. This attitude changed when the period drew near for the expiry of the Kutchwar leases. Exhibit 1(a) dated the 9th June 1947 (page 285) is the petition forwarding the Lime Company's application in the prescribed form in answer to the Government's advertisement calling for applications for leases of the Murli Hill quarries from the 1st April, 1948. The

application is for a term of twenty years from that date, and the applicant offers a minimum royalty of "Rs. 10,000 or such amount as may be fixed by the Government". The term of the leases applied for thus overlaps the term of the leases sought to be enforced in this suit. The forwarding petition states that the application is "without prejudice to the right which the petitioner Company has already acquired in the said Hills" by reason of preceding transactions between it and the Government. The petition refers to the fair copies of the draft leases signed by the Company and says that instead of calling for fresh applications the just, legal and equitable procedure would have been for Government

> "to complete the said leases in favour of the petitioner Company and allow it to re-enter and work the quarries under the said leases for 'a period of twenty years commencing from the date of its re-entry'." (The italics (here in inverted commas) are mine.)

(79) The petition concludes by asking that "the old leases in its (the Lime Company's) favour be completed", and stating that the application is forwarded "without prejudice to any of its (the Lime Company's) rights" in order to avoid technical objection. Even if we ignore the application which is stated to be "without prejudice", it is clear that the Lime Company was asking for the execution of leases on the basis of Exhibits 22 and 22A for a fresh period of twenty years. This is the position which the Lime Company took up in the plaint and in this Court in Appeal. This is its position also in its petition under section 15 of the Act which petition is "without prejudice" to the submissions under Section 18 of the Specific Relief Act. Where the plaintiff is asking for more than he is entitled to under the contract, he cannot be said to be ready and willing to perform his part of the contract.

(80) Point No. 8: Can Messrs. Dalmia Jain be made liable for compensation from the 1st April 1948?

The Subordinate Judge has directed that

> "the plaintiff will get compensation from defendants Nos. 1 and 2 for the period commencing from the 1st April 1948 till he gets possession of the leasehold properties."

These words appear to make Dalmia Jain liable from the 1st April 1948. The intention of the Subordinate Judge is more clearly expressed when he deals with the point of compensation under issue No. 10. He says there that Dalmia Jain will be liable for compensation only for the period for which they have been in possession. Obviously they could not be liable for the period that they were not in possession.

(81) For the reasons which I have given, I would allow these appeals with costs, set aside the decree of the Subordinate Judge and dismiss the suit with costs.

(82) DAS, J.: I have had the advantage of reading the judgment prepared by my learned brother and I am in agreement with him as respects the main conclusions at which he has arrived. Therefore, it is unnecessary for me to cover the same ground which my learned brother has so ably and fully covered. I shall content myself with summarising the conclusions at which I have independently arrived, for reasons, more or less the same as explained by my learned brother.

(83) A large number of questions—some of them rather hypothetical in nature—were mooted, argued and investigated before us. This was unavoidable to some extent; because what the plaintiff-respondent really wanted was not specific performance of the contract finally agreed on by the parties, but a reconstruction of such contract for his benefit. I agree with my learned brother that from the correspondence between the parties and the draft leases (Exhibits 22 and 22A) which were produced from the office of the Board of Revenue, it is possible to spell out a finally concluded agreement, with regard to the essential terms of the proposed leases, on or about the 10th of May, 1935. This is, however, different from the agreement which the plaintiff-respondent pleaded, or which the plaintiff-respondent wished to be specifically performed. The main argument of the learned Advocate General (Bihar) appearing for the plaintiff-respondent that there was an agreement between the parties for a twenty years' lease on what he called usual terms in respect of upper and lower Murli at a much earlier date than the 10th of May 1935, and his further argument that the correspondence merely worked out the details of that agreement, cannot in my opinion, be accepted. regard being had to the tenor and true import of the correspondence which has been examined by my learned brother. The argument of the learned Advocate General (Bihar) that the date of commencement of the proposed lease was not an essential term, and his further argument that the Court's power to enforce a contract after the time agreed on for its performance has passed implies the power to reconstruct the contract, appear to me to be unsound. My learned brother has referred to the decisions on which the learned Advocate General relied. I need merely point out that the decision in 'MAGNIRAM VITHURAM v. BAKUBAI', 36 Bom 510 was not approved by the Privy Council in 'GAURISHANKER BALMUKUND v. CHINNUMIYA', 45 Ind App 219 (PC). Their Lordships definitely said that 'MAGNIRAM VITHURAM'S CASE', was erroneously decided.

(84) The agreement which was finally concluded between the parties on or about the 10th of May 1935, cannot be specifically performed for the following reasons. I agree with my learned brother that both parties were under a mistake as to the right of Government to grant a lease—a mistake of fact essential to the agreement—and, on that ground, the agreement was void. A void agreement is not a contract, and section 4(a) of the Specific Relief Act states that, except where it is otherwise expressly enacted, nothing in the Act shall be deemed to give any right to relief in respect of any agreement which is not a contract. I am further of the view that if the agreement was not void under Section 20 of the Indian Contract Act, on the ground that the mistake was not a mistake as to a matter of fact essential to the agreement, even then specific performance of the contract could not be enforced against a party thereto when the assent of the party was given under the influence of a misapprehension; vide clause (c) of Section 28 of the Specific Relief Act. The word 'misapprehension' occurring in clause (c), in the juxtaposition of the words before and after it, must mean something more than a mere mistake of fact. The misapprehension in the present case

was erroneous belief of Government that it had the right and authority to grant a lease of upper and lower Murli in 1935.

(85) The second difficulty in decreeing specific performance arises out of the provisions of Section 30 of the Government of India Act, 1915. I agree with my learned brother that the contract, which is sought to be enforced against the State Government, was not executed "by such person and in such manner" as was laid down by the Governor-General under the provisions of sub-section (2) of Section 30.

(86) The third difficulty in the way of the plaintiff-respondent arises out of sections 15 and 18 of the Specific Relief Act. There has been much controversy before us as to if clause (a) of Section 18 relates to executed contracts or executory contracts. On behalf of the appellant, it has been contended that both Section 43 of the Transfer of Property Act and clause (a) of Section 18 of the Specific Relief Act relate to executed contracts. It is stated that the distinction between the two sections is this, as pointed out at page 208 of Sir Dinshaw Mulla's Transfer of Property Act, Third Edition:

> "Section 43 follows the equitable rule in that, until the option is exercised, it treats the transferee as the beneficiary of a trust who may be defeated by a purchaser for value without notice. But it departs from the equitable rule in that it does not require the transfer to be effected by a further conveyance. If the transferee were enforcing the contract under Section 18(a) of the Specific Relief Act, the transferor would be required to execute a further conveyance. But under Section 43 the exercise of the option or the mere requisition of the transferee is sufficient to bring the subsequent interest within the scope of the original transfer.'

(87) It is, I think, unnecessary in this case to decide if Section 18(a) Specific Relief Act, can apply to an executory contract (though I am of the view that the words used in clause (a), such as "sale or lease", are only apt and appropriate to executed contracts); assuming that Section 18(a) applies to executory contracts, like the one we have here, the plaintiff-respondent is up against the difficulty of S. 15. Section 17 of the Specific Relief Act lays down that the Court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections. I have no doubt in my mind that the date of the commencement of the proposed lease, as finally agreed to by the parties, was the 15th of April 1934, and the period agreed to was twenty years from that date. Therefore, the State Government was unable to perform the whole of their part of the contract at the date of the suit.

(88) I think it is unnecessary to express any opinion whether a suit for specific performance could have been brought at any earlier stage or whether there could be a suit for specific performance of an agreement to grant a lease on some future date. It is sufficient to state that on the date on which the suit was brought, one of the parties to the contract was unable to perform the whole of his part of it; therefore, he could not enforce the contract. The other party could ask the Court for specific performance and the court might direct the party in default to perform specifically so much of his part of the contract as he could perform, provided that the plaintiff relinquished all claim to further performance and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant. This, in my opinion, is the effect of Section 15. My learned brother has pointed out, and I entirely agree with him, that the plaintiff-respondent did not relinquish all right to compensation etc. A conditional and partial relinquishment, without prejudice to other rights, does not fulfil the requirements of Section 15.

(89) Lastly, I agree with my learned brother that though the Lime Company is the nominal plaintiff, the real plaintiff, is the Cement Company for whose benefit the suit has been brought. The Lime Company may legally exist; but in decreeing specific performance, the Court will really be allowing the quarries to be worked by the Cement Company in violation of the agreed covenant against a transfer without the assent of the Board of Revenue. From this point of view also, the Court should not exercise its discretion of decreeing specific performance.

(90) For these reasons, I agree with my learned brother that the appeals should be allowed with costs, the decree of the Subordinate Judge should be set aside, and the suit dismissed with costs.

B/D.R.R. Appeals allowed.

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DAS AND RAMASWAMI JJ.

Jagdish Chandra Appellant v. Muhammad Bukhtiyar Shah and others Respondents.

A. F. O. D. No. 414 of 1946 D/- 2-5-1952.

(a) Deed — Construction — S granting permanent mokarari lease to P — P granted right to prospect and raise minerals — P covenanting to pay four annas share of annual net profit as royalty — P also covenanting to commence work within six years, agreeing to be liable to pay Rs. 2000 per year to S for such period as he would not commence work — Cl. 18 of document empowering P to transfer and encumber right acquired by him under lease or make 'darmukarrari' settlement — Should any 'kist' of royalty due by P to S be in arrears and P made darmukarrari settlement, lessees to be liable for current and arrears due to S — Series of subleases granted to several persons — Held on construction of various clauses of deed that S was entitled only to Rs. 2000 per year from P and not to one-fourth share of net profits made by sub-lessees. (Para 10)

(b) Deed — Construction — Ambiguity in language of instrument — Evidence of usage.

Where there is ambiguity in the language of an instrument, evidence may be given of usage to show what was the meaning attached to the instrument soon after its execution by those interested in interpreting it. It is not necessary that the actings should be of parties or their agents; it is sufficient that the actings are of persons purporting to act under the document. (1906) A.C. 92. Foll. (Para 11)

(c) Debt Laws — Chota Nagpur Encumbered Estates Act (6(VI) of 1876) S. 18 B — Settlement of legal dispute about interpretation of document.

S. 18 B is wide in its terms and confers a large measure of discretion in the management of the estate. The settlement of a legal dispute about interpretation of a document is an act done for the prudent management of the estate and falls within the manager's competence. (Para 14)

(d) Debt Laws — Chota Nagpur Encumbered Estates Act (6 (VI) of 1876) S. 4 — Power of Manager to determine amount payable as rent.

Under S. 4, the Manager has power to recover rent payable, and by necessary implication the Manager has the power to determine what is the amount payable as rent to the encumbered estate. So long as the Manager acts 'bona fide' and within the scope of the authority conferred by the statute there is no question that the act of the Manager would be binding on the owner of the estate. (Para 14)

(e) Registration Act (1908) S. 17 (1) (d) — Agreement resolving dispute as to interpretation of lease — (Transfer of Property Act (1882) S. 107)

Where an agreement does not alter the terms of a lease but merely resolves a dispute as to its interpretation, it does not require registration. (Para 14)

Anno: Reg. Act. S. 17 N. 76; T. P. Act, S. 107, N 1

(f) Transfer of Property Act (1882), Ss. 40 and 108 (j) — Lessor and sub-lessee — Privity of contract — Covenants in principal lease — Sub-lessee how far bound.

It is true that covenants that touch and concern the land, as distinguished from collateral covenants, run with the land and bind the assignees. But it is elementary that as between the lessor and the defendants who are sub-lessees there is neither privity of contract nor privity of estate and the sub-lessees would not be bound by the covenants of the principal lease. (Para 16)

Anno: T. P. Act S. 4 N. 1 S. 108 (j) N. 5 Pt. 1.

(g) Transfer of Property Act (1882), S. 40 — Doctrine of Tulk v. Moxhay (1848) 41 E. R. 1143 — Applicability.

The doctrine of Tulk v. Moxhay (41 E R 1143) applies only to restrictive or negative covenants, the doctrine cannot be extended to affirmative covenants such as covenant compelling a man to lay out money or to do any other act of an active character, the covenant must be one restricting or affecting the user of the land, and the remedy is not a remedy at law by way of specific performance under a species of implied privity, but a remedy in equity by injunction against the violation of the covenant. 'Case law discussed'. (Para 17)

Anno: T. P. Act, S. 40, N. 25

N. C. Chatterjee: S. N. Datta, Govt. Pleader, J. M. Ghosh, S. S. Rakshit and S. K. Ghose, for Appellant.

P. R. Das; B. N. Mitter, G. C. Mukherjee; A. C. Mukherjee, Narattam Chatterjee, A. K. Sen, A. K. Mitter, B. C. Ghosh and N. N. Ray for Respondents.

REFERENCES: Courtwar/Chronological/ Paras:

('97) 21 Bom. 311 16
('15) 19 Cal W N 1197: (AIR 1915 Cal 154(2) 16
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(1882) 20 Ch. D. 562: (51 L. J. Ch. 530) 17
(1885) 29 Ch. D. 750 : (53 L. T. 543) 17
(1906) A C 92: (75 L. J. P. C. 28) 11
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RAMASWAMI J: This appeal is presented on behalf of the plaintiff Jagdish Chandra Deo Dhabal Deb against the judgment and decree of the Additional Subordinate Judge of Chaibassa dated 4th June 1946.

(2) The facts which lead up to the question in debate may be shortly summarised. On 27th Pous 1306 B. S., corresponding to 10th January 1900 Raja Satrughna Deo Dhabal Deb, proprietor of the Dhalbhum estate, granted a permanent mokarrari lease to Prince Mohammed Bukhtyar Shah by a registered patta and kabuliat. The mokarrari lease related to an area of nearly 1100 Sq. miles and the Prince was granted right

to prospect and raise gold, silver, copper, lead, zinc, iron, mercury, mica, sulphur, copper sulphate, coal, chalk, red earth, ela-mati, slate stone and all kinds of precious stones such as diamond, ruby, emerald, topaz and crystals etc., lying on the surface and subsoil of the aforesaid pargana Ghatsila".

A sum of Rs. 1,10,000 was paid as salami and the Prince covenanted to pay four annas share of the annual net profit as royalty. The Prince also agreed to provide capital necessary for the purchase of machinery for extracting and selling minerals and stones. The Prince was permitted to recoup himself for the expenses incurred from the sale-proceeds of the minerals and the surplus left after the deduction was considered as the year's net profit. The Raja was entitled to four annas share of the profits thus ascertained and the remaining twelve annas share would belong to the Prince. In clause 7, the Prince covenanted that he would commence the work of prospecting and raising minerals within five years from the date on which the mokarrari lease was executed. If the Prince failed to commence work within six years he was liable to pay a sum of Rs. 2000 per year to the Raja for such period as he would not commence the work. Clause 18 empowered the Prince to transfer and encumber the interest acquired under the lease or make Darmokarrari settlement.

(3) In the year 1905, the management of the Dhalbhum estate was taken over by the Government under the Chotanagpore Encumbered Estates Act. In the same year, the estate of Prince was placed in charge of an Official Receiver by virtue of an order passed by the Calcutta High Court in Administration Suit no. 203 of 1905. The Dhalbhum estate continued to be in charge of Government till 1916 when Raja Satrughan Deo died and a dispute arose over succession to the estate. Protap Chandra claimed the estate as heir of Satrughan whereas the plaintiff alleged that he was sole legatee under a will executed by Satrughan. On 28th June 1916, the Revenue Authorities recorded the name of Protap Chandra as proprietor of the estate.

In October 1920, the estate was released from attachment under the Encumbered Estates Act but the management was immediately taken over by the Court of Wards acting on behalf of Protap Chandra. In 1921, the plaintiff filed a suit against Protap Chandra for a declaration of his title and for possession over the Dhalbhum estate. The suit was filed in the court of the Subordinate Judge of Midnapore. The plaintiff obtained a decree on 21st August 1922 but an appeal was preferred by Protap Chandra and the Calcutta High Court appointed Rai Debendranath Bagchi as receiver of the estate pending the decision of the appeal. The appeal was dismissed by the Calcutta High Court on 20th June 1924 but Protap Chandra applied for leave to appeal before the Judicial Committee. Eventually the appeal was dismissed by the Judicial Committee and the decree in favour of Jagdish Chandra was confirmed. On 9th July 1927, Jagdish Chandra obtained possession of the Dhalbhum estate.

(4) On 11th August 1937, the plaintiff brought the present suit alleging that from 1905 to 1927 the Official Receiver of the Prince's estate had granted a series of sub-leases but in spite of repeated requests on the part of the plaintiff neither the official receiver nor the sub-lessees had furnished him with accounts as required by the covenants of the principal lease. The plaintiff claimed that he was entitled under the covenants of the principal lease to a decree for one-fourth share of the profits made by the sub-lessees. The plaintiff asked that a preliminary decree for accounts should be granted against the defendants for the period from 1st November 1927 up to the date of the institution of the suit.

(5) Defendants 1 series are the heirs and representatives of the deceased Prince Bukhtyar Shah and defendant No. 2 is Muhamad Kamgar Shah in whom the management of the estate of the Prince has been vested by the order of the Calcutta High Court. Defendants 3 to 14 are sub-lessees or their representatives-in-interest. Defendants 1 and 2 contested the suit mainly on the ground that the Prince or his representatives had not commenced working of the mines within the demised area at any time, that upon a proper construction of the mokarrari lease the plaintiff was entitled only to a sum of Rs. 2000 per year from the estate of the Prince. It was alleged that in the year 1919, there was a dispute between the Manager of the Encumbered estates and the official receiver with respect to the interpretation of the principal lease, and it was settled that the official receiver would pay to the Manager, Encumbered estates, one-fourth share of the gross salami, royalties, rents and income from the sub-lessees. Defendants 1 and 2 asserted that the agreement was binding upon the plaintiff and payments in accordance with the compromise were made to the Manager of the Encumbered estate for the years in suit. The defence of the sub-lessees was that upon a proper construction of the principal lease there was no liability on the part of the sub-lessees to pay one-fourth share of the profits to the plaintiff, that, in any case, there was no privity of estate nor privity of contract between the plaintiff and the sub-lessees and the various covenants in the principal lease were therefore not binding upon the latter.

(6) Upon a consideration of the oral and documentary evidence, the Subordinate Judge held that plaintiff was not entitled to one-fourth share of the profits from the working of mines either from the Prince or from the sub-lessees but the plaintiff was only entitled to a decree for one-fourth share of the salami, and royalties which the Prince had received from the sub-lessees. He further held that the plaintiff had no cause of action against the sub-lessees since there was no privity of estate or privity of contract. As against defendants 1 and 2, the plaintiff was granted a preliminary decree for accounts from 1st January 1927 up to the date when the suit was instituted. The Subordinate Judge held that the royalty paid to the plaintiff would be one-fourth of the gross salami, rent and royalty payable by the sub-lessees to the estate of the Prince. A decree was accordingly granted against the lessees but the suit was dismissed as against sub-lessee defendants.

(7) The questions arising in this appeal are, (1) whether the plaintiff is entitled on a proper interpretation of the principal lease to one-fourth share of the profits from the estate of the Prince irrespective of the circumstance whether the Prince himself or the sub-lessees worked and extracted minerals from the area demised; (2) whether the agreement, exhibit K, dated 15th February 1919, between the Manager of the Encumbered estate and the official receiver is binding upon the plaintiff; and (3) whether the plaintiff is entitled to a decree or one-fourth share of the profits as against the sub-lessees.

(8) The first question involves the construction of certain provisions of the registered kabuliat, exhibit 2, and the registered patta, exhibit A, dated 10th January 1900. The two documents which constitute the principal mokarrari lease are almost in identical terms and written in Bengali. The opening paragraph recites that settlement was made with the Prince for carrying on mining operations, that the Prince had paid Rs. 1,10,000 as salami and the rental was four annas share net profits which would accrue from the mining operation. Paragraph 2 stipulates that the Prince would provide working capital necessary for carrying on the mining operation and from the sale-proceeds of the minerals raised the Prince would deduct the expenses incurred. Out of the net profits so calculated the Raja was to get four annas share and the Prince was to appropriate the remaining twelve annas share. Paragraph 3 provides that after the Prince had recouped the amount spent by him for the purchase of machinery the Raja would become owner to the extent of four annas in the machinery and the Prince would be owner to the extent of the remaining twelve annas.

Clause 7 is very important. It stipulates that the Prince should commence the mining operation within five years and sell the minerals within six years from the date of the execution of the lease. Out of the profits calculated in accordance with clause 2 the Raja was entitled to four annas share as 'malikana' royalty and the Prince was to appropriate the remaining twelve annas share. There is a provision that if the Prince did not start selling minerals within six years of the execution of the lease the Raja would be entitled to get royalty at the rate of Rs. 2000 per year until the work of extracting and selling minerals was commenced. Clause 8 of the lease states that if instead of profits there was loss incurred in the mining operation the Raja was not liable for the capital invested by the Prince. On behalf of the lessee, Mr. P. R. Das pointed out that the transaction was a combination of lease and partnership and that the intention was that the Prince would carry on the mining operation himself and that

he would give a share of the profits to the Raja only when he carried on the work.

Learned counsel pointed out that in a mining lease royalty is not normally calculated on the basis of net profits but royalty is fixed on tonnage or acreage or according to quantity of minerals sold or level of prices according to a sliding scale. Learned Counsel maintained that the covenants contained in clauses 1, 2, 3, 7 and 8 were personal and the Prince was bound to pay one-fourth share of the profits only when he himself worked the mines and not when he made a grant to the sub-lessees. There is great force in the argument of Mr. P. R. Das. The actual language of the clauses in its grammatical sense supports the view that the covenants are personal and the Prince alone is bound to perform the covenants. On behalf of the appellants Mr. N. C. Chatterjee laid stress on clause 18 and argued on the basis of that clause that the plaintiff was entitled to a decree for one-fourth profits from the Prince irrespective of the circumstance that the sub-lessees were actually working the minerals of the land demised. Clause 18 states:

"That I shall be competent if I like, to transfer, and encumber the right acquired by me, under the said patta or make meadi and darmukarrari etc., settlement under the terms of the said patta, should any kist of royalty due by me to you be in arrears and I transfer or make darmukarrari settlement, those lessees etc. shall be liable for the said amount i.e. current and arrears due to you". ("Ami ichcha karie amar ali pattai swatta hastantar daisangyog athaba ai pattar sarter adhin meadi wo darmukarrariadi bandobasta, karite pariba. Amar nikat apanar kona gata kistir babat royalty prapya thakile taha adai na diya hastantar ba dar mukarrari bandobasta karile sei bandobasta adi grihita apanar prapya ai takar janya arthat hal wo bakeya takar janya dayee thakibe").

In the course of argument there was a dispute whether in clause 18 the phrase used is "pattar 'sarter' adhin meadi wo darmukarrari adi" or "pattar sattwer adhin meadi wo darmukarrari adi". I shall assume in favour of the appellant that the word "Sarter" is used. The correct translation would then be:

"If you wish (you may) transfer (or) create charge (over) this pattai right of yours or make meadi and darmokarrari etc. settlements under the terms of this patta. If you transfer or make 'darmukarrari' settlement without paying the royalty due to me on any past kist those leases etc. would remain liable for my aforesaid dues that is current and arrears."

The question is — what is the true meaning and import of this clause? Does it mean that the Prince was liable to pay ¼th share of the net profits made by third parties in whose favour he had granted a sub-lease or 'darmokarrari' settlement? This is the meaning which Mr. Chatterji contends for. The alternative construction of clause 18 is that the Prince would be liable to pay the minimum royalty of Rs. 2000 even though he granted sub-lease and that the Prince could not avoid liability on the ground that the mines were worked by sub-lessees. Mr. Das contends that the alternative construction should be accepted. In my opinion, the language of clause 18 can be properly construed only in the sense contended for by Mr. Das. Such a construction would have the effect of harmonising the language of clauses 1 to 7 with the provisions of clause 18. In contrast, the construction for which Mr. Chatterjee, contends would do violence to the plain language of clauses 1 to 7 and would involve rewriting and material alteration of these clauses. It would be necessary to substitute "I and my sub-lessees" for the word "I" in clauses 1 to 6 and to make a more extensive paraphrasing in the language of clause 7. It would be necessary to paraphrase clause 7 in some such manner:

"That (my lessee) shall commence the work of prospecting and raising of the aforesaid minerals and stone etc. within 5 years from today and (my lessee) shall begin to sell the said articles within 6 years. From the very year (my lessee) shall begin selling within 6 years from today, all or any of the above articles, you shall get as malikana royalty and 4 annas share in the profit in respect of each of the years in which it will serve, after deducting the expenses referred to in para 2 and (I) shall pay the same to you and (my lessee) shall take the 12 annas (twelve anna) share, you shall get no 'malikana' royalty in respect of the years in which, after the commencement of the said work of selling, there shall accrue no profit after deducting the aforesaid expenses. Should (my lessee) fail to commence the work of selling the aforesaid minerals and stones etc. within 6 years from today, you shall after the expiry of the said 6 years, get from (me) at the rate of Rs. 2000/- (two thousand) per year till such period as (my lessee) do not commence the said work and should (my lessee) after the commencement of the work, keep the work suspended for one year, (I) shall continue to pay you at the said rate of Rs. 2000/- per year for the period (my lessee) keep the work suspended i.e. till the period (my lessee) again start the work."

(9) It is apparent that the expression 'I' has to be interpreted in two different senses, in the same clause according to the nature of the context. But the construction of Mr. P. R. Das would avoid such a consequence; it would not require any substitution or paraphrase of the language used in clause 7. The construction which Mr. P. R. Das advocates is also supported by a consideration of clause 19 which states:

"All the terms of this deed shall be binding on me and my heirs and successors-in-interest and you and your heirs and successors-in-interest" ("EI Daliler Tabat Sarta ami wo amar Ottaradhikari wo sthalabhishiktgan ebong apni wo apnar Uttaradhikari wo Sthalabhishiktagan Badhya hoiba wo hoiben")

Mr. N. C. Chatterjee suggested that the expression "Sthalabhishikta" would include a sub-lease. But "Sthalabhishikta" literally means "installed in one's place" or "anointed in one's place" and cannot properly denote a sub-lessee who holds merely a subordinate interest carved out of the patent tenure. In this context clauses 9, 10 and 11 are significant. They refer to certain prospecting licenses granting on behalf of the Raja's predecessors. Clause 9 makes an assignment of the right of the Raja in favour of the Prince, and there is a provision that the Prince would collect rent and royalty in respect of the leases granted and pay four annas share of the same to the Raja. Clause 10 lays down that if the land in respect of which the licenses were granted became 'khas' of the landlord, the other clauses of lease would operate and the Prince would give the Raja four annas share of the net profits out of the

mining operation and would keep the remaining twelve annas. Clause 11 states that the work by the Gillanders or their assigns under clause 9 would not be considered as work by the Prince for operation of the clause 7 of the lease.

Clauses 9, 10 and 11 therefore specifically deal with the liability of the Prince in case of sub-leases granted to Gillanders. If it was intended that the Prince should be liable to pay one-fourth share of the net profits in the case of other sub-leases, why did not the parties make an express provision to that effect in the document? It was argued by Mr. N. C. Chatterjee that it was inconceivable that the parties intended that the defendant would by adopting the devise of granting sub-leases to defeat the right of the plaintiff to one-fourth share of the net profits. But the question is not what the parties to the deed intended to do by entering into the document, but what is the meaning of the words used in the document. The principle is stated by Lord Wright in 'INLAND REVENUE COMMRS. v. RAPHAEL', (1935) AC 96 at p. 142

"It must be remembered at the outset that the Court, while it seeks to give effect to the intention of the parties, must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used. There is often an ambiguity in the use of the word "intention" in cases of this character. The word is constantly used as meaning motive, purpose, desire as a state of mind, and not as meaning intention as expressed. The words actually used must no doubt be construed with reference to the facts known to the parties and in contemplation of which the parties must be deemed to have used them. Such facts may be proved by extrinsic evidence or appear in recitals. Again the meaning of the words used must be ascertained by considering the whole context of the document and so as to harmonise as far as possible all the parts; particular words may appear to have been used in a special sense which may be technical or trade sense, or in a special meaning adopted by the parties themselves as shown by the whole document. Terms may be implied by custom and on similar grounds. But allowing for these and other rules of the same kind, the principle of the common law has been to adopt an objective standard of construction."

(10) In the present case, it is impossible to construe the principal lease in the way contended for on behalf of the appellant. In my opinion, there is no ambiguity in the language of the principal lease and upon a true construction of the various clauses it is patent that the plaintiff is entitled only to a sum of Rs. 2000 per year from the Prince and not to one-fourth share of the net profits made by the sub-lessees.

(11) The problem in this case does not go beyond the sphere of difficult construction into one of ambiguity. But it is right that I should express my view on the alternative argument of Mr. P. R. Das that even if clause 18 created ambiguity the document ought to be interpreted with reference to the conduct of the parties and the surrounding circumstances of the case. The principle is established that where there is ambiguity in the language of an instrument evidence may be given of usage to show what was the meaning attached to the instrument soon after its execution by those interested in interpreting it. It was objected by Mr. N. C. Chatterjee that neither the manager of the Encumbered estate nor the receiver were acting as agents of parties in the case and their actings would not be 'contemporanea exposita'. The argument is not correct. It is not necessary that the actings should be of parties or their agents; it is sufficient that the actings are of parties purporting to act under the document. In 'VAN DIEMAN'S LAND CO. v. MARINE BOARD OF TABLE CAPE', (1906) AC 92, Lord Halsbury observed that contemporaneous exposition was not confined to usage under the deed, and that all circumstances tending to show the intention of the parties whether before or after the execution of the deed were relevant:

"When these are the circumstances under which the grant is actually made — why is it not evidence, and cogent evidence, when the taking possession of the particular piece of land is proved and the continuance in possession before and after the grant is proved?..... It would be a singular application of the maxim quoted by Coke (2 Inst. 11) 'Contemporanea exposito est fortissima in lege' to suggest that the proof of user must be confined to ancient documents, whatever the word 'ancient' may be supposed to involve. The reason why the word is relied on is because the user is supposed to have continued, and thus to have brought us back to the contemporaneous exposition of the deed. The contemporaneous exposition is not confined to user under the deed. All circumstances which can tend to show the intention of the parties whether before or after the execution of the deed itself may be relevant, and in this case their Lordships think are very relevant to the question in debate".

(12) In a later case 'COMMUNE DE LAPRAIRIE v. COMPAGNIE DE JESUS', (1921) A C 314, the question arose whether upon a proper construction of the deed executed by the owners of a seigniory the proprietorship of the soil or only right of user passed to the inhabitants of Laprairie. By the document the owners of a seigniory granted land to the present and future inhabitants of a village Laprairie and of certain adjoining districts for a common. The land was granted in terms appropriate to a feudal grant by seigniors to consitaires, but the deed contained provisions which made it very doubtful whether more than a right of user passed. Agreements made in 1705 and 1724, to which some of the inhabitants who signed the deed of 1694 were parties, the same notary as in that case being employed, were based upon the view that the seigniors could alienate the land with the consent of the inhabitants. By the agreement of 1724 "the greater part of the inhabitants" purported to concede to the seigniors the right to grant building lots (emplacements) out of the land. The boundaries of the common had been ascertained and fixed under an Act of 1822. It was held by the Judicial Committee that in construing the deed it was permissible in the circumstances to take note of the agreements and that the inference from them was that the deed passed only a right of user. At page 323 Viscount Cave states:

"In view of the ambiguity of the grant, it is permissible to take note of the manner in which it was construed at or about the time of its execution; and accordingly, reference may be made to certain agreement entered into before the same notary in 1705 and 1724, to which some of the inhabitants who signed the deed of 1694 were also parties. By a convention entered into between the Jesuit Fathers and a number of inhabitants of Lap-

rairie on January 21, 1705, and found among the notarial acts of Maitre Adhemar it was agreed that the Jesuit Fathers should be at liberty to dispose of four arpents of the common on the terms of replacing them by other land of equal extent; and by another convention entered into by a meeting of inhabitants of Laprairie with the Jesuit Fathers on November, 30 1724 (to which more particular reference will be made hereafter) it was agreed that the Jesuit Fathers and their successors should be at liberty to grant as building lots (Conceder pour emplacements) such parts of the common as might be required for that purpose. In each of these agreements it is assumed that, subject to the consent of the commoners, the seigneurs are in a position to alienate the soil. These agreements therefore, support the view that the soil had not passed under the grant of 1694, but was still vested in the seigneurs".

(13) In the present case, it is manifest that the evidence of the conduct of the parties is relevant as an important circumstance to interrupt the mokarrari lease. From the accounts filed by the official receiver, exhibits J/5, J/10, J/16, J/19, J/28 and J/30, it appears that the official receiver never paid to the estate of Raja more than one fourth of the royalties and rents collected by him and no demands were made by the Raja of one-fourth share in the profits which the Sub-lessees were making from the mining operations. It is true that there is no evidence to show how the parties acted between the years 1900 to 1905. In 1905, the management of the estate of Shatrughan was taken over by the Encumbered estate and the estate of the Prince was taken over by the official receiver appointed by the Calcutta High Court. Exhibits J series are the accounts of the official receiver of the Prince's estate from 1905 to 1938.

There is evidence that for a long period from 1905 to 1927 the official receiver had paid to the Manager of the Encumbered Estate only one-fourth share of the gross collections made by him from the sub-lessees including 'salami', royalties and rents. In 1919, there was a dispute between the official receiver and the Manager of the Encumbered estate with reference to the interpretation of the lease. The official receiver maintained that he was liable to pay only one-fourth of the rents and royalties realised from the sub-lessees after deducting the expense of management. The Manager of the Encumbered estate claimed that the official receiver ought to pay one-fourth of the gross-collection made from the sub-lessees. The matter was settled in a conference between the Manager and the official receiver.

It was agreed that from 1st January, 1919 the official receiver would pay to the estate of the Raja one-fourth of the gross-collections made from the sub-lessees including salami, royalties and rents. Payment according to the agreement was made by the official receiver on 31st March, 1919 and the pending account for the previous years was adjusted. From 1919 onwards, the official receiver made payments to the Deputy Commissioner of Singhbhum in accordance with the terms of the agreement. From August, 1923, up to the beginning of 1927, all payments were made to Mr. D. P. Bagchi, the receiver of the plaintiff's estate. This evidence of conduct is highly important. It supports the argument of the lessee that the document can in no circumstance be interpreted to mean that the Prince was liable to pay to the estate of the Raja one-fourth of the profits made by the sub-lessees and that the claim of the appellant in this regard is untenable.

(14) The respondent lessee also relied upon the alternative argument that in any event there was an agreement between the official receiver and the Manager of the Encumbered estate on 16th February, 1919 with respect to the amount payable by the Prince, it was claimed by the Manager that the official receiver should pay 25 per cent. of the gross income from Royalties and 'salamis' received from the sub-lessees. The receiver did not admit the claim of the Manager but after some discussion a compromise was reached and in order to settle all the dispute the receiver agreed to pay 25 percent of gross 'salamis', royalties and rents collected from the sub-lessees as from 1st January, 1919. As regards the claim of the Raja for the previous years the receiver paid a sum of Rs. 3,000 in full satisfaction. It appears from exhibit D that the Board of Revenue, Bihar, sent a telegram to the official receiver approving of the terms of the agreement arrived at. It was argued by Mr. P. R. Das that the agreement, exhibit K, was binding upon the plaintiff since the Manager had authority to make a 'bona fide' settlement of a dispute in the interest of the estate. The argument is based upon section 18B of the Chotanagpore Encumbered Estates Act which states:

> "Subject to the sanction of the Commissioner the Manager shall have power to enter upon any contract or to execute or relinquish any lease or counterpart of a lease, or to take any action not otherwise provided for in this Act which in his opinion is necessary for the proper care and management of the property".

It is necessary to refer to certain other sections of the Act in this context. Under section 2, the management of the estate is vested in the Manager appointed by the Commissioner with the previous consent of the Provincial Government. Under section 4, the Manager has power to recover rent payable to the estate. Under section 16, the Manager has for the purpose of realising and recovering the rents and profits the same powers as the holder of the property would have had for such purpose if the Act had not been passed. Reading these sections it is clear that the Manager is vested with the management of the estate, that he is responsible for the fidelity and discharge of his duties, and that he has authority to take any action which is necessary for proper care and management. Section 18B of the Act is wide in its terms and confers a large measure of discretion in the management of the estate. Under section 4, the Manager has power to recover rent payable, and by necessary implication the Manager has the power to determine what is the amount payable as rent to the encumbered estate. So long as the Manager acts 'bona fide' and within the scope of the authority conferred by the statute there is no question that the act of the Manager would be binding on the owner of the estate.

It is not disputed in the present case that the Manager acted bona fide when he entered into the agreement, exhibit K, with respect to the interpretation of the lease. The Manager was also acting within the ambit of his authority conferred by section 4 read with section 16 of the Act. The agreement could also be supported under section 18B, for the settlement of a legal dispute about interpretation of a document is an act done for the prudent management of the estate and falls within the Manager's competence. It must be held there-

fore that the agreement, exhibit K, is binding upon the plaintiff. It was objected for the appellant that there is no evidence that Commissioner had given sanction to the agreement. Mr. P. R. Das pointed out that no such point was raised before the Subordinate Judge and hence no evidence was given. Mr. P. R. Das however referred to exhibit C/19, dated 21st March 1919 from which it appears that the draft compromise was submitted to the Commissioner.

Reference was also made to the letter, exhibit C/21, dated 30th April 1919, from the Commissioner addressed to the Receiver. Learned Counsel also relied upon the telegram, exhibit D, which shows that the Board of Revenue approved of the terms of the agreement. It was argued that under section 21A of the Encumbered Estates Act the Board of Revenue has power of supervision and control over the orders and proceedings of the Commissioner. I think that in the background of these facts, the Court may invoke the presumption, that all official acts have been regularly performed. Though there is no document to show that the Commissioner sanctioned the agreement, the material on the record suggests that not merely the Board of Revenue but also the Commissioner had approved of the agreement, exhibit K, which the parties had reached.

It was also objected on behalf of the appellant that the agreement, exhibit K, was not admissible in evidence, since it was not stamped. No such objection was taken in the trial court and under section 36 of the Stamp Act, when the document has been admitted in evidence, such admission cannot be called in question at any stage of the same suit on the ground that the document has not been duly stamped. The objection must therefore fail. The appellant then contended that the agreement, exhibit K, was in effect a variation of the terms of the principal lease and not having been registered the document was not admissible in evidence. But the answer to this argument is that the agreement did not alter the terms of the mokarrari lease but merely resolved a dispute as to its interpretation. The dispute between the parties was as to what their rights under the lease were and the compromise petition did nothing more than express an agreement that the lease would be interpreted in a particular way. It follows that exhibit K did not require registration and was properly admitted in evidence by the lower court.

(15) I hold that the agreement, exhibit K, is binding upon the plaintiff for the reasons already stated and the argument of Mr. N. C. Chatterji on this part of the case must fail.

(16) As regards the sub-lessees, Mr. N. C. Chatterji argued that the covenants in the principal lease were covenants running with the land and the sub-lessees would be liable under those covenants to pay to the plaintiff one-fourth share of the net profits made in the mining operations. Mr. Chatterji stressed the argument that payment of rent was a covenant running with the land. It was contended by the learned Counsel that clause 7 of the principal lease which stipulated that the lessee would pay one-fourth share of the net profits was clearly a covenant for payment of rent and would be binding upon the sub-lessees. It is not necessary in this context to examine the question whether clause 7 of the principal lease is a covenant running with the land; for the argument of Mr. Chatterji must fail on the ground that there is no privity of estate between the head lessor and the sub-lessee.

It is true that covenants that touch and concern the land, as distinguished from collateral covenants, run with the land and bind the assignees. But it is elementary that as between the plaintiff and the defendants who are sub-lessees there is neither privity of contract nor privity of estate and the sub-lessees would not be bound by the covenants of the principal lease. The law is plainly stated in Platt on Leases:

> "But as no privity exists between the underlessee and the original lessor, the covenants entered into between the latter and the original lessee, though they be covenants which run with the land, as to pay rent, to repair, and etc., cannot affect, either by way of right or liability, the underlessee personally",

the reason being that an underlessee is not an assignee. The rule is based on important authorities—'BERNEY v. MOORE', (1791) 2 Ridg. Parl. Rep. 310, at p. 331 and 'HOLFORD v. HATCH', (1779) 1 Doug. (K.B.) 183. The same rule applies in India—'TIMMAPPA v. RAMA VENKANNA', 21 Bom. 311, 'AKSHOY KUMAR v. AKMAN MULLA', 19 Cal. W. N. 1197 and 'GANGES MANUFACTURING CO. LTD. v. RADHA RANI DASI', I.L.R. (1947) 1 Cal. 365. In view of these authorities, it is clear that the plaintiff has no cause of action against the sub-lessees for the breach of any positive covenant contained in the principal lease.

(17) I now turn to the question argued on behalf of the appellant with much force and ingenuity, whether the plaintiff has cause of action against the sub-lessees on the ground that the covenant contained in the principal lease about payment of one-fourth share of the net profits is negative and restrictive. The argument is founded upon 'TULK v. MOXHAY' (1848) 41 E.R. 1143 in which it was decided that if a person took land with notice of a restrictive or negative covenant, he would be bound thereby, but such a covenant should be one restricting the user of the land and for the benefit of land in which the covenantee was interested. 'TULK v. MOXHAY' was actually a case of an assignee and not of a sub-lessee, and the covenant was contained in a deed of conveyance by which the purchaser bound himself (and his heirs and assigns) to keep the land sold "in an open state, uncovered with buildings." On the land afterwards passing into other hands by successive assignments, the last assignee was held bound by the covenant on the ground that he had notice of it, and an injunction was granted to restrain a breach.

The scope and limitation of the rule in 'TULK v. MOXHAY' has been explained in subsequent authorities. In 'HAYWOOD v. BRUNSWICK PERMANENT BENEFIT BUILDING SOCIETY', (1882) 8 Q B D 403 it was held by the Court of Appeal that where land has been granted in fee in consideration of a rent charge and a covenant to build and repair buildings, the assignee of the grantee of the land is not liable, either at law or in equity on the ground of notice, to the assignee of the grantee of the rent charge on the covenant to repair. It was observed by Brett, L. J. that the doctrine of 'TULK v. MOXHAY' applied only to covenants which restricted the mode of using the land and that the doctrine cannot be extended to a covenant to repair which was a covenant of an affirmative character. In 'LONDON AND SOUTH WESTERN RAILWAY CO. v. GOMM', (1882) 20 CH. D. 562 it was held by the Court of

Appeal that a covenant which gave an option for repurchase cannot be enforced under the doctrine of 'TULK v. MOXHAY'. At page 583, Jessel, M. R., states

"with regard to the argument founded on 'TULK v. MOXHAY' that case was very much considered by the Court of Appeal at Westminster in 'HAYWOOD v. THE BRUNSWICK PERMANENT BENEFIT BUILDING SOCIETY', (1882) 8 Q. B. D. 403, and the Court there decided that they would not extend the doctrine of 'TULK v. MOXHAY' to affirmative covenants, compelling a man to lay out money or do any other act of what I may call an active character, but that it was confined to restrictive covenants. Of course, that authority would be binding upon us if we did not agree to it, but I most cordially accede to it. I think that we ought not to extend the doctrine of 'TULK v. MOXHAY' in the way suggested here. The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of 'SPENCER'S CASE', (1583) 5 Co. Re. 16a to another line of cases, or else an extension in equity of the doctrine of negative easements, such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light".

The same principle was enunciated in 'AUSTERBERRY v. CORPORATION OF OLDHAM', (1885) 29 Ch. D. 750 in which the Court of Appeal held that the doctrine of 'TULK v. MOXHAY' could not be extended so as to bind in equity a purchaser taking with notice of a covenant to expend money on repairs. At page 773 Cotton, L. J. states;

"In my opinion, if this is not a covenant running at law, there can be no relief in respect of it in equity; it is not a restrictive covenant; it is not a covenant restraining the corporation or the trustees from using the land in any particular way, at least so far as this case is concerned. If either the trustees or the corporation were intending to divert this land from the purpose for which it was conveyed, that is, from its being used as a road or street, that would be a very different question; then one would have to consider this—how far, having regard to the Act of 1880, the equitable right would travel; because, undoubtedly where there is a restrictive covenant, the burden and benefit of which do not run at law, Courts of Equity restrain anyone who takes the property with notice of that covenant from using it in a way inconsistent with the covenant.

But here the covenant which is attempted to be insisted upon on this appeal is a covenant to lay out money in doing certain work upon this land; and, that being so, in my opinion — and the Court of Appeal has already expressed a similar opinion in a case which was before it — that is not a covenant which a Court of Equity will enforce: it will not enforce a covenant not running at law when it is sought to enforce that covenant in such a way as to require the successors in title of the covenantor, to spend money, and in that way to undertake a burden upon themselves. The covenantor must not use the property for a purpose inconsistent with the use for which it was originally granted: but in my opinion a Court of Equity does not and ought not to enforce a covenant binding only in equity in such a way as to require the successors of the covenantor himself, they having entered into no covenant, to expend sums of money in accordance with what the original covenantor bound himself to do."

All these cases demonstrate that the doctrine of 'TULK v. MOXHAY' applies only to restrictive or negative covenants that the doctrine cannot be extended to affirmative covenants such as covenant compelling a man to lay out money or to do any other act of an active character, that the covenant must be one restricting or affecting the user of the land, and that the remedy is not a remedy at law by way of specific performance under a species of implied privity, but a remedy in equity by injunction against the violation of the covenant. In the present case, there is no room for the application of the doctrine. Clause 2 of the principal lease requires that the lessee should lay out capital for working the mines, prospecting and raising the minerals.

Clause 7 stipulates that four annas share of the net profits will be paid as royalty to the Raja. Clause 12 empowers the Raja to inspect the mines and the process of extracting minerals. The Raja is also empowered to supervise the work at all times. Clause 13 stipulates that the lessee should supply a true copy of the account of expenditure and income every year to the Raja. Clause 14 states that if the accounts are not furnished the Raja may keep the mining work suspended. It is obvious that none of the clauses is a restrictive covenant falling within the rule in 'TULK v. MOXHAY' and the plaintiff cannot be granted a decree against the sublessees for payment of one-fourth share of the net profits made.

(18) It is right to state that in the lower court the Counsel for the plaintiff attempted to raise an issue whether the plaintiff was entitled to damages from the lessee on account of breach of the covenants of the principal lease. It was argued that the lessee had committed breach of clause 18 of the principal lease since sub-leases were not created in such a manner as to enable the Raja to realise one-fourth share of the profits from the sub-lessees. It was submitted that the Raja had suffered damages on account of the breach of covenant on the part of the lessee.

The argument was rejected by the learned Subordinate Judge who declined to frame such an issue on the ground that there was nothing in the plaint to indicate that there was a breach of the covenant on the part of the lessee or that the plaintiff had suffered damages on that account. On the contrary, paras, 19 and 21 of the plaint indicate that there was no breach of the covenant on the part of the lessee, but the sub-lessee was bound by the terms and conditions of the principal lease to pay one-fourth share of profits to head lessor. The plaintiff had in fact based his claim on the sub-leases on the ground that the Prince had validly created the sub-leases and the sub-lessees were therefore liable to perform the covenants in the principal lease.

(19) For the reasons assigned I would affirm the decree of the Subordinate Judge and dismiss the appeal with costs to contesting respondents. There will be one hearing fee to be divided between lessee and contesting sublessees in proportion of 2/3 and 1/3 respectively.

(20) DAS J.: I agree.

B/V.R.B. Appeal dismissed.

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RAMASWAMI AND SARJOO PRASAD JJ.

The State of Bihar v. Sir Kameshwar Singh Bahadur, Opposite Party.

Misc. Judicial Case No. 244 of 1949, D/- 19-2-1952.

(a) Bihar Agricultural Income-tax Act (7 (VII) of 1938), S. 26 — "Escaped Assessment" — Meaning of — (Income Tax Act (1922), S. 34).

If an item of income is not charged because it is not included in the return, it will be proper to say that the income has escaped assessment. Similarly, income will be said to have escaped assessment if it has not been charged on account of a mistake or oversight on the part of the taxing authorities. The Agricultural Income-tax Officer is therefore entitled to proceed under this section to re-assess income if he thinks that owing to some mistake in the first assessment a part of the income has not been assessed. It is not necessary that there must be new facts brought to the notice of the Agricultural Income-tax Officer or that there should be any change in the law. The phrase "escaped assessment" must be held to apply to a case where the Agricultural Income-tax Officer deliberately reached an erroneous result as much as to a case where the officer had not considered the matter at all but simply omitted assessment of the property on account of inadvertence: AIR 1934 PC 30, Expln. Case law referred. (Para 4)

Anno: Income-tax Act, S. 34, N. 3.

(b) Bihar Agricultural Income-tax Act (7 (VII) of 1938), S. 26 — Order of assessment — Certain sum accepted as capital receipt — Jurisdiction to revise order under section — (Income-tax Act (1922), S. 34).

Where the Agricultural Income-tax Officer made an order of assessment after accepting the claim of the assessee that a certain sum was capital receipt according to the terms of a zarpeshgi lease, but, later on, issued notice under S. 26 on the ground that agricultural income from zarpeshgi lease should have been taxed and made fresh assessment:

Held that the Income-tax Officer had jurisdiction to revise his previous order under S. 26. (Para 7)

Anno: Income-tax Act, S. 34, N. 4.

(c) Bihar Agricultural Income-tax Act (7 (VII) of 1938), S. 2 (a) — Zarpeshgi lease — Under terms of lease lessee advancing sum of money to lessor — In consideration thereof, lessee granted right to enjoy rent and profits of certain villages for 28 years—Rs. 1000 to be paid annually by lessee to lessor as rent — Revenue and other Government demands to be paid by lessor — After certain deductions lessee to appropriate remaining profits to himself — No stipulation that usufruct would be taken towards adjustment of loan — No rate of interest fixed — Lessee held had in effect exchanged capital for income for 28 years — Income held was taxable as agricultural income in hands of lessee. (Para 8)

Govt. Advocate and R. Prasad, for the State of Bihar: Sir Sultan Ahmad, B. K. Mazumdar, S. P. Srivastava and S. Shamshul Hassan, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras

('34) 61 Ind App 10: (AIR 1934 PC 30)	6, 14, 16
('35) 14 Pat 552: (AIR 1935 PC 143)	10
('35) 14 Pat 623: (AIR 1935 PC 172)	11
('43) AIR 1943 Bom 132: ILR 1943 Bom 206	5, 17
('31) 58 Cal 909: (AIR 1931 Cal 545 SB)	6
('33) 1933-1 ITR 129: (AIR 1933 Cal 777)	5
('40) 1940-8 ITR 236: (AIR 1940 Cal 520)	5
('35) 1935-3 ITR 171: (AIR 1935 Lah 361)	5
('26) 49 Mad 22: (AIR 1926 Mad 287)	5
(1903) AC 299: (72 LJKB 617)	9
(1905) 2 KB 507: (74 LJKB 671)	10

RAMASWAMI J.: This case is stated by the Board of Agricultural Income-tax under Section 25(1) of the Bihar Agricultural Income-tax Act (Act VII (7) of 1938).

(2) On 28th December 1945, the Agricultural Income-tax Officer of Darbhanga made an order of assessment holding that the agricultural income of Maharaja of Darbhanga was Rs. 37,43,520 for the accounting year 1944-45. The assessee had claimed a sum of Rs. 2,82,192 as capital receipt according to the terms of a 'zarpeshgi' lease. The claim was accepted by the Agricultural Income-tax Officer who completed the assessment on 28th December 1945. The Assistant Commissioner approved the assessment and demand notice was issued. The assessee paid two out of three instalments of the amount of tax but, on 22nd March 1946, the Agricultural Income-tax Officer issued notice under Section 26 on the ground that agricultural Income from Gaya zarpeshgi lease should have been taxed.

In response to the notice the assessee filed a fresh return and after examination of the accounts the Agricultural Income-tax Officer determined the net income from the Gaya zarpeshgi lease to be Rs. 2,50,879 and after adding it to the total income imposed a tax of Rs. 39,512 and odd. The assessment was approved by the Assistant Commissioner on 23rd March 1946. The assessee appealed to the Commissioner who held that no Income had escaped assessment and the Agricultural Income-tax Officer had no jurisdiction to apply Section 26 of the Act. The Commissioner allowed the appeal. On behalf of the State of Bihar, a revision application was filed before the Board of Agricultural Income-tax who has referred the case to High Court under S. 25 (1) of the Act.

(3) The questions referred are: (1) Whether in view of the circumstances of the case, and particularly the manner in which, after due consideration, the Agricultural Income-tax Officer in his first judgment dated the 10th March 1947, had held that the assessee was not liable to be assessed for the receipt on account of the zarpeshgi lease, the Agricultural Income-tax Officer had jurisdiction to revise his own order under Section 26 of the Act; and (2) assuming he had the jurisdiction to revise his own order under Section 26 of the Act, whether the income from the zarpeshgi lease of the assessee was taxable under the Act.

(4) The first question is whether the Agricultural Income-tax Officer was competent under Section 26 of the Act to review the previous order of assessment and to hold that the assessee was liable to be assessed for the income from the properties granted in zarpeshgi lease. On behalf of the assessee, Dr. Sultan Ahmad argued that there was no 'escape of income' from the process of assessment and that Section 26 has been wrongly applied in this case. It was contended by the learned

Counsel that in order to hold that the income had escaped assessment there must have been either some fresh facts brought to the notice of the Agricultural Income-tax Officer or some alteration in the state of the law. It was urged that a mere change of view on the part of the Agricultural Income-tax Officer was not sufficient. In my opinion the argument is not correct. Section 26 states—

"If for any reason any agricultural income chargeable to agricultural income-tax has escaped assessment for any financial year, or has been assessed at too low a rate, the Agricultural Income-tax Officer may, at any time within one year of the end of that financial year, serve on the person liable to pay agricultural income-tax on such agricultural income, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section 2 of section 17, and may proceed to assess or re-assess such income."

Having regard to the opening words of the section 'for any reason' there is no justification for giving a restricted meaning to the word 'escape'. In its lexicographic sense, the word 'escape' connotes 'to elude' or 'to succeed in avoiding'. If, an item of income is not charged, because it is not included in the return it will be proper to say that the income has escaped assessment. Similarly, income will be said to have escaped assessment if it has not been charged on account of a mistake or oversight on the part of the taxing authorities. The Agricultural Income-tax Officer is therefore entitled to proceed under this section to re-assess income if he thinks that owing to some mistake in the first assessment a part of the income has not been assessed. It is not necessary that there must be new facts brought to the notice of the Agricultural Income-tax Officer or that there should be any change in the law.

Dr. Sultan Ahmad also stressed the argument that the phrase 'escaped assessment' must mean not that the question has been considered and decided in favour of the assessee but the Agricultural Income-tax Officer had omitted to consider the question at all. Learned counsel contended that the Section cannot apply to a case where the Agricultural Income-tax Officer has upon consideration reached the erroneous conclusion that a part of the income was not assessable. But such a construction is not possible in view of the later part of the section 'where income..... has been assessed at too low a rate'. This clause cannot refer to a matter of mere inadvertence but must refer to a deliberate assessment made by the Agricultural Income-tax Officer in the preceding year with knowledge of the facts. The phrase 'escaped assessment' must be construed in a similar manner, and must be held to apply to a case where the Agricultural Income-tax Officer deliberately reached an erroneous result as much as to a case where the officer had not considered the matter at all but simply omitted assessment of the property on account of inadvertence.

(5) There is a 'cursus curiae' of all the High Courts in support of this interpretation with reference to Section 34 of the Indian Income-tax Act which is in 'pari materia' with section 26 of the Bihar Agricultural Income-tax Act: 'COMMR. OF INCOME-TAX v. RAJA OF PARLAKIMEDI', 49 Mad. 22; 'AMIR SINGH SHER SINGH v. COMMR. OF INCOME-TAX', 1935-3 I. T. R. 171 (Lah.); 'IN RE P. C. MULLICK & D. C. AICH', 1940-8 I.T.R. 236 (Cal) and 'CHIMANRAM v. COMMR. OF INCOME-TAX, (CENTRAL) BOMBAY', A.I.R. 1943 Bom 132. In 'ANGLO PERSIAN OIL COMPANY LTD. v. COMMISSIONER OF INCOME-TAX', 1933-1 I. T. R. 129 (Cal.) there is also a dictum of Sir George Rankin to the effect that Section 34 is applicable to put right an assessment by which a deduction has been improperly allowed and that there is nothing in Section 34 which limits it to the case of non-disclosure by the assessee or discovery of new matter or inadvertence.

(6) Dr. Sultan Ahmad placed reliance upon a dictum of the Judicial Committee in 'RAJENDRANATH MUKHERJEE v. COMMR. OF INCOME-TAX', 61 Ind App 10 (PC) in which the question arose whether it was competent to make an assessment under section 23 (1) of the Income-tax Act after the expiry of the year for which the tax was charged. It appears that in April 1927, notice was issued to Burn & Co., calling for a return of their income for the year 1926-27 and a return was duly made in 1928. Meanwhile, the Income-tax authorities thought that Martin & Co. had purchased Burn & Co., and made an assessment on Martin & Co., in respect of the joint income of Burn & Co., and Martin & Co. Martin & Co., appealed and the High Court ultimately held on May 16, 1930, that the two companies should have been separately assessed. The assessment of Martin & Co. was accordingly amended by eliminating the income of Burn & Co. and the Income-tax Officer assessed Burn & Co. on November 8, 1930 on their income as returned in 1928. It was held by the Judicial Committee that the assessment made under Section 23 (1) on Burn & Co. on 8th November 1930 was a legal assessment.

It was contended on behalf of the appellant that an assessment once begun if not completed within the year could not be made unless it was done under Section 34. The argument was negatived on the ground that Section 23 under which assessment was made contained no limitation of time during which assessment could be made. The Judicial Committee observed that income had not escaped assessment within the meaning of section 34 since proceedings for assessment were pending and no final order had been made. The ratio of the case is that an assessment could be made under section 23 (1) of the Act more than a year, in fact at any time after the assessment year if in the meantime no final assessment has been made. But Dr. Sultan Ahmad referred to the dictum at page 16:

"To say that the income of Burn & Co., which in January, 1928, was returned for assessment and which was accepted as correctly returned though it was erroneously included in the assessment of Martin & Co., has 'escaped' assessment in 1927-28 seems to their Lordships as inadmissible reading. The fact that Section 34 requires a notice to be served calling for a return of income which has escaped assessment strongly suggests that income which has already been duly returned for assessment cannot be said to have 'escaped' assessment within the statutory meaning. Their Lordships find themselves in agreement with the view expressed in 'IN RE LACH-

HIRAM BASANTLAL', 58 Cal 909 (S. B.) by the learned Chief Justice (Rankin): 'Income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessees' income which have not yet terminated in a final assessment thereof."

But the passage must be read in context of the whole report. When the Judicial Committee remarked that the expression 'escaped assessment' was not equivalent to 'has not been assessed' the Judicial Committee meant that the expression 'escaped assessment' can have no possible application to a case where the course of assessment was not yet complete and there had in fact been no final assessment order. The Judicial Committee was more concerned with the meaning of the word 'assessment' to which it gave wide interpretation than with defining exact meaning of the word 'escaped'. All that the Judicial Committee held about the latter word was that it was not wide enough to include income as to which no final assessment order had been made and as to which assessment proceeding was still running its course.

(7) Upon the first question therefore, I hold that in the circumstances of the case income had escaped assessment and the Agricultural Income-tax Officer had jurisdiction to make fresh assessment under section 26 of the Act.

(8) Upon the second question, Dr. Sultan Ahmad argued that the receipt from the zarpeshgi lease was not taxable. It was contended that the assessee had advanced a loan of 17 lacs and odd to Rani Bhuvaneshwari Kuer and that the receipt from the leasehold properties was appropriated by the assessee in recoupment of the loan and interest. But it was argued for the State of Bihar that under the terms of the zarpeshgi lease the assessee was to remain in possession and enjoy the usufruct of the properties given in lease for fixed term of years and whatever income was derived during the term of the lease was income of the assessee and was liable to be taxed. In order to determine which of the contentions is right, it is necessary to examine the true nature and character of the transaction between the assessee and Rani Bhuvaneshwari Kuer. The zarpeshgi lease is based on two documents called indentures of lease between the assessee and Rani Bhuvaneshwari Kuer. From these documents, it is apparent that the lessee had advanced a sum of Rs. 17,16,000/- to Rani Bhuvaneshwari Kuer; that in consideration thereof, the assessee was granted right to enjoy rent and profits of the villages mentioned in schedule I for a term of 28 years commencing from the first day of Asarh 1342 Fs.

The other conditions were (1) that Rs. 1000/- should be annually paid by the lessor to the lessee as rent of the leasehold properties, (2) that revenue and other Government demands will be paid by the lessor as the leasehold properties were only part of certain touzis for which public dues were jointly payable (3) that after payment of the stipulated rent of the lessor and after deducting 12½ per cent. of the aggregate amount payable by the mokarraridars as expenses of collection the assessee was entitled to appropriate the remaining profits to himself. According to the terms of the zarpeshgi lease the assessee is de facto landlord and has sole right to collect rent from the tenants. There is no stipulation in the document that the usufruct would be taken towards adjustment of the loan of 17 lacs and odd. There is no rate of interest fixed. The assessee has in effect exchanged capital for income for a period of 28 years. The assessee advanced capital of 17 lacs in place of which he obtained usufruct of the properties for a fixed term of 28 years. There is no question of redemption after paying of the advance. The lease terminates by the expiration of the term and the lessor may re-enter the properties as on the termination of any other lease. The re-entry does not depend upon the redemption of the advance nor can the property be held after the termination of the lease to secure repayment as there is nothing to repay. Upon construction of the terms of the zarpeshgi lease, it is plain that the amount of Rs. 2,52,879/- is taxable as agricultural income in the hands of the assessee.

(9) The distinction which is to be drawn for the purpose of tax between payment of income character and payment of capital nature is sometimes very fine and rather artificial one. The question in each case depends upon the precise character of the transaction. To take an example, if the true bargain is that a capital sum shall be paid, the fact that the method of payment which is adopted in the document is that of payment by instalments will not have the effect of giving those instalments the character of income. Their character is determined by the circumstance that the obligation is to pay a capital sum and instalments are merely a method of effecting the payment. On the other hand, where there is no undertaking to pay a capital sum and no capital obligation is in existence and all that exists is an undertaking to let the assessee appropriate the usufruct of certain properties the sum so appropriated would be stamped with the character of income for the purpose of tax.

Dr. Sultan Ahmad relied upon 'SECY. OF STATE v. SCOBLE', (1903) A. C. 299 in which the Indian Government purchased the G. I. P. Railway for a certain sum. In exercise of their option, the Government elected to pay off the purchase price by annual instalments which were called in the contract 'annuities'. The House of Lords held upon an analysis of the transaction that the 'annuity' was merely the payment of the purchase price by instalments together with interest at a certain rate, and that the tax was payable only in respect of that portion of each instalment which represented on an actuarial valuation the interest on the unpaid purchase price. To put it in other words there was no transmutation of the principal sum into annuities but the annual payments were instalments of the principal sum with interest on actuarial valuation calculated in a way familier to accountants and actuaries. The material facts of the present case are manifestly different.

(10) In my opinion the present case comes within the authority of 'GOPAL SARAN NARAIN SINGH v. COMMR. OF INCOME-TAX B. & O.', 14 Pat. 552 in which the appellant had transferred an estate to Rani Bhuvaneshwari Kuer in consideration of (a) payment of the transferor's debts of 10 lacs and odd; (b) cash payment of 4 lacs and odd and (c) annual payment of Rs. 2,40,000/- to the transferor for his life. It was held by the Judicial Committee that the owner of the estate had exchanged capital asset for a life annuity which

was taxable as income in his hands, that the annual payments were not instalments of the capital sum, that they were part of the 'price' of the sale but that did not make them necessarily capital payments. The same principle is stated in 'CHADWICK v. PEARL LIFE INSURANCE CO.', (1905) 2 K. B. 507 in which an unexpired term of a leasehold was assigned to an Insurance Company in payment of a lump sum of £ 1625/- to be paid until the expiration of the term. It was held by Walton J. that the intention of the transaction was that the plaintiff should continue to receive as income to the end of the term the same net amount that he had previously received as rent; that the payments were payments of an annuity or other annual payment within the meaning of section 40 of the Income-tax Act, 1853, and were not the payment of a fixed amount by instalments, and that the deduction in respect of income-tax had therefore been properly made by the defendants. At p. 154 Walton J. states:

"It is obvious that there will be cases in which it will be very difficult to distinguish between an agreement to pay a debt by instalments, and an agreement for good consideration to make certain annual payments for a fixed number of years. In one case there is an agreement for good consideration to pay a fixed gross amount and to pay it by instalments; in the other there is an agreement for good consideration not to pay any fixed gross amount, but to make a certain, or it may be an uncertain, number of annual payments. The distinction is a fine one, and seems to depend on whether the agreement between the parties involves an obligation to pay a fixed gross sum".

(11) Upon this survey of the authorities, it is plain that the income from the zarpeshgi lease in the present case is not capital receipt but is income receipt. Learned Government Pleader contended that the receipt was agricultural income. Dr. Sultan Ahmad did not dispute that if the amount in question is not capital receipt it would bear the character of agricultural income. It was indeed pointed out by the Government Pleader that under the terms of the zarpeshgi lease, the assessee was granted possession of the villages in question, that he was given sole right to collect rents from the tenants and to enjoy the profits. The facts are closely parallel to 'COMMR. OF INCOME-TAX, BIHAR & ORISSA v. MAHARAJADHIRAJ OF DARBHANGA', 14 Pat 623 in which a money-lender lent money on a zarpeshgi lease and usufructuary mortgage of agricultural lands under which he was put in possession with the general powers and obligations of an owner to manage the estate, collect rents, pay the Government revenue and taxes and to exercise all powers in relation to raiyats that an owner might exercise. There was also a clause in the contract that after deducting from a gross estimated rental the estimated costs of management and 'thika' rent he was to take the balance ('thicka' profits). It was held by the Judicial Committee that the 'thicka' profits were agricultural income and not income from money-lending business.

(12) In view of these considerations, I would answer both the questions referred in favour of the State of Bihar. The assessee must pay the cost of this reference Hearing fee 10 gold mohars.

(13) SARJOO PROSAD J.: I agree that the questions under reference should be answered in the manner proposed by my learned brother.

(14) The decision of the question: whether in the circumstances of the case the Agricultural Income-tax Officer had jurisdiction to revise his order under section 26 of the Agricultural Income-tax Act, has caused me considerable embarrassment. The argument on behalf of the assessee that the Officer had no jurisdiction to do so when he had already decided on a previous occasion to exempt the zarpeshgi income from assessment gathered much strength on the dictum of the Judicial Committee in 'SIR RAJENDRANATH MUKHERJI v. COMMR. OF INCOME-TAX', 61 Ind App 10 (P C). Lord Macmillan, while interpreting Section 34 of the Indian Income-tax Act, which is undoubtedly in 'pari materia' with Section 26 of the Agricultural Income-tax Act, with which we are at present concerned, is reported to have observed therein as follows:

"The appellants, however, submit that this is a case of income escaping assessment within the meaning of Section 34. Assessment, they argue, is a definite act, indeed the most critical act in the process of taxation. If an assessment is not made on income within the tax year, then that income, they submit, has escaped assessment within that year, and can be subsequently assessed only under S. 34 with its time limitation. This involves reading the expression 'has escaped assessment' as equivalent to 'has not been assessed'. Their Lordships cannot assent to this reading. It gives too narrow a meaning to the word 'assessment' and too wide a meaning to the word 'escaped'."

(15) True it is that section 34 played an "important part in the debate" before their Lordships and it is needless to ignore the fact that the attention of their Lordships was duly focussed upon the terms of the section. I admit that the language used by his Lordship is broad enough to encourage the submission of the learned Counsel for the assessee—a submission which is also in consonance with the ordinary and accepted notions of procedural law relating to review of orders and judgments. Left to myself, I would have been loath to resist the aforesaid contention of the assessee; but I have had the advantage of examining the said decision of the Judicial Committee in the light of the other authoritative pronouncements. I agree that the decision has to be confined to its own context.

(16) An analysis of the decision in 'RAJENDRANATH MUKHERJI'S CASE', (61 Ind. App. 10 (P. C.)) (ibid) shows that the assessment under consideration by their Lordships purported to be one under s. 23 of the Indian Income-tax Act. The appellants argued that on a sound construction of the provisions of the Income-tax Act, it was incompetent to make any assessment to tax after the expiry of the year for which the tax was charged, except in the cases provided for in section 34 of the Act. This argument, their Lordships, did not entertain. They held that there was no such limitation in Section 23 of the Act itself. They then proceeded to examine the provisions of Section 34, in view of the argument advanced, and opined thus:

"Their Lordships do not accept the inference sought to be drawn from Section 34, that it

is only where income has escaped assessment in the tax year, or has been assessed too low in that year, that an assessment may be made after the expiry of the tax year. It may be that, in the two cases to which the section applies, if no notice is served within the year following the tax year, no subsequent assessment or re-assessment can be made of the income which has escaped assessment or been assessed too low, but that is not to say that in no other case can an assessment be made after the expiry of the tax year."

(17) This is really the crux of their judgment. It would thus be clear that the appellants also agreed that Section 34 was applicable to the case in question and on that hypothesis asked the Judicial Committee to draw an inference in their favour which it refused to do. Their Lordships apparently were not examining there the question with which we are now confronted and it may not be therefore desirable to extend their dictum too far. It was on similar lines that Kania, J. (as he then was) distinguished the above observations of the Judicial Committee in 'CHIMANRAM MOTILAL v. COMMR. OF INCOME-TAX (CENTRAL) BOMBAY', I.L.R. (1943) Bom. 206: A. I. R. 1943 Bom. 132 at page 137. The matter appears to have been placed beyond any realm of doubt by various other judicial pronouncements both before and after the said decision of the Judicial Committee. It is needless for me to refer to all those cases most of which have been already cited in the judgment of my learned brother. I agree with him that the 'cursus curiae' of the various High Courts in India is in favour of the interpretation of section 26 of the Agricultural Income-tax Act adopted by him, which Section is substantially similar to Section 34 of the Income-tax Act considered in those cases. For the reasons aforesaid, I have eventually agreed to the answers proposed as well as to the directions for costs allowed in this reference.

B/V.R.B. Reference answered in affirmative.

A. I. R. 1952 PATNA 421

RAMASWAMI AND SARJOO PROSAD JJ.

Narain Mishra, Appellant v. Mahanth Mishra and others, Respondents.

A. F. A. D. Nos. 2357 of 1948, and 108 of 1949, D/- 27-2-1952.

(a) Evidence Act (1872), S. 92 — Mortgagee coming into possession after execution of mortgage bond — Proof of factum of possession.

If the fact is that after the execution of the mortgage bond in question, the mortgagees actually came into possession of the mortgaged property, this fact which has nothing to do with the terms of the mortgage bond, can be proved by adducing evidence in the case. Such evidence is not in contravention of the terms of the mortgage bond. It is not for the purpose of contradicting, varying, adding to or subtracting from the terms of the mortgage bond, and Section 92 does not shut out any such evidence. Evidence of this nature does not come under proviso (4) of section 92: Case law Rel. on. (Para 5)

Anno: Evidence Act, S. 92 N. 9, 28.

(b) Transfer of Property Act (1882), S. 76 — Mortgagee in possession making default in payment of arrears of rent — Subsequent purchase.

Even if it is found that no money was left with the mortgagees to pay the arrears of rent to the landlord, nonetheless there is a liability on the part of the mortgagees to pay the rent due during the continuance of the mortgage, they having come in possession of the mortgaged property; and therefore if they have defaulted in payment of such rent, they cannot take advantage of any such default to purchase the property in the name of a person, who has been established to be a benamidar of the mortgagees: AIR 1952 Pat 286, Rel. on. (Para 5)

Anno: T. P. Act, S. 76 N. 8.

(c) Limitation Act (1908), Arts. 12, 142 and 144 — Redemption by mortgagor — Interference by mortgagee — Suit for declaration and confirmation of possession — Limitation — Necessary Parties — Civil P. C. (1908), O. 22, R. 4 and O. 41, R. 4.

In August 1921, one Kusheshwar sold certain lands to Jageshar Jha. This sale was recognised by the landlord's office. The plaintiff's case was that this Jageshwar Jha was a benamidar of the plaintiffs, and that the plaintiffs were the real purchasers of the disputed lands. The plaintiffs on the 3rd of August 1928, executed a mortgage bond with respect to these lands in favour of two brothers Sudhakar Misra and Bidyakar Misra for a sum of Rs. 800/-. The plaintiffs alleged that subsequently the mortgagees were put in possession of the mortgaged property. The landlord's dues remained unpaid, and in consequence, the landlord sued for rent the recorded tenant Jageshwar Jha, obtained a decree in September 1929 and in execution of that decree, the lands were sold and purchased by defendant No. 1. The plaintiffs alleged that the liability to pay the rent was on the mortgagees and the plaintiffs were unaware of the rent suit decree or the execution proceedings or the sale held thereunder. They, therefore, said that they being ignorant of these proceedings in due course paid up the mortgage dues on the 20th of January 1939, to the mortgagees who accepted the payment and even delivered possession of the mortgaged property to the plaintiffs including the disputed lands; but in November 1941, the mortgagees began to interfere with the possession of the plaintiffs and claimed the lands in suit. It is only then that the plaintiffs on enquiry discovered, that a rent suit had been filed by the landlord in which a decree was obtained and in execution whereof the lands had been sold and purchased by the defendant No. 1. The plaintiffs challenged the rent suit, the decree and the execution proceedings as being collusive and fraudulent to defeat their interest; and they further alleged that the lands were purchased at auction sale by the mortgagees themselves in the name of the defendant first party who was their relation. On these allegations, the plaintiffs filed the suit for declaration that they were not bound by the decree in the rent suit or the sale in execution thereof and for confirmation of possession, or, in the alternative, for recovery of possession of the disputed lands. Bidyakar being dead, his heirs and legal representatives, defendants 3 to 8 were

made parties to the suit, defendant No. 7, Bijender, being one of the heirs. The judge held that the suit in substance was a suit for declaration of title and confirmation of possession, or in the alternative for recovery of possession, and the appropriate Article applicable to such a case was either Art. 142 or Art. 144 of the Limitation Act:

Held that the Judge having found that the plaintiffs had come into possession of the disputed lands after the redemption of the mortgage in 1931 was right in holding that the suit was not barred by limitation.

Held further that it was not possible for the plaintiffs to get a decree for recovery of possession or confirmation of possession as against the defendant No. 1 alone without suing the mortgagees themselves against whom they actually alleged a cause of action. The defendant No. 7 was, therefore, a necessary party to the suit even for declaration of title and recovery of possession, and all the more so a necessary party to the appeal by plaintiffs when the plaintiffs' suit had been dismissed in his favour.

The plaintiffs in the plaint made a prayer that they should be held entitled to the reliefs on payment of Rs. 251/-, the cost incurred by the mortgagees in paying up the decree in the rent suit with interest as a part of the mortgage amount. This was necessary in view of the fact that the declaration that the purchase made by defendant No. 1 on behalf of the mortgagees would enure to the benefit of the mortgagors and would not affect their right of redemption could only be granted in their favour subject to payment of the cost incurred by the mortgagees in paying up the rent decree and acquiring the lands in suit by virtue of their purchase. The defendant No. 7 was a necessary party to the appeal before the Court of appeal below. For this reason also and he not being impleaded as a party, the appeal was incompetent and should have been dismissed on this ground alone: AIR 1939 Pat 198, AIR 1916 PC 227, Rel. on. (Paras 7, 8)

Anno: Lim. Act, Art. 12, N. 1; Arts. 142 and 144, N. 3; C. P. C., O. 22 R. 4 N. 23; O. 41 R. 4 N. 8.

Kamala Kanta Varma and Ratikant Chaudhury (in No. 2357) and S. C. Mazumdar (in No. 108), for Appellants; B. C. De, S. C. Mazumdar, Raghunath Jha and Satyendra Narain Sinha (in No. 2357) and B. C. De, Raghunath Jha and Akbar Hussain (in No. 108), for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('17) 44 Ind App 30: (AIR 1916 PC 227) 8
('33) 60 Ind App 273: (AIR 1933 PC 178) 5
('87) 9 All 392 5
('05) 27 All 351: (1904 All WN 270 FB) 5
('30) AIR 1930 All 440: (122 Ind Cas 894) 5
('10) 11 Cal LJ 39: (2 Ind Cas 13) 5
('12) 16 Cal WN 137: (11 Ind Cas 713) 5
('36) AIR 1936 Mad 380: (162 Ind Cas 53) 5
('37) AIR 1937 Mad 261: (168 Ind Cas 699) 5
('39) AIR 1939 Pat 198: (182 Ind Cas 740) 8
('40) 21 Pat LT 437: (AIR 1940 Pat 49) 5
('52) S. A. No. 2123 of 1948: (AIR 1952 Pat 286) 5

SARJOO PROSAD J.: These two appeals arise out of the same judgments of the two Courts below. Second Appeal No. 2357 of 1948 has been preferred by the defendant No. 1 to the suit to which these appeals relate. The other appeal (Second Appeal No. 103 of 1949) has been preferred by the defendant third party, the landlord of the lands in dispute. The dispute relates to two plots of lands described in the survey by plots 2620 and 2137 of khata No. 299 of village Bargaon covering an area of 7 bighas 4 dhurs. The lands in question admittedly were the kasht lands of one Chunchun Jha but the landlord in execution of a rent decree against the tenant got the holding sold and purchased it himself, and thereafter settled the lands with Kusheshwar, son of the said Chunchun Jha. In August 1921, Kusheshwar sold the lands to Jageshwar Jha, defendant No. 10, the defendant fourth party in the suit.

This sale was recognised by the landlord & Jageshwar was recorded as a raiyat in the landlord's office. The plaintiffs' case is that this Jageshwar Jha was a benamidar of the plaintiffs, and that the plaintiffs were the real purchasers of the disputed lands, and it appears that on the 25th of July 1928 Jageshwar Jha executed a deed of bajidawa or relinquishment in favour of the plaintiffs in respect of these lands. The plaintiffs on the 3rd August 1928 executed a mortgage bond with respect to these lands in favour of two brothers Sudhakar Misra and Bidyakar Misra for a sum of Rs. 800/-. Sudhakar is defendant No. 2 in the suit and Bidyakar being dead, his heirs and legal representatives defendants 3 to 8 were made parties to the action, defendant No. 7, Bijender, being one of the heirs. The mortgage in question related not only to these lands but to certain other lands which were hypothecated to the mortgagees for the payment of the debt. The plaintiffs alleged that subsequently the mortgagees were put in possession of the mortgaged property, and, out of the consideration for the mortgage, a sum of Rs. 50/- was left in the hands of the mortgagees in order to pay off the arrears of rent due to the landlord.

The facts, however, show that the landlord's dues remained unpaid, and in consequence the landlord sued for rent the recorded tenant Jageshwar Jha, obtained a decree in September 1929 and in execution of that decree, the lands were sold and purchased by the appellant, defendant No. 1. The plaintiffs allege that the liability to pay the rent was on the mortgagees and the plaintiffs were unaware of the rent suit decree or the execution proceedings or the sale held thereunder. They, therefore, said that they being ignorant of these proceedings in due course paid up the mortgage dues on the 20th of January 1939, to the mortgagees who accepted the payment and even delivered possession of the mortgaged property to the plaintiffs including the disputed lands; but in November 1941, the mortgagees began to interfere with the possession of the plaintiffs and claimed the lands in suit. It is only then that the plaintiffs on enquiry discovered, according to the allegation in the plaint, that a rent suit had been filed by the landlord in which a decree was obtained and in execution whereof the lands had been sold and purchased by the defendant No. 1.

The plaintiffs challenge the rent suit, the decree and the execution proceedings as being collusive and fraudulent to defeat their interest; and they further allege that the lands were purchased at the auction sale by the mortgagees themselves in the name of the defendant first party who is their relation. On

these allegations the plaintiffs filed the suit for declaration that they were not bound by the decree in the rent suit or the sale in execution thereof and for confirmation of possession, or, in the alternative, for recovery of possession of the disputed lands. They also prayed that in case it was held that the mortgage bond, dated the 3rd of August 1928, had not been redeemed, the plaintiffs should be allowed to redeem the same.

(2) The suit was contested by the defendant No. 1 — the auction-purchaser, defendants 3 to 7 of the second party — the mortgagees, and the defendant third party — the landlord. Defendant No. 2 of the second party does not appear to have entered any contest. These various sets of defendants filed separate written statements. The defendant first party contended, 'inter alia', that the plaintiffs had no cause of action; that Jageshwar Jha, the recorded tenant was not the benamidar of the plaintiffs, that the mortgagees were not in possession of the lands in suit, and there was no liability or default on their part to pay the landlord's rent; that the rent suit decree and the execution proceedings which followed were legal and valid; that the auction purchase by this defendant was in his own rights and not as a benamidar for the mortgagees; and that all the allegations of the plaintiffs to the contrary were false and unfounded. He also contended that the suit was barred by limitation.

The defendants 3 to 7 denied the alleged redemption of the mortgage bond by the plaintiffs and they further supported the case of the defendant first party that he was not a benamidar of the mortgagees. The landlord, defendant third party, stated that the suit had been properly instituted by him against the recorded tenant and that there was no collusion or fraud on his part, and therefore the plaintiffs had no right to sue this defendant.

(3) The learned Munsif who tried the suit dismissed the same disbelieving almost the entire case of the plaintiffs in a fairly elaborate judgment. He held that Jageshwar, defendant fourth party, was not the benamidar of the plaintiffs. He also disbelieved the case of the plaintiffs that by a subsequent oral agreement the mortgagees had come in possession of the mortgaged property and were entitled to satisfy the interest due out of the usufruct or that any sum of money was left with the mortgagees for payment of the outstanding dues of rent to the landlord, or that there was any liability on the part of the mortgagees to pay the landlord's rent.

He held, on the contrary, that the mortgagees were not bound to pay the rent and they did not make any default, that there was no fraud in the rent suit or in the execution proceedings either on the part of the landlord or on the part of the mortgagees, and that the sale in execution of the decree in favour of the defendant No. 1 was binding upon the plaintiffs and conveyed a good title to the purchaser — the defendant No. 1 who was not a benamidar of the mortgagees. He also found that the plaintiffs' suit was barred by limitation. In regard to the allegation of the plaintiffs that the mortgage bond had been redeemed by payment on the 20th January 1929, he found in favour of the plaintiffs, but at the same time he held that the plaintiffs had not come into possession of the disputed lands as alleged by them.

(4) On appeal, the lower appellate court has reversed all those findings of the learned Munsif which were against the case of the plaintiffs, except in regard to the allegation of fraud and collusion on the part of the defendant third party, the landlord; and has accordingly decreed the suit declaring the title of the plaintiffs to the disputed lands and confirming their possession. Most of these findings are findings of fact which could not be challenged in second appeal before this Court, but Mr. Kamala Kanta Varma appearing on behalf of the appellant raised various points in support of the appeal.

(5) He has contended, in the first place, that no evidence was admissible to prove that the mortgagees had been put in possession of the mortgaged property, and Section 92 of the Evidence Act was a bar to the admissibility of any such evidence. He contends that the mortgage bond was admittedly a simple mortgage bond under which the hypothecated properties did not pass into possession of the mortgagees but remained in possession of the mortgagors who were under a personal covenant to pay the mortgage dues, and any evidence to show that the mortgagees had come into possession of the mortgaged property was in contravention of the terms of the bond, and as such had to be ruled out of evidence. In support of his contention, he relied upon various decisions: 'FEROZ SHAH v. SOHBAT KHAN', 60 Ind App 273 (PC), 'KALI DEEN SINGH v. JAGDAT PATHAK', A.I.R. 1930 All. 440, and 'KHUB LAL v. BECHAN MANDAL', 21 Pat. L. T. 437.

In my opinion, it is unnecessary to examine these decisions in any detail because they have not much relevancy to the point under consideration. The two courts below were justified in taking evidence on the point whether or not the mortgagees had actually come into possession of the mortgaged property. Such evidence was not in contravention of the terms of the mortgage bond but they were only necessary to prove the fact that the mortgagees had actually taken possession of the mortgaged property. Such evidence is not for the purpose of contradicting, varying, adding to or subtracting from the terms of the mortgage bond, and Section 92 of the Evidence Act does not shut out any such evidence. If the fact is as it has been in this case, that after the execution of the mortgage bond in question, the mortgagees actually came into possession of the mortgaged property, I do not see why this fact which has nothing to do with the terms of the mortgage bond, cannot be proved by adducing evidence in the case.

There may be much strength in the contention of the learned Counsel that evidence of this nature does not come under proviso (4) of section 92 of the Evidence Act, because if it were to be regarded as an evidence of a subsequent oral agreement modifying or rescinding the terms of the contract, it would not be permissible, the contract in the present case being a registered contract. But as I have said, proviso (4) to Section 92 or Section 92 itself has nothing to do with the present case where what was sought to be proved is the factum or possession of the mortgaged property by the mortgagees. Instances are too numerous to mention that in such cases evidence of this na-

ture has been entertained; see, for instance: 'KAMALA SAHAI v. BABU NUNDAN', 11 Cal L J 39, 'RAMAWATAR SINGH v. TULSI PROSAD SINGH', 16 Cal W N 137; 'RAM BAKSH v. DURJAN', 9 All 392, as also 'MADARI v. BALDEO PROSAD', 27 All 351, a Full Bench decision of the Allahabad High Court. I may also refer to two other decisions of the Madras High Court, viz., 'LAKSHMINARASIMHA v. RAGHAVAMMA', AIR 1936 Mad 380 and 'V. KRISHNASWAMI RAO v. R. SRINIVASA DESIKAN', AIR 1937 Mad 261.

The case last referred to is a decision by the eminent Judge Varadachariar, J. In that case, the suit was by the mortgagee for sale of the mortgaged property, and the mortgagor pleaded that there was an oral agreement between him and the mortgagee resulting in the settlement of the mortgage dues at a certain amount and also that a certain property should be sold to the mortgagee in full discharge of the mortgage debt. It was held that the mortgagor was entitled to adduce evidence to prove the oral agreement. In discussing Section 92 his Lordship pointed out:

"The main clause excludes evidence of 'any oral agreement for the purpose of contradicting, varying, adding to or subtracting' from the terms of a contract, etc. proved in the manner provided for by Section 91. The provisos introduce certain exceptions (or apparent exceptions) and to prov. 4 there is an exception. The language of the exception in the proviso does not of itself prohibit or exclude any kind of evidence; it merely excludes the benefit of the proviso in the excepted cases; with the result that in these cases the prohibition contained in the main part of the section will apply. We have accordingly to consider whether the oral agreement alleged in the written statement 'contradicts, varies, adds to or subtracts' from the mortgage document.

"It is settled by a long line of authority—and Mr. Bhashyam does not deny—that a debtor may plead and prove an actual discharge in a manner or on terms different from those contemplated by or provided for in the document evidencing the debt. But relying on the distinction drawn in the cases between a 'discharge' and an agreement to give a discharge in future, he maintains that in the present case the alleged contract to take a sale of a portion of the hypotheca in satisfaction of the debt amounts to nothing more than an agreement to give a discharge if and when the sale is completed and is therefore within the prohibition contained in Section 92. This argument seems to us to rest on a misapprehension of the legal effect of the contract of sale in such cases."

I therefore hold that evidence was admissible to show that the mortgagees had subsequently come in possession of the mortgaged property, and that the interest payable on the simple mortgage bond in favour of the mortgagees was to be satisfied out of the usufruct of the mortgaged property. That being so, the mortgagees took possession of the mortgaged property during the continuance of the mortgage, and in the absence of a contract to the contrary, they were liable to pay the rent accruing due in respect of the mortgage during such possession under section 76(c) of the Transfer of Property Act. The finding of the learned Subordinate Judge, therefore, based as it is upon the evidence adduced on the point cannot be challenged in appeal before this Court.

It is true that the learned Subordinate Judge has found in favour of the plaintiffs as did the learned Munsiff that Rs. 50/- was not left with the mortgagees to pay the arrears of rent to the landlord, but nonetheless there was a liability on the part of the mortgagees to pay the rent due during the continuance of the mortgage, they having come in possession of the mortgaged property; and therefore they having defaulted in payment of such rent, they could not take advantage of any such default to purchase the property in the name of the defendant No. 1, who also has been established to be a benamidar of the mortgagees. The point has been fully discussed by me in a recent decision of this Court in 'DEO SARAN SINGH v. BARHU SINGH', Second Appeal No. 2123 of 1948 (Pat) decided on the 19th of February 1952.

(6) Mr. Varma next challenged the finding of the learned Subordinate Judge that defendant No. 1, auction-purchaser, was not a benamidar of the plaintiffs. In this connection, he referred to the findings of the learned Munsiff and argued that the learned Subordinate Judge has not dealt with all the reasonings of the learned Munsif before reversing his finding. I have carefully examined the decision of the learned Subordinate Judge on the point, and I find it difficult to accept the contention of Mr. Varma. It is quite obvious that the learned Subordinate Judge has applied his mind to the evidence and referred to some of the salient circumstances for coming to the conclusion that the defendant No. 1, who was the wife's brother of one of the mortgagees, Bidyakar Misra, was merely a name-lender for the mortgagees at the auction-purchase, and in second appeal I find no reason to interfere with this finding of the learned Subordinate Judge.

(7) The learned Counsel has next contended that the learned Subordinate Judge should have held that the suit was barred by limitation as governed by Art. 12 or Art. 95 of the Limitation Act. The learned Subordinate Judge points out that the suit in substance is a suit for declaration of title and confirmation of possession, or, in the alternative for recovery of possession, and the appropriate article applicable to such a case was either Art. 142 or Art. 144 of the Limitation Act which prescribes a period of 12 years from the date of the cause of action. The plaintiffs alleged that after the payment of the mortgage dues in January 1939 they came in possession of the mortgaged property including the disputed lands but in November 1941 the mortgagees started interfering with the plaintiffs' possession. This case of the plaintiffs, though disbelieved by the learned Munsif, has been accepted by the learned Subordinate Judge, and I do not see how we can in second appeal come to a contrary conclusion however unsatisfactory the finding may be. The learned Subordinate Judge having found that the plaintiffs had come into possession of the disputed lands after the redemption of the mortgage in 1931 was right in holding that the suit was not barred by limitation, and in my opinion, his decision on the point cannot be successfully assailed.

(8) The only other point which remains to be considered and which perhaps requires a most serious consideration is the question that Bijen-

dra, defendant No. 7, was not impleaded as a party to the appeal before the lower appellate court. The learned Counsel for the appellant contends that in the absence of defendant No. 7, who was a necessary party to the appeal, the appeal was incompetent and had to be dismissed because otherwise it was bound to lead to a conflict of decision as it was done in the present case. It is to be remembered that the learned Munsif had found that the mortgagees had not come in possession of the mortgaged property, that there was no liability on their part to pay the landlord's rent, that they had not committed any default in the payment of the mortgage dues, and that the defendant No. 1, the auction-purchaser, was not their benamidar. On these findings, the learned Munsif had dismissed the suit in favour of the mortgagees. These findings were in favour of the defendant No. 7, and the decree dismissing the suit had become absolute so far as he was concerned. In order to have the decree set aside, and to get those findings reversed it is contended that it was quite necessary to implead as a party to the appeal the defendant No. 7 as well, and that not having been done, the appeal was incompetent and should have been dismissed on that account.

Reliance has been placed in this context upon a decision of this Court in 'RAJESHWARI PD. v. SAHEB SINGH', AIR 1939 Pat 198, where it was held that in a case where a decree is obtained in the names of individual members of a joint family the question of representation does not arise and an appeal against that decree must be preferred against all the persons in whose name the decree stands, and if one of them is given up in appeal, the appeal could not proceed against the remainder, and as such it had to be dismissed. The decision in question strongly supports the contention of the learned Counsel. In my opinion, the absence of defendant No. 7 as a party to the appeal in the court below rendered the appeal incompetent & no decree reversing the decision of the learned Munsif could be passed as against the other mortgagees to the suit even assuming that the defendants 3 to 8 were all members of the same family and impleaded in the suit as heirs and legal representatives of the deceased mortgagee Bidyakar Misra.

Mr. De on behalf of the respondents contends that it was not necessary to make the mortgagees parties to the appeal at all because the learned Munsif had already found in favour of the plaintiffs in regard to the redemption of the mortgage bond: therefore, no question of redemption at all arose in the case, and the suit in the appellate stage should be treated as merely a suit for declaration of title and recovery of possession as against the defendant No. 1, the benamidar of the mortgagees who could be sued in that capacity. It is contended that the suit as such could have been instituted against the defendant No. 1 alone and consequently the right to sue survives in favour of the plaintiffs against the defendant No. 1 even in the absence of the mortgagee defendant No. 7. If the allegation were that the defendant No. 1 was interfering with the possession of the plaintiffs in spite of the redemption of the mortgage bond, perhaps there would be some justification for this contention.

The allegation, however, is, as it appears from a perusal of the plaint, that the mortgagees, Sudhakar Misra and others, were interfering with the possession of the plaintiffs and had set up a hostile title in themselves on the basis of the purchase made in execution of the rent decree. That being so, I do not see how it could be possible for the plaintiffs to get a decree for recovery of possession or confirmation of possession as against the defendant No. 1 alone without suing the mortgagees themselves against whom they actually alleged a cause of action. The defendant No. 7 was, therefore, a necessary party to the suit even for declaration of title and recovery of possession, and all the more so a necessary party to the appeal when the plaintiffs' suit had been dismissed in his favour and the adjudications which they claimed had been made against them by the learned Munsif. The plaintiffs themselves made him a party to the suit and did not purport to sue only the head member or 'karta' of the joint family as representing the interest of the heirs of the deceased mortgagee, Biduakat Misra. They cannot, therefore, now claim that the other heirs of Bidyakar Misra sufficiently represented that interest, and, therefore, defendant No. 7, Bijendra, need not have been made a party to the appeal at all.

The decision relied upon by the appellants in 'AIR 1939 Pat 198 (Supra)' negatives such a contention. The other reason which, in my opinion, also supports the contention of the learned Counsel for the appellant on this point is that the plaintiffs in the plaint made a prayer that they should be held entitled to the reliefs on payment of Rs. 251/-, the cost incurred by the mortgagees in paying up the decree in the rent suit with interest as a part of the mortgage amount. This was necessary in view of the fact that the declaration that the purchase made by defendant No. 1 on behalf of the mortgagees would enure to the benefit of the mortgagors and would not affect their right of redemption could only be granted in their favour subject to payment of the cost incurred by the mortgagees in paying up the rent decree and acquiring the lands in suit by virtue of their purchase; see 'DEONANDAN PRASHAD v. JANKI SINGH', 44 Ind App 30 (PC). The learned Subordinate Judge appears to have lost sight of this factor in making a declaration in favour of the plaintiffs.

As far as I can see from the plaint, the plaintiffs only claimed that they had paid up the mortgage dues but they had not claimed that they had also paid up the amount to which the mortgagees were entitled in paying up the rent decree and acquiring the property in the name of defendant No. 1. This amount they were certainly bound to pay with interest thereon, and it was for this reason that they made a prayer to that effect in their plaint. This prayer could be granted to them only if all the mortgagees who were parties to the suit in the court below had been made parties in the appeal. These reliefs were evidently refused to them by the trial court, and so far as the defendant No. 7 is concerned, the decision of the trial court has become absolute in his favour. Now, it would lead to conflict of decisions if a decision to the contrary effect is given as against the other mortgagees who are parties to the suit. For these reasons I have no option but to hold that the defendant No. 7 was a necessary party to the appeal before the court of appeal below, and he not being impleaded as a party, the appeal was

incompetent and should have been dismissed on this ground alone.

I regret that the matter has to be decided against the plaintiffs on this technical basis alone, but the ground was vital to the maintainability of the appeal, and I see no escape from the position that the appeal before the learned Subordinate Judge in the absence of defendant No. 7 could not be entertained and allowed. It is true that defendant No. 7 is not a party to this appeal either, but that does not matter; the other defendants are entitled to challenge the decree of the court below on the point without making defendant No. 7 a party to this appeal. It was really for the plaintiffs who were appellants in the court below, to see that their appeal was properly framed and that all the necessary parties were on the record.

(9) For these reasons, the decree of the learned Subordinate Judge is set aside and that of the trial court restored, but in the circumstances I do not feel that the defendants should be allowed any costs of the litigation throughout.

(10) The position of the defendant third party who is the appellant in Second Appeal No. 108 of 1949, however, stands on a different footing. So far as he is concerned, the trial court very definitely found that there was no collusion on behalf of the landlord in instituting the rent suit against the recorded tenant or in obtaining the decree or even in proceeding to execute the same and getting the disputed lands sold. The plaintiffs, therefore, had no justification for dragging this defendant in the litigation, and the learned Munsif was, therefore, justified in dismissing the suit against him with costs. The learned Subordinate Judge on appeal has not reversed this finding of the learned Munsif so far as defendant third party is concerned. That being so, obviously he should not have decreed the suit with costs even as against this defendant as the decision of the learned Subordinate Judge does not indicate that the defendant third party was exempted from any liability for the costs. On the contrary, the proper decree should have been to dismiss the suit with costs as against this defendant. That is why the plaintiffs have not seriously contested this appeal which should, therefore, be allowed with costs throughout in favour of the defendant third party alone.

(11) RAMASWAMI J.: I agree.

C/D.H. Order accordingly.

AIR 1952 PATNA 426

NARAYAN J.

Jagabandu Dutta and another, Appellants v. Maneck Home and others, Respondents.

A. F. A. D. No. 934 of 1949, D/- 21-8-1951.

(a) Tenancy Laws — Chota Nagpur Tenancy Act (VI of 1908), Ss. 20(3) and 208 — Pradhani tenure — Sale for arrears of rent — Effect — Lands abandoned by raiyat and which have come into possession of pradhan also pass by such sale.

A pradhan is a tenure-holder and therefore his rights are liable to be sold in execution of a decree for arrears of rent under S. 208, Chota Nagpur Tenancy Act: AIR 1940 PC 137 Rel. on.

Where lands comprised in his tenure have come into possession of the pradhan as a result of abandonment by certain raiyats the pradhan cannot hold those lands as a raiyat. The reason is that a proprietor or a tenure-holder cannot hold a raiyati land under himself and the principle of merger and coalescence would be strictly applicable. Hence where the pradhani tenure is sold for arrears of rent, these lands would also pass by such sale: AIR 1924 PC 144 and AIR 1922 PC 94 Ref. (Para 4)

(b) Civil P.C. (1908), S. 100 — Finding that there was no reclamation of land by certain person is one of fact — Finding arrived at after careful consideration of evidence — Finding is binding in second appeal. (Para 6)

Anno: C. P. C., Ss. 100 and 101, N. 52.

G. C. Mukherji and S. K. Mazumdar, for Appellants; R. S. Chatterji, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('22) 26 Cal WN 565: (AIR 1922 PC 94) 5
('24) 51 Cal 631: (AIR 1924 PC 144) 5
('40) 19 Pat 949: (AIR 1940 PC 137) 4

JUDGMENT: This is an appeal brought by the defendants in a suit for declaration of title and recovery of possession with regard to five plots of land, namely, plots Nos. 9, 10, 11, 12 and 13. These plots were recorded in the survey under khewat No. 4 which was the Pradhani tenure of the defendant No. 3. This Pradhani tenure was sold in execution of a decree for arrears of rent and purchased by the holder of Khewat No. 3, which was a mukarrari khewat, in the year 1918. The plaintiffs' case is that the mukarraridar then settled the entire village consisting of Khewats Nos. 3 and 4 with them in darmukarrari right by a registered document dated the 25th of September 1919. On the 26th of September 1919, the plaintiffs made an ijara settlement with the defendant No. 3 of the right to realise rent from the tenants of the village. The lands in suit had been abandoned by their respective tenants even before the khanapuri stage of the survey, and the plaintiffs' contention is that as a result of the sale of the Pradhani tenure these plots also passed to the auction-purchaser. It was further alleged that after the plaintiffs had taken the darmukarrari settlement they reclaimed these plots and converted them into paddy fields. After the ijara in favour of defendant No. 3 with regard to the right to realise rent from the tenants of the village, the defendant No. 3 executed a patta dated 26-7-39 in favour of defendants 1 and 2 in respect of the plots in dispute, and the allegation is that on the strength of this patta the defendants 1 and 2 began to interfere with the plaintiffs' possession. There were criminal cases between the parties and in a proceeding under Section 145, Criminal P.C., it was held that the defendants had been in possession of the disputed plots, and that led to the institution of this present suit.

(2) The suit was contested by the defendants 1 and 2 who are the appellants before this Court, and their contention was that the sale of the Pradhani tenure was void in law, and that the defendant No. 3 continued to be the Pradhan even after the sale. It was further contended by them that before the creation of the darmukarrari interest in favour of the plaintiffs, the defendant No. 3 had converted

this land into a paddy field and had thus acquired occupancy or korkar right therein.

(3) The courts below have concurrently held that by the auction sale of 1918 the entire Pradhani interest including these abandoned lands passed to the darmukarraridar, and that it was the plaintiffs and not the defendant No. 3 who converted these lands into paddy fields.

(4) The main contention of Mr. Mukherji who appears for the appellants before me is that because the lands in suit were abandoned lands, they could not be treated as bakasht and that consequently they did not pass to the auction purchaser when the Pradhani interest was sold in the year 1918. It may be noted at the very outset that the appellants did not claim any interest in this property by virtue of the ijara that was granted to them on the 26th September 1919, by the plaintiffs, and it could not also be contended in view of the decision of the Judicial Committee in 'JAGADISH CHANDRA v. DEBNATH', 19 Pat. 949 that a Pradhan is not a tenure-holder, and that his rights are not liable to be sold in execution of a decree for arrears of rent under Section 208 of the Chota Nagpur Tenancy Act. But Mr. Mukherji has argued that these lands being abandoned lands, they continued to remain the property of the Pradhan even after the auction sale of the Pradhani tenure in the year 1918. In my opinion, there is no substance in this contention. If the Pradhani interest has now been recognised as a tenure, there is no reason why the lands which had come in possession of the Pradhan as a result of abandonment by certain raiyats should not pass by the sale which took place in the year 1918. According to Section 20(3) of the Chota Nagpur Tenancy Act:

"A person interested in estate, tenure, village or land, whether solely or jointly with others, as a temporary tenure-holder, ijaradar or farmer of rents or as a mortgagee, in possession, shall not, during the period of his lease or mortgage acquire by purchase or otherwise a right of occupancy in any land comprised in his lease or mortgage."

I have quoted the old Section 20(3) of the Chota Nagpur Tenancy Act which now stands amended. In other words, the law of merger has to be strictly applied, and the Pradhan after the abandonment of the lands could not hold these lands as a raiyat. As has been often said, a proprietor or a tenure-holder cannot hold a raiyati land under himself and the principle of merger and coalescence would be applicable.

(5) The Judicial Committee held in the well-known case of 'MIDNAPUR ZEMINDARI CO. LTD. v. NARESH NARAYAN', 51 Cal. 631, that even if the Midnapur Company purchased any jote rights in lands held in common by the co-sharers, such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers, and the jote rights so purchased would by the purchase be extinguished. In 'DULHIN LACCHANBATI KUMARI v. BODHNATH', 26 Cal. W.N. 565, it was observed by the Judicial Committee that the doctrine of merger must be taken as it stands, and their Lordships further observed that there may be several reasons — conveyancing reasons, reasons arising out of the object of the acquisition of the one right being merely for a temporary purpose, family reasons and others — in the course of which the expediency of avoiding the coalescence of interest and preserving the separation of title may be apparent. These considerations are wholly irrelevant for the purpose of this case, and, on the principle of merger, it must be held that these lands could not be held by the Pradhan under himself as a raiyat, after their abandonment.

(6) The respondents' learned Counsel has rightly drawn my attention to the Pradhani record of rights which shows that there was no khas or mal land of the Pradhan. Under Section 27 of the Chota Nagpur Tenancy Act, this record of rights will be conclusive evidence in the case. But it was contended by Mr. Mukherji that the record of rights having been finally published in 1910 and the Pradhani tenure having been sold in 1918, there was nothing to show that the Pradhan had not within this period reclaimed the lands and acquired occupancy rights therein. But the finding in the case is that there was no reclamation whatsoever by the defendant No. 3 and that it was the plaintiffs who had reclaimed these lands. This finding is binding on me, and I have no doubt that it has been arrived at after a careful consideration of the evidence. According to the proviso to Section 20 of the Chota Nagpur Tenancy Act, the village headman could acquire occupancy rights by force of local custom or usage. But there is no case of local custom or usage made out in the present litigation.

(7) In the result this appeal fails and is dismissed with costs.

(8) Leave to appeal under the Letters Patent is refused.

C/K.S. Appeal dismissed.

AIR 1952 PATNA 427

NARAYAN J.

Shyama Kumari, Petitioner v. Shyam Sunder Prasad Singh and others, Opposite Party.

Civil Revn. No. 303 of 1951, D/- 6-2-1952.

Civil P. C. (1908), S. 115 and O. 9, R. 9 — Suit dismissed for default — Application for restoration — Illness alleged as ground for non-appearance — Lower Courts' finding that applicant was not really prevented from proceeding with case on account of illness — Finding cannot be challenged in revision.

(Para 1)

Anno: C.P.C. S. 115 N. 13 O. 9 R. 9 N. 13.

M. Fazl Ali and Medni Prasad Singh, for Petitioner; N. L. Untwalia, for Opposite Party.

ORDER : This application is directed against an order of the District Judge of Monghyr dismissing an appeal which has been preferred by this applicant against an order of the Subordinate Judge of Begusarai rejecting an application under Order 9, Rule 9 of the Code of Civil Procedure. This applicant had instituted a suit in forma pauperis which was dismissed for default by the learned Subordinate Judge on 2-5-49, and for setting aside the order of dismissal, she had filed an application under Order 9, Rule 9 of the Code. From the facts as indicated in the judgments of the two courts it appears that her plea was that on account of her illness, she was not able to proceed with the suit on 2-5-49. The courts below were not prepared to accept her statement that she had been prevented on account of her illness from proceeding with the suit, and in that view of the matter, they dismissed her application for restoration. The learned District Judge has

definitely said that "he has no doubt that the allegation of the defendant that the illness was a feigned one was true". It was not open to the applicant to challenge the findings of the courts below in his revision application, and I do not find any substance in the contention of the applicant's learned Counsel that the courts below had come to a decision in this case without considering properly the plea raised by her. I have looked into the depositions of the witnesses, and I find that the only ground that had been put forward by the applicant was the ground of illness, and certainly there is the finding of the court of appeal that she was not really prevented from proceeding with the case on account of her illness.

(2) The applicant's learned Counsel, however, submitted during the course of his argument that the order of dismissal passed on 2-5-49 was not really an order under Rule 8 of Order 9 of the Code, but an order under Rule 3 of Order 17. That, however, cannot improve matters for this applicant because if that order was an order under Order 17, Rule 3, then it amounted to a decree, and the remedy open to the petitioner was to prefer an appeal or to file an application for review. Neither was an appeal preferred nor was a review application filed, and the order dated 2-5-49 even if it is not perfectly legal cannot now be revised by me on this application.

(3) There is, therefore, no substance in this application, and I would dismiss it with costs: hearing fee two gold mohurs.

C/G.M.J. Application dismissed.

AIR 1952 PATNA 428

LAKSHMIKANTA JHA C. J. AND REUBEN J.

Lachhmi Narain Sahy and another, Appellants v. Ashrafilal Sah and others, Respondents.

Letters Patent Appeal No. 18 of 1950, D/- 26-3-1952, from decision of Shearer J., D/- 2-2-1950.

Tenancy Laws — Bihar Tenancy Act (VIII (8) of 1885), Ss. 13 and 65 — Purchase of holding by mortgagee in execution of mortgage decree against tenants — Subsequent purchase of same holding by landlord in execution of decree for arrears of rent against some of tenants — Landlord held got nothing by his purchase.

In execution of their mortgage decree against the tenant-defendants (including B and C) the mortgagees purchased the holding held by the defendants under landlord A and got delivery of possession. The mortgagees, however, did not deposit the landlord's fee and take steps for giving notice to him as required by S. 26A read with S. 13, Bihar Tenancy Act. Subsequently the landlord A purchased the same holding in execution of a decree for arrears of rent obtained by him against tenants B and C in rent suit instituted after the purchase by the mortgagees. The second appellate Court, holding that the decree in the rent suit was only a money decree and, therefore, only the interest of B and C passed by it, directed that the mortgagees should recover possession of suit property to the extent of the interest of the original tenants other than B and C.

Held that by the mortgagees' purchase in execution of the mortgage decree the interest of B and C passed to the mortgagees. When, therefore, the decree in the rent suit was executed as a money decree, B and C had no interest in that property in respect of which the sale held in that execution case could operate. The landlord, therefore, got nothing by his purchase. The fact that the mortgagees did not take steps according to law for the payment of the landlord's fee and the giving of notice to the landlord under S. 13, was not relevant. It might have been relevant if the decree obtained by the landlord had been a rent decree, so that he would have been in a position to proceed against the holding as such. (Para 3)

Rai B. B. Saran, for Appellants; S. Anwar Ahmad, for Respondents.

REUBEN J.: This is an appeal by the plaintiffs against a decision of Shearer J. in second appeal modifying a decision of the Second Additional Subordinate Judge of Darbhanga, affirming in appeal a decision of the Third Additional Munsif of Darbhanga.

(2) The facts of the case are simple and do not need to be stated at length. The property in suit, which is a holding in village Banouli, formerly held by the defendants second party under the defendant first party, was purchased by the plaintiffs on the 2nd October 1939 in execution of a mortgage decree obtained by their predecessors-in-interest against the defendants second party. The sale was confirmed on the 16th November 1939 and the plaintiffs got delivery of possession on the 13th December 1942. The plaintiffs, however, did not deposit the landlord's fee and take steps for giving notice to the landlord as required by Section 26A read with Section 13 of the Bihar Tenancy Act. The landlord defendant first party himself purchased the holding on the 16th June 1944 in execution of a decree for arrears of rent obtained by him against two of the tenants, Lalji Sahni and Babue Sahni in Rent Suit No. 3829 instituted by him in the year 1940, that is to say, after the purchase by the plaintiffs. The plaintiffs alleged that the decree in the rent suit and the sale in execution thereof were both vitiated by fraud. They also pleaded that the decree in the rent suit was merely a money decree. On these pleadings, they asked for a declaration that their interest in the property was unaffected and prayed for a decree confirming their possession or, in the alternative, for recovery of possession. The Munsiff decided the questions of fact in favour of the plaintiffs and decreed the suit. His finding on the facts and his decision were maintained by the lower appellate court. Shearer J. accepting the findings of fact which were binding on him, has held that the decree in the rent suit was only a money decree and, therefore, only the interest of Lalji Sahni and Babue Sahni passed by it. He has accordingly modified the decree of the Courts below by directing that the plaintiffs (should?) recover joint possession of the suit property to the extent of the interest of the original tenants other than Lalji Sahni and Babue Sahni.

(3) The correctness of the proposition that, the decree in the rent suit being a money decree, only the interest of two judgment-debtors passed at the sale in execution of the decree is indisputable. The consequent direction made by his Lordship, however, seems to have been

made under a misconception. From the statement of the facts of the case which I have given above, it is clear that by the plaintiffs' purchase in execution of the mortgage decree on the 2nd October 1939 the interest of Lalji Sahni and Babue Sahni passed to the plaintiffs. When, therefore, the decree in the rent suit was executed in 1944 as a money decree, the two judgment-debtors had no interest in that property in respect of which the sale held in that execution case could operate. The defendant first party, therefore, got nothing by his purchase.

On behalf of the respondent defendant first party, it has been urged that the arrears of rent in respect of which the decree against the two Sahnis was obtained related in part to the period prior to the plaintiffs' purchase. It has also been pointed out that the plaintiffs did not take steps according to law for the payment of the landlord's fee and the giving of notice to the landlord under Section 13 of the Tenancy Act. Those points might have been relevant if the decree obtained by the defendant first party had been a rent decree, so that he would have been in a position to proceed against the holding as such. Here, however, on the facts found the decree was a money decree and he could only proceed against the interest of the individual judgment-debtors. It has also been urged that the plaintiffs did not pray for consequential relief by setting aside the decree in the rent suit and the sale in execution thereof. There is no substance in the contention. Where the plaintiffs' interest in the property is not affected by the execution sale, it is not necessary for them to ask that the decree and the sale in execution thereof be set aside.

(4) For these reasons I would allow the appeal, set aside the decree of the learned Judge and restore the decree of the courts below. The plaintiffs will get their costs throughout.

(5) LAKSHMIKANTA JHA C. J. : I agree.

C/G.M.J. Appeal allowed.

AIR 1952 PATNA 429

NARAYAN J.

Inderdeo Singh and others, Appellants v. Janeshwar Singh and others, Respondents.

A. F. A. D. No. 2040 of 1949, D/- 21-12-1951.

Civil P. C. (1908), S. 100 — Decision on evidentiary value of canal paper— Papers not properly considered.

It is no doubt true that the value to be attached to canal papers as evidence of possession is a matter for the Court of fact, and that its decision on the evidentiary value of those papers as proof of possession is a decision on a question of fact and not of law. But where the Court of fact has not properly considered those papers, its judgment is not binding on the High Court in second appeal: AIR 1945 Pat 453, Foll. (Para 6)

Anno: C. P. C., Ss. 100 and 101 N. 29.

Rajkishore Prasad and Shambhu Sharan, for Appellants; Pandey Narsingh Sahay, Pandey Gopal Krishna Sahay and Pratap Narain Sinha, for Respondents.

REFERENCE..... Para.

('45) AIR 1945 Pat 453: (24 Pat 379) 6

JUDGMENT: This is a defendants' appeal arising out of a suit for declaration of title and recovery of possession with regard to 2.52 acres of land recorded in the survey in khata No. 67. One Gokul Kahar was the tenant recorded in the survey with regard to this land and, according to the plaintiffs' case, he died leaving surviving him a son named Janki and a widow named Batasia. Janki died in 1944 leaving behind a minor son named Balgovind and a widow named Chandreshri Kaharin. The plaintiffs claim to have purchased the lands in question from Chandreshri Kaharin through a sale deed dated the 12th March 1946, which purports to have been executed by Chandreshri on her own behalf and as the guardian of her minor son. The plaintiffs' allegation is that they came in possession of the land after this purchase, but that the defendants created trouble leading to a proceeding under Section 144 of the Criminal Procedure Code, in which the order was against the plaintiffs. Dispossession is said to have taken place after the order in the Section 144 proceeding.

(2) The defendants who are the landlords contended that the plaintiffs had acquired no valid title to the property and that they or their alleged predecessors-in-interest had not been in possession of this land during the period of 12 years preceding the institution of the suit. The version put forward by the defendants was that Gokul did not leave any son Janki and that Musammat Batasia, the widow of Gokul, surrendered this land in their favour in Jeth 1330 Fasli corresponding to the English Calendar year 1923, that ever since the surrender they have been in possession of it.

(3) The Court of first instance rejected the story of surrender put forward by the defendants, but it held that the plaintiffs had not been able to prove that they or their alleged vendors had been in possession of this land for a period of 12 years preceding the institution of the suit. The suit was accordingly dismissed by the learned Munsif.

(4) On appeal, the learned Subordinate Judge of Gaya decreed the suit on the finding that the plaintiffs had been able to prove their title and possession over the land.

(5) Mr. Rajkishore Prasad appearing for the defendants-appellants has contended that the decision of the learned Subordinate Judge cannot be regarded as a decision according to law so as to be binding on this Court in second appeal, and I am inclined to agree with the learned Counsel that the decision of the Court of appeal below cannot be sustained. The defendants had produced some documents for proving their possession over the lands in question, and those documents included certain canal parchas.

While referring to these canal parchas, the learned Subordinate Judge says that they are "no doubt stumbling blocks in the way of the plaintiffs", but he rejects them by a process of reasoning which appears to me to be curious. He says that he is not prepared to place too much of reliance on these parchas. It is difficult to understand what he actually meant by using the expression "too much of reliance" and it certainly appears from this observation of his that he was not inclined to reject these documents as thoroughly unreliable. His next observation in this connection is that "the influential landlords who had collusively brought into existence a fraudulent deed of transfer could easily have surreptitiously got entries made in canal purchas in their own names and in the names

of persons of their camp". Mr. Pandey Narsingh Sahay, who appeared for the respondents before me, could not contend that this was a sound observation simply because the defendants had propounded a document for proving the alleged surrender which has been rejected by the Courts below as an unreliable document, it could not be held that the other documents which they had produced were also unreliable. Canal parchas are documents issued by the Canal Department and they stand on an entirely different footing as compared to a deed of surrender which was a private document, and if the defendants had engineered a fraudulent deed of surrender, it could not be presumed that they would collude with the canal authorities for manufacturing the canal parchas and other canal papers such as the Khesra and the water rates receipts.

It is, therefore, manifest that the learned Subordinate Judge could not reject these canal parchas as unreliable documents on any satisfactory ground, and his observation that they should be rejected because the deed of surrender has been rejected is absolutely unsound. Then he proceeds to consider some of the canal parchas, in one of which the name of Baleshwar Hajam stands recorded and in the other that of Bifan Kahar. Regarding this Baleshwar Hajam, the case made out by the defendants was that they had got plot 1102 by exchange and that thereafter his name was recorded in the canal khesra with regard to this plot. The learned Munsif has discussed the question of exchange and, in his opinion, the canal parcha (exhibit A-11), standing in the name of Baleshwar Hajam, is a good piece of evidence for proving the exchange and the possession of the defendants. The learned Subordinate Judge does not seem to have considered the question of exchange and hence it cannot be urged that he has properly considered the canal parcha standing in the name of Baleshwar Hajam.

Besides parchas standing in the names of Bifan and Baleshwar, there are certain other parchas standing in the names of some of these appellants. One of these parchas is a parcha of the year 1923 and there are other parchas which appear to bear the dates 1928 and 1929. The learned Subordinate Judge, while he considered it necessary to refer to the parchas standing in the names of Baleshwar and Bifan, did not consider it necessary to refer to the parchas standing in the names of the appellants themselves. It is true that he has discussed the oral evidence and he finds that the witnesses of the plaintiffs are more reliable than the witnesses of the defendants, but the question of possession could not properly be decided without considering these documents, and, so far as the canal parchas are concerned, it is obvious that he has not considered them in a satisfactory manner, though, to use his own language, they are the stumbling blocks in the way of the plaintiffs.

(6) Learned Counsel for the respondents drew my attention to a decision of this Court in 'MOHAN BIKRAM SHAH v. DEONARAIN MAHTO', AIR 1945 Pat. 453, in which it was observed that the value to be attached to canal papers as evidence of possession is a matter for the Court of fact, and that its decision on the evidentiary value of those papers as proof of possession is a decision on a question of fact and not of law. Nobody can dispute this proposition of law and I never mean to say that, if the learned Subordinate Judge would have rejected these canal papers as absolutely unreliable documents, it would have been open to me to say in second appeal that they are documents proving the possession of the defendants. What I have said above is only this much that the process of reasoning by which the learned Subordinate Judge has refused to act on these canal parchas is open to serious criticism and, as his reasoning stands, these documents cannot be deemed to have been properly considered by him.

Exhibit 2 is another important document which, as conceded by Mr. Pandey Narsing Sahay, has not been considered by him. Mr. Rajkishore Prasad drew my attention to an entry in this document showing that at least one of the plots stands recorded in the names of the landlords. It is a document which had been filed by the plaintiffs, and there is no reason why this document should not have been considered by the learned Subordinate Judge. It is possible that, after a proper consideration of this document, it may be found to be helpful to the plaintiffs. But the fact is that it has not been considered by the learned Subordinate Judge, and hence that is another criticism which can be advanced against the judgment of the learned Subordinate Judge. I am, therefore, of the opinion that this is not a judgment which can be binding on this Court in second appeal. The appeal is allowed and the judgment and decree of the learned Subordinate Judge are set aside and the case is remanded to the lower appellate Court for a fresh decision according to law. The costs of this appeal will abide the final result.

C/V.R.B. Appeal allowed.

AIR 1952 PATNA 430

JAMUAR AND RAI JJ.

Dhirendra Nath Banerji, Appellant v. Narhari Gir and another, Respondents.

Civil Revn. No. 225 of 1951 (with A.F.O.O. No. 160 of 1950), D/- 11-2-1952

(a) Court-fees Act (1870) S. 7(iv)(c) — Suit for possession after declaration of title.

The plaintiffs had instituted the suit on the allegation that the plaintiff No. 2 had purchased certain shares in properties mentioned in the schedule attached to the plaint by a registered sale deed from one H and others. Plaintiff No. 2 executed a deed of relinquishment in favour of defendant admitting that the properties purchased in his name really belong to defendant. This was followed by a registered deed of relinquishment to the same effect. In the suit, inter alia, the following relief was claimed: "After declaration of the title of the plaintiffs (or of plaintiff No. 2) possession over the properties in suit may be delivered to the plaintiffs or any one of them."

Held that the plaint read as a whole together with the relief sought in it made it abundantly clear that the relief for declaration of title was not redundant and the case came within the purview of S. 7 (iv) (c), AIR 1938 Pat. 22 FB and AIR 1942 Pat. 60 disting. (Para 2)

Anno: Court-fees Act S. 7(iv)(c) N. 3.

(b) Civil P.C. (1908) O. 39, R. 1 — Court holding that plaintiffs had not proved prima facie title to properties in suit. — There was, held, no justification for the plaintiffs to ask

for an injunction against defendant more so, when their interest had been amply safeguarded by taking security for the full amount from defendant. **(Para 6)**

Anno: C.P.C. O. 39 R. 1 N. 3.

K. D. De, for Appellant; S. C. Sinha, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('37) 16 Pat 766: (AIR 1938 Pat 22 (FB)) 3
('41) 20 Pat 780: (AIR 1942 Pat 60) 3

CIVIL REVISION NO. 225 OF 1951

RAI J.: This application by the plaintiff No. 2 is directed against the judgment and order of the Court below dated the 24th of February 1951, asking him to deposit ad valorem court-fee on Rs. 18000/-.

(2) The plaintiffs had instituted the suit on the allegation that plaintiff No. 2 had purchased certain shares in properties mentioned in the schedule attached to the plaint by a registered sale deed, dated the 17th February 1937, from one Harballabh Narayan and others. Sometime in July 1951, plaintiff No. 2 executed a sale deed of relinquishment in favour of defendant No. 1 admitting that the properties purchased in his name really belong to defendant No. 1. This was followed by a registered deed of relinquishment, dated the 22nd of April 1942, to the same effect. Defendant No. 2 is an assignee of the interest of defendant No. 1. There had arisen several litigations with respect to the properties in suit including a suit for partition and a mortgage action which have been mentioned in some details in the plaint of the present suit in which, the following reliefs were claimed:

"(i) After declaration of the title of the plaintiffs (or of plaintiff No. 2) possession over the properties in suit may be delivered to the plaintiffs or any one of them.

(ii) The defendants be permanently restrained from appropriating any of the issues, profit, usufructs and other compensations accruing out of the properties in suit.

(iii) Mesne profits (to be enquired hereafter) be awarded to the plaintiffs.

(iv) All costs of the suit may be awarded.

(v) Such other relief or reliefs to which the plaintiffs or any of them may be entitled may be decreed.

(vi) It be declared that the plaintiffs were entitled to their proportionate share in the sum of Rs. 4,30,000/- and odd awarded as compensation in the Defence of India Case Project No. 4 of 1942 and the defendants be permanently restrained from realising the same or any interest accruing out of it."

The trial Court has held that the plaintiffs should pay ad valorem court-fees on Rs. 18,000/- which was the consideration mentioned in the sale deed dated the 17th February 1937.

Learned Advocate for the petitioner contended that, in order to assess court-fee, the plaint as a whole should have been taken into consideration. According to him, the registered deed of relinquishment did not transfer any title to defendant No. 1. He further submitted that, though, in the relief portion of the plaint, declaration regarding plaintiffs' title had been sought, yet this relief was a redundant one and a relief for possession only would have been sufficient. I am afraid I am not inclined to accept this argument on behalf of the petitioner. The plaint read as a whole together with the reliefs sought in it makes it abundantly clear that the relief for declaration of title was not redundant and the Court below was perfectly justified in holding that the case came within the purview of Section 7(iv)(c) of the Court-fees Act.

(3) The learned Advocate for the petitioner, in support of his contention, referred to the case of 'RAMKHELAWAN v. BIR SURENDRA', 16 Pat. 766 (FB), and also to the case of 'RAMAUTAR v. RAM GOBIND', 20 Pat. 780. But those two cases were distinguishable from the present case. In the former case the plaintiff had claimed three reliefs: (i) possession of the properties in suit, (ii) costs, and (iii) any other relief to which the plaintiff may be entitled in the opinion of the Court. Those reliefs were held not to be sufficient to bring that case within the purview of Section 7(iv)(c) of the Court-fees Act. In the present case, however, the reliefs claimed do attract the provisions of Section 7(iv)(c) of the Court-fees Act. In the case of 'RAMAUTAR v. RAM GOBIND', 20 Pat. 780, it was held that the plaint in terms asked only for partition and there being no prayer for a declaration of title or for cancellation of any document, it was not proper to import those two prayers in the plaint by implication. In the present case, however, the specific reliefs claimed in the plaint themselves bring the case within the purview of Section 7(iv)(c) of the Court-fees Act.

(4) In my opinion, there is no merit in this application, which is hereby dismissed with costs to the opposite party No. 2: hearing fee two gold mohurs.

MISCELLANEOUS APPEAL NO. 160 OF 1950

(5) This appeal by the plaintiff No. 2 is directed against the judgment and order of the Court below disallowing the prayer of the plaintiffs for temporary injunction restraining the defendant No. 2 from withdrawing a sum of Rs. 92,000/-. The Court below has, by that order, permitted defendant No. 2 to withdraw that amount after giving security to the satisfaction of that Court.

(6) The amount in question represents a portion of the compensation money which is in deposit with the District Judge of Patna in connection with some land acquisition proceedings in which some of the properties in suit were acquired by Government. The Court below has taken the view that the plaintiffs have not proved any prima facie title to the properties in suit, and that there was no justification for issuing the injunction prayed for when defendant No. 2 was prepared to give security for the entire amount to the satisfaction of that Court. In this case the plaintiffs have not yet paid full court-fee on the plaint. In my opinion, there is no justification for the plaintiffs to ask for an injunction against defendant No. 2, more so, when their interest has been amply safeguarded by taking security for the full amount. The appellant has failed to point out any illegality in the order of the Court below.

(7) The result is that the appeal fails, and is dismissed with costs to respondent No. 2.

(8) JAMUAR J.: I agree.

C/D.H. Order accordingly.

AIR 1952 PATNA 431

RAMASWAMI AND SARJOO PROSAD JJ.

Bhagwat Rai and others, Appellants v. Ramasis Rai and others, Respondents.

A.F.A.D. No. 1952 of 1948, D/- 22-2-1952.

(a) **Evidence Act (1872) S. 92 — Document evidencing usufructuary mortgage — Subsequent conduct of parties showing it to be a sale — Admissibility — (T. P. Act (1882), S. 58(c)).**

When the terms of a document clearly show that the transaction embodied therein is a usufructuary mortgage, the parties are precluded, as between themselves, by S. 92, Evidence Act, from admitting or examining any oral evidence as to their subsequent conduct to show that the transaction was not a mortgage but an outright sale: AIR 1917 PC 207; 22 All 149 (PC) and AIR 1934 PC 58 Rel. on: Case law referred. (Paras 5 and 7)

Anno: Evidence Act S. 92 N. 5, T. P. Act S. 58 N. 33.

(b) **Res judicata — Constructive res judicata — Decision by Revenue Court as to status of tenant — As the decision of the revenue officer on the status of the tenant can be impeached in a civil court in a collateral proceeding it is manifest that no question of constructive res judicata arises in the case of such decision. (Para 8)**

Balbhadra Pd. Singh, Padmanand Jha and Shivanandan Pd., for Appellants; Dasu Sinha, Tribeni Narain Sinha and Shyamnandan Pd. Singh, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('15) 27 Ind App 58: (22 All 149 PC)	6
('17) 44 Ind App 236: (AIR 1917 PC 207)	5, 6
('34) 61 Ind App 35: (AIR 1934 PC 58)	6
('06) 30 Bom 119: (7 Bom L R 669)	5
('98) 25 Cal 603: (2 Cal WN 562 FB)	6
('47) 26 Pat 748: (AIR 1949 Pat 139)	8
(1858) 2 De, G and J 97: (6 WR 242)	5
(1859) 4 De, G and J 16: (7 WR 350)	5

RAMASWAMI J.: The question to be determined in this appeal is whether the plaintiffs can be granted a decree for redemption with respect to certain lands of khata Nos. 257 and 333 and certain palm trees in khata No. 368 located in village Shahbazpur, touzi Nos. 3051 and 3054.

(2) The plaintiffs alleged that on 1st June 1897 Ganga Ram had executed a usufructuary mortgage deed in favour of Ramlal, ancestor of defendants 1 to 4, with respect to the lands in dispute for a consideration of Rs. 100. After the death of Ganga Ram, defendant No. 5 succeeded to the properties and on 5th of October 1946 the plaintiffs purchased the equity of redemption from defendant No. 5 by a registered sale deed. There was a stipulation in the document that a sum of Rs. 100 was kept in deposit with the plaintiffs for the purpose of redeeming the land. The plaintiffs alleged that though they tendered the amount to defendants 1 to 4, the latter refused to accept the money or to deliver possession of the land to the plaintiffs. The main ground of defence was that the document executed by Ganga Ram, though in form a mortgage deed, was intended to operate as a sale. It was averred on behalf of the defendants that the devise had to be resorted to since under the law then prevalent the holding could not be transferred unless there was custom of transferability in the village. Upon a consideration of the evidence adduced the Munsif held that the transaction was a sale and not mortgage and the plaintiffs ought not to be granted a decree for redemption of the alleged mortgage. The decision has been affirmed by the learned Subordinate Judge in appeal.

(3) The main question to be decided is therefore whether the document dated 1st of June 1897 executed by Ganga Ram was a usufructuary mortgage, as contended on behalf of the plaintiffs, or constituted a sale, as contended on behalf of the defendants.

(4) It is necessary for the purpose of answering this question that the terms of the document should be closely examined. The document, exhibit 11, recites that

"Ganga Ram in order to pay off the dues of a simple mortgage bond dated 5th June 1883 due to the mortgagee Ramlal Rai gives the lands including trees in rehan for a period of five years from Jeth 1304 to Jeth 1349 Fs. for a consideration of Rs. 100. That the consideration of Rs. 100 is set off towards the previous mortgage dues."

The document proceeds to state:

"The executant has put the rehandar in possession of the properties mentioned in the deed and the latter is required to appropriate the income from the lands after payment of rent as long as the principal money is not paid off."

There is the usual stipulation that in case the rehandar gets out of possession due to defect in title or being dispossessed then he would be entitled to realise the entire principal money with interest at the rate of Rs. 2 per cent. per mensem from the mortgage security and if this is not sufficient then the mortgagor would be personally liable for payment of the balance.

(4a) The lower appellate court held that the document should be construed to be a usufructuary mortgage and there was no indication that the executant intended that the transaction should be a sale. But in view of the other evidence adduced on behalf of the defendants with respect to the conduct of the parties the lower appellate court held that the document was in reality an out and out sale and the plaintiffs were not entitled to be granted a decree for redemption of the alleged mortgage. In the first place, the lower appellate court referred to the circumstance that in the record of rights, exhibit 12, the lands in question are measured in khata No. 257 and 333 of touzi No. 3051 and there is a remark that Ganga Ram was the vendor and Ramlal Rai was the vendee. In the remarks column of khata No. 333 there is a note that the lands have been transferred by a registered document dated 1st June 1897 for a consideration of Rs. 100. There is also evidence to the effect that Ganga Ram did not take any steps to get the entry rectified, though according to the case of the plaintiffs survey entry was wrong. There was a further circumstance that though the due date in the mortgage bond, exhibit 11, was for the year 1309 Fasli no action was taken by Ganga Ram or his heirs to redeem the mortgage bond, though the amount was comparatively small and the area mortgaged was substantial. Finally the lower appellate court took into account the important circumstance that the defendants had applied under Section 112A of the Bihar Tenancy Act for getting the rent of khata No. 333 reduced. There is evidence that rent was in fact reduced by the Rent Reduction Officer and the defendants had been paying rent at the reduced rate to the landlords. In view of these circumstances, the lower appellate court came to the conclusion that the transaction, though in form a usufructuary mortgage, was intended to

operate as an outright sale of the lands in question.

(5) The main argument addressed by Mr. Balbhadra Prasad Singh is that the lower appellate court was debarred under Section 92 of the Evidence Act from admitting or examining any oral evidence or evidence as to the conduct of the parties to the effect that the transaction was not usufructuary mortgage but an outright sale of the land. It was contended by the learned counsel that the entire evidence with respect to the conduct of the parties must be rejected and it ought to be held upon the clear terms of the document, exhibit 11, itself that the transaction was usufructuary mortgage and that the plaintiffs are entitled to be granted a decree for redemption of the lands mortgaged. Learned counsel founded his argument upon 'MAUNG KYIN v. MA SHWE LA', 44 Ind App 236 (PC) in which it was held by the Judicial Committee that as between the parties to an absolute conveyance Section 92 of the Indian Evidence Act (subject to its provisos) precluded the giving of oral evidence to prove that the transaction was intended to be a mortgage. Learned counsel also referred to 'DATTOO v. RAMCHANDRA', 30 Bom. 119 in which the plaintiff sued to recover possession of land contending that the document under which the defendants held the land, though in form an absolute conveyance, was intended to operate merely as a mortgage. The High Court dismissed the suit holding that the contention of the plaintiff was that the document was accompanied by a contemporaneous oral agreement or statement of intention which must be inferred from the said several circumstances relied on, but that in questions of this kind Courts in India must be guided by Section 92 of the Evidence Act and cannot have recourse to those equitable principles which enable the Court of Chancery to give relief in those cases of which 'ALDERSON v. WHITE', (1858) 2 De. G & J 97, or 'LINCOLN v. WRIGHT', (1859) 4 De. G & J 16, furnish examples.

(6) It was contended on the other hand by Mr. Dasu Sinha on behalf of the respondents that evidence as to subsequent conduct of the parties was not precluded by Section 92 of the Evidence Act. Learned counsel relied in support of his argument upon 'PREONATH SHAHA v. MADHU SUDAN', 25 Cal. 603 (FB). But the authority of this case is doubtful in view of the subsequent decision of the Judicial Committee in 'MAUNG KYIN v. MA SHWE LA', 44 Ind App 236 (P.C.) in which Lord Shaw observed that the case reported in 25 Cal. 603 and other authorities to the same effect ceased to be of binding authority after the judgment of the Judicial Committee pronounced in the case of 'BALKISHEN DAS v. LEGGE', 27 Ind App 58 (PC). The principle that where the words in a deed are clear, evidence of subsequent conduct of parties is irrelevant is also enunciated by Lord Alness in a subsequent case 'BARABONI COAL CONCERN LTD. v. GOKULANANDA', 61 Ind App 35 (PC).

(7) Upon this survey of the authorities, it is plain that in the present case the evidence of subsequent conduct was not admissible in evidence in view of Section 92 of the Evidence Act and the lower appellate court misdirected itself in taking into account such evidence and in reaching the conclusion that though the document was in form a usufructuary mortgage it should be construed as an outright sale of the land in dispute.

(8) The second question in this case is whether the plaintiffs are estopped from claiming redemption of the usufructuary mortgage on the ground that in Section 112A proceedings the defendants had asserted that they were occupancy tenants and as such entitled to apply for reduction of rent. It was pointed out by Mr. Dasu Sinha on behalf of the respondents that in these proceedings the husband of plaintiff No. 1 was impleaded as one of the opposite party. It was argued by the learned counsel that the decision of the revenue officer in 112A proceedings would operate as constructive res judicata since the predecessor-in-interest of the plaintiffs did not raise the point that the defendants were not occupancy tenants of the holding but were only mortgagees. The argument is at first sight attractive but it must be rejected on the ground that the revenue officer conducting 112A proceedings cannot finally adjudicate upon the issue whether the defendants had the status of occupancy raiyats of the holding or not. The jurisdiction of the revenue officer is contingent in the sense that no such jurisdiction can be exercised unless the fact is admitted or established that the defendants had the status of occupancy raiyats and that the holding was an occupancy holding. This is one of the conditions precedent to the jurisdiction of the revenue officer. But the decision of the latter is not binding and conclusive. As pointed out by a Full Bench of this Court in 'M. B. RAMRANBIJAYA PD. SINGH v. RAMKAMAL UPADHAYA', 26 Pat. 748, there is inherent lack of jurisdiction on the part of a revenue officer if he proceeds to reduce the rent of a tenant who is not an occupancy raiyat. The legislature has not vested the Revenue Court with the jurisdiction to conclusively determine whether the preliminary state of facts exists. On the contrary the decision of the Revenue Officer on the preliminary facts may be challenged in the civil court in a collateral proceeding, and if it is shown that the preliminary facts do not exist, the civil court will hold that the Revenue officer has acted without jurisdiction. As the decision of the revenue officer on the status of the tenant can be impeached in a civil court in a collateral proceeding it is manifest that no question of constructive res judicata arises in this case.

(9) For these reasons I think that this appeal must be allowed and the decree of the lower court must be set aside and the plaintiffs must be granted a preliminary decree for redemption of the lands in dispute. The plaintiffs are granted six months time for depositing the amount due in the court of the Munsif and on the amount being deposited the Munsif will pass a final decree for redemption in the usual terms.

(10) I do not propose to make any order as to costs.

(11) It is right that I should make it clear that the plaintiffs will have no claim to plot No. 1778 or to the 19 palm trees since it has been found by the lower courts that Ganga Ram has no property either in the plot or in the palm trees.

(12) SARJOO PROSAD J.: I agree.

C/D.R.R. Appeal allowed.

A. I. R. 1952 PATNA 433

LAKSHMIKANTA JHA C. J.

Chakori Mahton and others, Petitioners v. Mahadeo Singh and others, Opposite Party.

Civil Revn. No. 493 of 1951, D/- 14-2-1952.

Civil P.C. (1908), O. 1, R. 10 — Partition suit — Application by certain persons to be added as defendants — Rejection of application on ground that if plaintiffs did not want applicants to be added as parties they could not be forced upon them and that applicants' interest, if any, would not be affected by any decision in suit — Court held had misdirected itself in rejecting application — Real question for determination held was whether the presence of applicants before Court was necessary in order to enable it effectually and completely to adjudicate upon and settle all questions involved in suit.

(Order vacated and case sent back for disposal according to law). (Para 2)

Anno: C.P.C. O. 1 R. 10 N. 10, 11.

A. B. N. Sinha for T. K. Prasad, for Petitioners.

ORDER: In this case, I am of the opinion that the order of the learned Subordinate Judge cannot stand.

(2) The plaintiffs-opposite party instituted a suit for partition impleading opposite parties Nos. 3 to 37 as defendants. The petitioners made an application to be added as defendants under Order 1, Rule 10, Code of Civil Procedure. The learned Subordinate Judge rejected the application observing that

"If the plaintiffs do not want the applicants to be added as parties they cannot be forced upon them. The applicants' interest, if any, will not be affected by any decision in this suit and it is not necessary to make them parties."

I am of the opinion that the learned Subordinate Judge misdirected himself in rejecting the application. The real question for determination was whether the presence of the petitioners before the Court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The order must, therefore, be vacated and the case must go back for disposal in accordance with law. As there is no appearance for the opposite parties, there will be no order as to costs.

C/G.M.J. Case remanded.

A. I. R. 1952 PATNA 434

CHATTERJI J.

Thakai Gope, Appellant v. Ramlagan Manjhi and others, Respondents.

A. F. A. O. No. 404 of 1950, D/- 4-12-1951.

(a) Civil P. C. (1908), S. 100 and O. 21 R. 90 — Application under O. 21 R. 90 based on fraudulent suppression of notice under S. 158B, Bihar Tenancy Act (VIII (8) of 1885) — Second appeal.

Where application under Order XXI, rule 90 was also based on fraudulent suppression of the notice under S. 158B of the Bihar Tenancy Act which substantially corresponds to Order XXI, rule 22 the second appeal from the appellate order passed in the proceeding under O. 21 R. 90 is maintainable. AIR 1947 Pat 454 FB, Foll. (Para 2)

Anno: C. P. C., S. 100 N. 9 O. 21 R. 90 N. 44.

(b) Civil P. C. (1908), S. 100 — Finding of fact.

The finding that there was no fraudulent suppression of the notice under S. 158B of the Bihar Tenancy Act is a finding of fact which concludes a second appeal. (Para 5)

Anno: C. P. C., S. 100 N. 52.

R. K. Choudhuri, for Appellant.

Balbhadra Prasad Singh, Shreenath Singh and P. Jha, for Respondents.

REFERENCE..... Para.

('47) 26 Pat 340: (AIR 1947 Pat 454 FB) 2

JUDGMENT: This is an appeal by the judgment-debtor from an appellate order dismissing his application under Order XXI, rule 90 of the Code of Civil Procedure for setting aside a sale.

(2) Though the second appeal is from an appellate order passed in a proceeding under Order XXI, rule 90, Civil Procedure Code, the appeal is maintainable, in view of the decision of the Full Bench in 'RAMLAL SAHU v. MT. RAMIA', 26 Pat 340 (FB), because the application under Order XXI, rule 90 was also based on fraudulent suppression of the notice under section 158B of the Bihar Tenancy Act which substantially corresponds to Order XXI, rule 22 of the Code of Civil Procedure.

(3) The learned Munsif allowed the application under Order XXI, rule 90, holding that the notice under section 158B as well as the sale proclamation were fraudulently suppressed. He also held that the application was not barred by time.

(4) On appeal by the auction-purchaser, the learned Subordinate Judge held that there was no fraudulent suppression either of the notice under section 158B of the Bihar Tenancy Act or of the sale proclamation. He also held that the application was barred by limitation. He accordingly allowed the appeal and confirmed the sale.

(5) It is contended by Mr. R. K. Choudhuri on behalf of the appellant that one of the main reasons given by the learned Munsif for holding that the notice under section 158B of the Bihar Tenancy Act was fraudulently suppressed was that one of the witnesses to the service report, Dunia Gope, was examined on behalf of the applicant and he not only denied the signature but also asserted that he was illiterate and his evidence was accepted by the learned Munsif but the learned Subordiante Judge did not apply his mind to the fact that Dunia Gope was illiterate.

The learned Subordinate Judge considered the evidence of Dunia Gope and he was not at all prepared to believe his evidence. In his opinion, the witness came to depose falsely to support the applicant in whom he was interested. It is true that he did not specifically refer to Dunia Gope's evidence that he was illiterate, but when he definitely disbelieved his evidence and accepted the service report as true it necessarily implies that he must have disbelieved his evidence that he was illiterate. The finding that there was no fraudulent suppression of the notice under section 158B of the Bihar Tenancy Act is a finding of fact which concludes this appeal.

(6) The appeal is accordingly dismissed, but I would make no order as to costs because the applicant was minor at the time of the sale represented by his mother as guardian.

C/D.H. Appeal dismissed.

A. I. R. 1952 PATNA 435

JAMUAR AND RAI JJ.

Surajmal Kedia, Appellant v. The Union of India, Respondent.

A. F. A. D. No. 1835 of 1949, D/- 8-5-1952.

(a) Railways Act (1890), S. 72 — Risk-Note B — Duty of Railway Administration — Extent of.

Under the terms of Risk Note B it is not necessary for the defendant Railway to give evidence in respect of that part of the journey, which was uneventful unless the plaintiff wanted the Railway Administration to give evidence regarding the particular part of the journey: AIR 1929 Lah 887 and AIR 1930 Lah 557, Rel. on. (Para 7)

Anno: Railways Act, S. 72, N. 25.

(b) Railways Act (1890), S. 72 — Misconduct — Suit against Railway Administration for short delivery of consignment booked under Risk-Note B — Suit cannot be decreed merely because Railway had failed to disclose loss by theft, in its correspondence — Omission may be relevant and an important factor in deciding story of theft as disclosed at trial by Railway but it cannot be held sufficient to establish misconduct of Railway Administration. AIR 1937 PC 152; AIR 1948 Pat 45, Ref. (Para 8)

Anno: Railways Act, S. 72 N. 25.

(c) Civil P. C. (1908), S. 100 — Finding of fact — Misconduct — Interference in second appeal.

Where the lower appellate Court in arriving at a finding that the Railway Administration was not guilty of misconduct, has not considered some important aspects of the case and has omitted to consider certain important documents and has further travelled in the realm of imagination, the finding, though one of fact, is vitiated and the High Court would interfere in second appeal. (In this case, the High Court remanded the appeal for fresh hearing after giving opportunity to the defendant to examine a certain material witness for explaining discrepancy in the evidence). AIR 1930 Pat 283, Dist. (Para 13)

Anno: C. P. C., S. 100 N. 39, 53.

Lalnarain Sinha, Ramanand Sinha and Lakshmansaran Sinha, for Appellant; N. C. Ghose and P. K. Bose, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('37) 64 Ind App 176: AIR 1937 PC 152	8
('29) AIR 1929 Lah 887: (114 Ind Cas 51)	7
('30) AIR 1930 Lah 557: (125 Ind Cas 327)	7
('30) 11 Pat LT 161: (AIR 1930 Pat 283)	12, 13
('48) AIR 1948 Pat 45: (1948 Pat WN 36)	8

RAI J.: This appeal by the plaintiff is directed against the judgment and decree of the District Judge, Santhal Parganas, Dumka, modifying those of the Subordinate Judge, Deoghar.

(2) The plaintiff instituted Money Suit No. 13 of 1947 in the court of the Subordinate Judge, Deoghar, against the defendant-respondent for realisation of Rs. 4,522/8/- representing the price of ten bales of cotton yarn along with the approximate profit and the railway freight.

(3) The case of the plaintiff was that Messrs. Lachminarain Gouri Shankar of Gaya tendered to the Bengal Nagpur Railway at station Nagpur a consignment of 40 bales of cotton yarn for carriage to Baidyanath Dham Railway Station. The railway receipt was duly endorsed in favour of the plaintiff. On presentation of the railway receipt at Baidyanath Dham Railway Station, the East Indian Railway Company delivered to the plaintiff only 24 bales of cotton yarn on the 14th of June 1946 and another six bales of cotton yarn on the 17th of June 1946, but the remaining ten bales out of the consignment were not delivered to him. After waiting for a sufficiently long time, the plaintiff, through his pleader, complained to the Chief Commercial Manager (Claims), East Indian Railways, who in his letter dated the 10th of September 1946 informed him that the matter was under inquiry. As the railway company failed to deliver the remaining ten bales of yarn, the plaintiff filed the present suit on the 2nd of June 1947.

(4) The suit was contested by the defendant who pleaded, inter alia, that the Railway Administration was not liable for the loss of a part of the consignment except on the proof of misconduct on the part of its servants.

(5) The suit was ultimately decreed by the trial court. It came to the conclusion that the required notices had been properly served on the defendant. It also held that the misconduct of the Railway Administration's servants had been fully established on the evidence on record.

(6) The defendant thereafter went in appeal which was allowed in part. The appellate Court held that the misconduct of the railway administration or its servants had not been established by the evidence led on behalf of the plaintiff. The plaintiff was, therefore held entitled to a decree for the proportionate price of one bale of yarn plus the proportionate profit and the proportionate railway freight paid for the same, but he was held not entitled to any damages for the loss of the remaining nine bales. The plaintiff has thereafter filed the above mentioned second appeal in this Court.

(7) Learned Counsel for the appellant contended that the railway administration has failed to disclose how the consignment was dealt with by it throughout its transit. According to him, the evidence of D. W. 1, who worked as guard of the goods train by which the wagon in question was carried from Anara to Asansol, did not furnish a disclosure regarding the entire route of the transit. He submitted that the defendant should have also given evidence as to what was the condition of the wagon at each and every station the goods train halted from Nagpur to Baidyanath Dham. In my opinion, on the terms of Risk Note B it was not necessary for the defendant to give evidence in respect of that part of the journey, which was uneventful unless the plaintiff wanted the railway administration to give evidence regarding a particular part of the journey. I am supported in this view by the decisions in the cases of 'SECY. OF STATE v. SHIB DAYAL MURLI RAM'. AIR 1929 Lah 887 and 'DELHI SWADESHI CO-OPERATIVE STORES CO. LTD. v. B.B. and C.I. RLY. CO.', AIR 1930 Lah 557. Learned Counsel for the appellant has not pointed out anything from which it could be gathered that the plaintiff has asked the defendant about any other portion of the journey. In my opinion, there is not much force in this contention of the learned Counsel for the appellant.

(8) Before I deal with the next point raised by Mr. Lalnarain Sinha, I would better give the relevant portion of Risk Note which runs thus:

"I/We, the undersigned, do, in consideration of such lower charge, agree and undertake to hold the said Railway Administration harmless and free from all responsibility for any

loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the Rly. Administration's servants; provided that in the following cases: (a) Non-delivery of the whole of the said consignment or of the whole of one or more packages forming part of the said consignment packed in accordance with the instructions laid down in the Tariff or, where there are no such instructions. protected otherwise than by paper or other packing readily removable by hand and fully addressed, where such non-delivery is not due to accidents to trains or to fire: (b) Pilferage from a package or packages forming part of the said consignment properly packed as in (a), when such pilferage is pointed out to the servants of the Railway Administration on or before delivery: The Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct. But, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving 'such misconduct shall' lie upon the consignor."

Mr. Lal Narain Sinha next contended that the Rly. Administration had failed to disclose anything about the alleged theft of the 9 bales in its correspondence (Exts. 4 and 4a), and on its failure to do so the suit should have been decreed. In this connection he relied upon the decision of their Lordships of the Judicial Committee in the case of 'SURAT COTTON SPINNING & WEAVING MILLS. LTD. v. SECY. OF STATE', 64 Ind App 176: AIR 1937 PC 152. While dealing with this point, Lord Thankerton who delivered the judgment of their Lordships observed as follows:

"The first portion of the proviso provides that the Railway Administration shall be bound to disclose to the consignor 'how the consignment was dealt with throughout the time it was in its possession or control, and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct'.

In their Lordships' opinion, this obligation arises at once upon the occurrence of either of cases (a) or (b) and is not confined to the stage of litigation. Clearly one object of the provision is to obviate, if possible, the necessity for litigation. On the other hand, the closing words of the obligation clearly apply to the litigious stage. As to the extent of the disclosure, it is confined to the period during which the consignment was within the possession or control of the Railway Administration; it does not relate, for instance, to the period after the goods have been theftuously removed from the premises. On the other hand, it does envisage a precise statement of how the consignment was dealt with by the Administration or its servants. The character of what is requisite may vary according to the circumstances of different cases but, if the consignor is not satisfied that the disclosure has been adequate, the dispute must be judicially decided. As to the accuracy or truth of the information given, if the consignor is doubtful or unsatisfied, and considers that these should be established by evidence, their Lordships are of opinion that evidence before a court of law is contemplated, and that, as was properly done in the present suit, the railway administration should submit their evidence first at the trial."

This decision of their Lordships of the Judicial Committee was construed in the case of 'GOVERNOR-GENERAL OF INDIA IN-COUNCIL v. THAKURSI DASS', AIR 1948 Pat 45 in which Meredith, J. observed as follows:

"What exactly this involves and the proper procedure on such case has been clearly explained by the Privy Council in 'SURAT COTTON SPINNING AND WEAVING MILLS, LTD. v. SECY. OF STATE', 64 Ind App 176 (PC). What it comes to is this. The Railway Administration must first make the necessary disclosure, and if the consignor is not satisfied with or is doubtful as to the accuracy or truth of the information disclosed and wants evidence, then the Railway Administration must be the first to submit their evidence at the trial. If the consignor is satisfied that full disclosure has been made, then he must discharge the onus upon him, and he can do it either by showing that misconduct may be inferred from the evidence led by the Railway Administration, or the disclosure made by them, or he may in his turn affirmatively lead evidence which establishes misconduct. That is one possible course. If, on the other hand, he is not satisfied with the disclosure made, then it is his duty to call upon the Railway Administration for further and better disclosure, or evidence. If he does so then it will be for the court to decide whether his demand has or has not gone beyond the obligation which lies upon the Railway Administration under the proviso. If the court holds that his demand for further proof is not justifiable, then of course the Railway Administration need not disclose anything more, and there can be no inference against them from that fact. The plaintiff still has to discharge his burden. But, if the court holds that the demand is reasonable and in spite of the court's decision the Railway Administration does not disclose the further particulars called for, then the presumption under S. 114 (g), Evidence Act, which says that a presumption may be drawn that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it, will come into operation and the plaintiff may call upon the court to draw an inference of misconduct upon the basis of that presumption alone. But if the Railway Administration has made the further disclosure and no inference can be drawn from the evidence disclosed, then the burden still lies upon the plaintiff, and he has to discharge it before he can succeed."

In my opinion, it is not correct to say that the suit should have been decreed on the authority of the above mentioned Privy Council decision merely because no mention of loss by theft was made in Exhibits 4 and 4a. This omission may be a relevant and an important factor in deciding the story of theft as disclosed by the defendant at the trial, but it cannot be held to be sufficient to establish the misconduct of the Railway Administration's servants.

(9) Learned Counsel for the appellant next contended that the judgment of the lower appellate court is vitiated because it has not considered and discussed some important documents which go to show that the defendant's story of theft in the running train between the stations Ramkanali and Burnpur is an after-

thought. He referred particularly to exhibits 4, 4a and H in this connection. He submitted that if the tampering with the wagon was detected on the 6th of June 1946 and if on that date telegraphic messages to that effect had been despatched to the authorities concerned as is the case of the defendant, then how is it that on the 28th of August 1946 enquiries were being made to trace the consignment? The relevant portions of the letters from the Chief Commercial Manager, East Indian Railway, to the pleader of the plaintiff which have been marked as exhibits 4a and 4 on the record run thus:

"Dear Sir,

Re: Nagpur to Baidyanathdham

Inv. 21, D/- 31-5-1946, 40 bales of Yarns.

Your letter dated 28-8-1946.

With reference to your letter quoted above I have to inform you that the special enquiries are being made to trace the consignment and on completion of the same the result will be communicated to you very shortly....."

"Dear Sir,

Re: Nagpur to Baidyanathdham,

Inv. 21 dated 31-5-1946.

Your Letter dated 14-11-1946.

With reference to your letter quoted above I have to inform you that enquiries are in progress and on completion of the same will be communicated with the result very shortly."

(10) Mr. Lalnarain Sinha further submitted that the court of appeal has failed to notice that in the forwarding consignment note (Ext. H) it was distinctly mentioned that the 40 bales of cotton yarn had been loaded in wagon No. 59409, while the case of the defendant at the trial is that 34 bales were despatched by wagon No. 59409 and 6 bales were despatched by wagon No. 28912. According to him, this discrepancy in exhibit H could have been explained only by D. M. Dhavle who is said to have filled in the relevant entries. He urged that proof of exhibits G, H and I by Mr. P. B. Naidu on his recognition of the writing of Mr. Dhavle should not have been considered sufficient. He contended that the examination of Mr. Dhavle is very essential in the circumstances of this case.

(11) Mr. Lalnarain Sinha further submitted that the following passage in the judgment of the lower appellate court leaves no room for doubt that the learned District Judge had proceeded to decide the case more on imagination rather than on evidence. According to him, it is a fit case in which this Court should interfere. The relevant portion of the judgment which was the subject-matter of this criticism runs thus:

"The learned Subordinate Judge has rightly pointed out that while the train is moving a man cannot use both his hands in breaking a rivet because he will loose his foothold. It seems to me, however, that there is no justification for assuming that only one man must have taken part in the breaking of the rivets. It is quite possible that two men got near the doors and one of them held the chisel and the other used the hammer. Apart from that, the witness further deposed that there is one instrument with a hole in it by which one can break a rivet with one hand. The possibility that an instrument of this kind might have been used cannot be excluded."

(12) Learned counsel for the respondent, on the other hand, contended that the finding about 'misconduct' is a finding of fact which cannot be interfered with in second appeal. In support of his contention he relied upon the decision in the case of 'DURGA DUTTA SHRI RAM FIRM v. SECY. OF STATE', 11 Pat LT 161 in which Wort, J. observed as follows.

"If the finding in this case had been that there was wilful neglect, it would have been for this court to say whether there was any evidence of wilful neglect and that undoubtedly was a question of law. But, when the learned Judge in the court below has considered all the facts and circumstances in the case and come to the conclusion as a fact that there has been no wilful neglect, I agree with the argument, which was put forward by Mr. S. N. Bose on behalf of the respondent, that the matter is concluded so far as this Court is concerned."

(13) In my opinion, the decision in the case of 'DURGA DUTT SHRI RAM FIRM', (11 Pat LT 161) cannot apply to this case as the court of appeal below has not considered some important aspects of the case. I agree with the learned Counsel for the appellant that the court of appeal below has omitted to consider exhibits 4, 4a and H in the light of his argument and has further travelled in the realm of imagination in arriving at the most important finding in the case. I further agree with him that the examination of Mr. Dhavle was necessary to explain the apparent inconsistency in the entry in exhibit H and the evidence of the defendant led at the trial as to whether all the 40 bales had been despatched in one wagon or in more than one wagon. In this view of the matter, justice of the case demands that the appeal be sent back for further hearing and decision in accordance with law, after giving an opportunity to the defendant to examine D. M. Dhavle.

(14) The result is that the judgment and decree of the court of appeal below are set aside and the appeal is remanded to the lower appellate court for decision in accordance with law. Costs of this appeal will abide the result.

(15) JAMUAR J.: I agree.

B/K.S. Case remanded.

A. I. R. 1952 PATNA 437

LAKSHMIKANTA JHA C. J.

Mst. Bibi Qamrun and others, Appellants v. Mohammad Ali Sabir, Respondent.

A.F.A.D. No. 936 of 1951 with Civil Revn. No. 607 of 1951, D/- 7-5-1952.

(a) Civil P.C. (1908), O. 41 R. 23, Ss. 151, 100-101 and O. 43 R. 1 — Order of remand passed in exercise of inherent powers — No adjudication on rights of parties — Appeal.

An order of remand passed by an appellate Court obviously in exercise of its inherent powers and not under O. 41 R. 23 is not appealable under O. 43 R. 1: AIR 1918 Pat. 505(1) Rel. on. (Para 2)

Where the order does not finally adjudicate upon the rights of parties it cannot be split up into a decree and an order and the appeal against it treated as an appeal against a decree: AIR 1926 Pat. 457 Rel. on. (Para 2)

Therefore no appeal will lie against such an order either as an appealable order or as a decree. (Para 2)

Anno: Civil P.C. O. 41 R. 23 N. 22, 22a Ss. 100-101 N. 5, 8; S. 151 N. 9.

(b) Civil P.C. (1908) Ss. 115, 151 and O. 41 R. 23 — Remand by appellate Court under inherent powers — Court has power to do so and no error in exercise of jurisdiction results therefrom. **(Para 3)**

Anno: Civil P.C. S. 115 N. 10; S. 151 N. 10; O. 41 R. 23 N. 35.

S. S. Asghar Hussain, for Appellants; Rajkishore Prasad and Harihar Nath Sinha, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('18) 3 Pat LJ 253: (AIR 1918 Pat. 505(1)) 2
('27) 6 Pat 160: (AIR 1926 Pat 457) 2

JUDGMENT: This second appeal arises out of a suit for recovery of possession of certain land conveyed to the plaintiff under a sale-deed. One of the points in controversy in this suit was that title could not pass without payment of the consideration. The trial court accepted the contention of the defendants and held that consideration not having been paid title did not pass to the plaintiff, and in that view of the matter it dismissed the plaintiff's suit. There was an appeal to the court below and by consent of the parties it remanded the case directing the trial court to decide the suit in accordance with certain directions given in its judgment. The present appeal is directed against this order of remand.

(2) In my view, the appeal is not maintainable. The right of appeal is a creature of statute. Every decree is appealable and so also certain orders have been made appealable under Order 43, rule 1, Code of Civil Procedure. It is conceded that the order passed by the Court of appeal below is not one passed under Order 41, rule 23, Code of Civil Procedure. Obviously, the order was passed in exercise of the inherent powers of the court under section 151, Code of Civil Procedure; and as such no appeal lies under Order 43, Rule 1. The contention of the learned Counsel for the appellants is that this order may be split up into two parts (1) a decree, and (2) a direction. This contention, in my view, has no substance. There is no final adjudication of the rights of the parties by the order under appeal. Therefore, this appeal cannot be treated as an appeal from a decree. If the order has been passed, as I have already said, under section 151, then no appeal lies. There is a clear authority in support of this view in 'RAGHUNANDAN SINGH v. JADUNANDAN SINGH', 3 Pat L J 253. A similar contention was raised before a Division Bench of this Court in 'PERMANAND KUMAR v. BHON LOHAR', 6 Pat 160 and the argument that an order can be split up into two, one amounting to a decree and the other amounting to an order, was repelled; and, if I may say so, rightly, and I respectfully agree with that view. I am clearly of the opinion that the present case is fully covered by the authority in 'PARMANAND'S CASE', 6 Pat 160. Therefore, the appeal cannot be entertained.

(3) The next question is whether the order can be interfered with under Section 115 of the Code of Civil Procedure. I think, there is no error of jurisdiction. The court of appeal below had a right to make a remand, and if, in the exercise of its power as an appellate court, it made the remand, it cannot be said to have erred in the exercise of its jurisdiction.

(4) The appeal and the revision are accordingly dismissed with costs. Hearing fee one gold mohur in the revision application.

C/M.K.S. Order accordingly.

*** A. I. R. 1952 PATNA 438**

RAMASWAMI AND SARJOO PROSAD JJ.

Sri Ram and others, Appellants v. Chandeshwar Prasad Narayan Singh, Respondent.

A.F.O.D. No. 89 of 1946, D/- 22-4-1952.

(a) Hindu Law — Widow — Alienation — Spiritual benefit to husband — Mathematical limit to power of alienation.

No mathematical limit can be fixed to the power of alienation of a widow of husband's property for the purpose of religious acts which conduce to his spiritual benefit. The question whether the property dedicated constitutes a reasonable proportion of the whole estate must depend upon the facts and circumstances of each particular case:

Held on facts that it was not unreasonable that the widow should endow 1/5th or even 1/4th of her husband's estate and the dedication to deity was valid and competent: 37 Cal 1 and AIR 1916 Cal 792, Rel. on. (Para 7)

(b) Hindu Law — Religious endowment — Office of shebait — Succession to.

When the worship of an idol is founded, the office of the shebait is held to be vested in the heirs of the founder in default of evidence to show that he has disposed of it otherwise: 5 Beng LR 181; 17 Cal 3 (PC); AIR 1918 Mad 1278 (FB) and AIR 1925 PC 139, Rel. on. (Para 9)

† * (c) Hindu Law — Religious endowment — Management of dedicated properties — Right of widow of founder to appoint trustee.

A widow's estate is not a life estate but her right is in the nature of right of property and the whole estate is for the time vested in her absolutely for certain purposes. The power of nominating new trustees is a right which is appurtenant to the right of management and which the widow is competent to exercise. Therefore, a widow who is an heir of the founder of the endowment and in whom trusteeship has vested can appoint a trustee or create a new line of trustees for the proper management of the dedicated properties. (Para 10)

Per Sarjoo Prosad J.: The right of the founder to lay down the line of devolution of the shebaitship is a heritable right, and the successor of the founder is entitled to exercise that right. (Para 20)

(d) Hindu Law — Religious endowment — Alienation — Nomination of trustee by heir of founder is not alienation.

It is not correct to say that nomination of a trustee by the heir of the founder of an endowment would tantamount to alienation of office of trustee. The heir of the founder has right to create a new line of trustees if the trusteeship has vested in him or her owing to the failure of the line of the original trustees: AIR 1918 Mad 1278 (FB) and 18 Ind Cas 232 (All), Rel. on; AIR 1939 Pat 1 and AIR 1951 SC 293, Disting. (Para 11)

(e) Hindu Law — Religious endowment — Office of shebait — Succession to.

The office of shebait devolves upon the successor who is nominated by the previous

shebait, and, if there is no nomination, the heir (that is, the seniormost Chela) of the deceased shebait under the Hindu Law will succeed to the office. (Para 13)

(f) Hindu Law — Religious endowment — Idol -Representation — Denial of right of idol to dedicated property by shebait — Representation of idol in suit.

Where there is a dispute between rival shebaits or where the shebait denies the right of the idol to the dedicated properties, it is desirable that the idol should file suit through a disinterested next friend, nominated by the Court: AIR 1925 PC 139, Rel. on. (Para 14)

Held that the de facto shebait who was in possession of the temple and properties appertaining thereto, until his dispossession was a fit and proper person to act as shebait of the idols and had sufficient interest in the deities to represent them for the purpose of prosecuting the suit. (Paras 14, 25)

(g) Hindu Law — Adoption — Niyoga rule.

On principle it is difficult to hold that the rule of the immoral and obsolete practice of Niyoga should be invoked in order to ascertain who could or could not be adopted. Any legal objection raised to the validity of adoption as being contrary to Niyoga rule cannot be sustained. (Para 16)

(h) Hindu Law — Religious endowment — Shebait — Compromise by shebait when is illegal — (Civil P. C. (1908), S. 11 and O. 23 R. 3.)

A shebait has no authority to annihilate the interest of the deities in the endowed properties. Hence, if he agrees to a compromise which is wholly prejudicial to the interest of the deity, the compromise petition and the decree based thereon are void and illegal and cannot operate as res judicata. (Para 17)

Anno: C.P.C. S. 11 N. 114; O. 23 R. 3 N. 8.

Lalnarain Sinha, Guneshwar Pd., M. N. Pal and L. M. Sharma, for Appellants; Mahabir Pd., Rameshwar Choudhury, B. K. Sharma, Balbhadra Pd. Singh and Shreenath Singh, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('74-75) 2 Ind App 145: (4 Beng LR 450 PC) 10
('90) 17 Cal 3: (16 Ind App 137 PC) 9
('04) 31 Ind App 203: (32 Cal 129 PC) 14
('25) 52 Cal 809: 52 Ind App 245: (AIR 1925 PC 139) 9, 14, 20
('51) 1951 SCJ 394: (AIR 1951 SC 293) 11, 12, 22
('13) 18 Ind Cas 232 (All) 11
('70) 13 WR 396: (5 Beng LR 181) 9
('10) 37 Cal 1: (1 Ind Cas 945) 7
('16) 43 Cal 574: (AIR 1916 Cal 792) 7
('37) ILR (1937) 2 Cal 265 24
('17) 40 Mad 612: (AIR 1918 Mad 1278 FB) 9, 11, 20
('39) 18 Pat 171: AIR 1939 Pat 1 11, 12, 21, 22
(1886) 17 QBD 521: (55 LJQB 578) 10

RAMASWAMI J.: This appeal is brought on behalf of the plaintiffs against the judgment and decree of the Additional Subordinate Judge of Mozaffarpur, dated 30th July 1945.

(2) The plaintiffs 1 and 1(a) are the deities Sri Ram and Sri Janki installed in a temple in village Nawahi; and plaintiff No. 2 Mahanth Rasik Siromani is the shebait of the deities. The plaintiffs alleged that Ramanugrah Narayan Singh built the temple and installed the deities, Ram and Janki therein and spent a sum of about Rs. 9000 per year for maintenance of the temple, expenses of Ragbhog and entertainment of the Sadhus. In the year 1288 Fs., Ramanugrah endowed properties described in Schedule 1(a) of the plaint by way of Sankalp to the deities and constituted Mahanth Mithila Saran as a shebait. The properties yielded an income of Rs. 1200 or thereabout. As this was insufficient Ramanugrah continued to provide additional funds from his estate in order to carry out the objects of the endowment. In 1288 Fs. Ramanugrah laid the foundation stone of the temple, but he could not complete it as he died shortly after leaving a widow Mst. Jagatrup Kuer and two sons Awadhbehari Narain Singh and Janki Narain Singh. Janki died in Asin 1300 Fs., and Awadhbehari died in September 1903 without leaving any issue or any widow. On 28th June 1906 Jagatrup Kuer endowed properties described in Schedule 1/b of the plaint by a registered document. Jagatrup included all the properties of Schedule 1/a but she failed to state that there was an oral dedication by her husband of these properties. By this document the widow constituted herself as first shebait with power to nominate her successor. On 14th December 1914 the widow executed a deed of shebaitnama appointing Mithila Saran as shebait and handed over the idols and properties to his charge. On 14th June 1917 Jagatrup Kuer died but Mithila Saran continued to be shebait for the endowed properties.

(3) In the year 1929, the defendant claimed that he was nearest reversioner to the estate of Ramanugrah Narain Singh on the ground that he had been adopted by a collateral Kishun Kishore Narain Singh. The defendant challenged the validity of the endowment and claimed that he was entitled to the properties as the nearest reversioner of Mst. Jagatrup Kuer. The suit (Title Suit. 51 of 1929) ended in compromise. Mithila Saran acknowledged that endowment was not binding upon the defendant. The latter in his turn agreed that Mithila Saran would continue in possession and upon his death, defendant would get possession as owner of the properties. On 20th October 1935, Mithila Saran also executed a deed of Ladavi, exhibit 56, relinquishing in favour of defendant properties described in Schedule 1/c of the plaint. These properties were acquired by Mithila Saran out of the income of the religious endowment. On 14th April 1938, Mithila Saran died whereupon plaintiff No. 2, who was the seniormost Bairagi chela of Mithila Saran obtained possession of the properties. But on 12th July 1938, plaintiff No. 2 was forcibly dispossessed by the defendant who took charge of the temple and its compound and drove out the Sadhus who were inmates of the temple. The deities, plaintiffs 1 and 1/a, therefore, asked for a declaration of their title to the properties and plaintiff No. 2, Rasik Shiromani asked for a declaration that he is shebait and for recovery of possession of the properties on behalf of the deities. The plaintiffs have also asked for a decree for mesne profits.

(4) The defendant contested the suit on the ground that Rasik Shiromani was not chela of Mithila Saran and was not competent to maintain the suit. The defendant alleged that Ramanugrah did not build the temple nor instal any deities or dedicate any properties. The defendant on the contrary asserted that Jagatrup Kuer was the founder, that she had

alienated the properties by Samarpannama in 1906 under the spiritual influence of Mithila Saran. The defendant asserted that he was validly adopted by Kishun Kishore Singh and was competent to impeach the alienation made by Jagatrup Kuer. The defendant further maintained that the compromise decree in Title Suit 51 of 1929 operated as res judicata.

(5) Upon these rival contentions, the learned Subordinate Judge held in the first place that the compromise decree in Title Suit 51 of 1929 was beyond the authority of the shebait, that it was prejudicial to the interest of the deities and void and did not operate as res judicata. The Subordinate Judge also held that Ramanugrah had constructed a Thakurbari and had installed the deities and used to meet the expenses of the temple from his own estate. As regards Samarpannama of 1906, the Subordinate Judge found that the properties endowed constituted really 1/4th of the whole estate and the widow was not competent to make the endowment since the proportion was unreasonable. He further held that plaintiff No. 2 was the seniormost Bairagi chela to Mithila Saran but he was not nominated or designated by Mithila Saran as succeeding shebait. The Subordinate Judge found that defendant No. 1 was validly adopted by Kishun Kishore Singh and was entitled to impeach the alienation made by Jagatrup Kuer. Upon these findings the Subordinate Judge dismissed the suit holding that plaintiff was not entitled to any relief.

(6) The issues arising in this appeal are: (1) whether Jagatrup Kuer could validly make endowment of the properties mentioned in Samarpannama of 1906; (2) whether plaintiff No. 2, Rasik Shiromani, has title as shebait to the endowed properties and whether he is competent to prosecute the present suit on behalf of the deities; (3) whether defendant was validly adopted by Kishun Kishore Singh; and (4) whether the compromise decree in Title Suit 51 of 1929 operates as res judicata.

(7) Upon the first question, Mr. Lalnarain Sinha contended that the Subordinate Judge has wrongly held upon evidence that Jagatrup Kuer had dedicated 1/4th share of the whole estate. P. W. 1 Rasik Shiromani stated that the annual income of the dedicated properties was Rs. 9000 in cash and 2000 maunds of grain. In his previous statement, exhibit NN, P. W. 1 had stated that the dedicated properties represented 4 annas share of the estate inherited by Jagatrup Kuer. Mithila Saran has deposed in the previous suit that the annual income from the dedicated properties was Rs. 9000 in cash and 3000 maunds of grain (see exhibit 71). Implicit reliance cannot however be placed upon the statement of Rasik Shiromani that the income from dedicated properties was 1/4th share of the whole estate since he was initiated as chela in 1917 and was not even born at the time of Samarpannama. It is a striking fact in this case that the defendant has suppressed all the account books of the estate. The presumption therefore should be drawn that if the account books were produced they would not have supported the case of the defendant. The evidence of D. W. 10, Kishori Lal Das, is also important. He admitted when cross-examined that the income of the endowed properties was about Rs. 15000 and that the total income of the estate of Ramanugrah was rupees eighty to eighty-five thousand in addition to the income from two to three thousand bighas zirat land. The Subordinate Judge has not taken into account this important statement. Upon the evidence it is plain that the endowed properties constituted about 1/5th share of the entire estate of Ramanugrah Narain Singh. It was argued by the Advocate-General that even so the widow has alienated an unreasonable proportion of the estate for religious purpose and the dedication must be declared to be invalid. But no mathematical limit can be fixed to the power of alienation of a widow of husband's property for the purpose of religious acts which conduce to his spiritual benefit. The question whether the property dedicated constitutes a reasonable proportion of the whole estate must depend upon the facts and circumstances of each particular case. In 'CHURAMAN v. GOPI SAHU', 37 Cal. 1 a gift of slightly less than one-third of the estate was sustained as valid. In a later case 'KHUB LAL SINGH v. AJODHYA MISSER', 43 Cal. 574 Mookerjee and Newbould JJ. held that a gift of 2 bighas out of 10 bighas of land by a widow for the purpose of excavation and consecration in connection with a temple was reasonable. In the present case there is evidence that Ramanugrah constructed the temple in 1288, installed deities and spent about Rs. 9000 per year for the purpose of Ragbhog. Ramanugrah had died without completing the temple but before his death he had expressed his wish that property should be endowed for the proper maintenance of the temple and the service of the deities. After the death of Ramanugrah his two sons Awadhbehari and Janki died without leaving widows or any issue and Jagatrup Kuer must have realised that her husband's branch had become extinct. In the context of these facts it is not unreasonable that the widow should endow 1/5th or even 1/4th of her husband's estate, and it must be held that the dedication is valid and competent.

(8) The next important question is whether Mithila Saran was validly appointed to be shebait by Jagatrup Kuer. It was submitted by the Advocate-General in the first place that upon a proper construction of the shebaitnama, exhibit 54, it ought to be held that Mithila Saran was appointed merely as pujari and not as shebait. Learned Counsel found his argument upon para 5 of exhibit 54 which states that

> "The shebait shall perform all work in connection with the Thakurjis and their properties according to my advice and precepts and on my death according to the advice of Babu Gena Jha, who is the karta putra of me the executant."

Reference was also made to para 13 which states that the executant would be competent to remove prodigal and immoral shebait and

> "to appoint a shebait from among the disciples for the time being who will be deemed fit by majority opinion".

But the contention of the Advocate-General cannot be accepted as correct. Even if para 13 was non-existent prodigal and immoral shebaits would be liable to be removed under the law, and it is not possible to argue that the executant reserved any legal right. It is true that para 5 states that the shebait will perform all work in accordance with the advice of the executant. But the tenor and effect of the whole document is that Mithila Saran was vested with the power of managing the properties and with the power of ministering to

the deities. In the opening paragraph, the document recites:

> "I, the executant desired to appoint Shri Mahanth Mithila Saran, who is a Sadhu, pandit, wise man and the guru of my deceased son Babu Janki Prasad Singh as sevait, so that the work might be efficiently done and the properties might be well managed and the shewa of the Thakurji be well performed."

In the conception of shebait both the elements 'office' and 'property' are mixed and blended together and the document makes it plain that both the office and property are conferred upon Mahanth Mithila Saran who is properly constituted shebait. It should be noticed that the expression 'shebait' is used by the executant not once but several times in the course of the document and no special reason has been suggested on behalf of the respondent why the expression 'shebait' should not be construed in its technical sense. Upon a consideration of all the terms of the document there can be no doubt that Mithila Saran was appointed as a shebait and not as mere pujari.

(9) It was next submitted on behalf of the respondent that Jagatrup Kuer was not the founder of the endowment and that she was not competent to lay down a line of succession of shebaits. It was argued that Ramanugrah had built the temple and installed the deities and was the founder of the endowment. It was contended that Ramanugrah could have laid down the course of devolution of the office but it was not competent for Jagatrup Kuer to do so. In my opinion this argument is not correct. The principle is well-settled that when the worship of an idol is founded, the office of the shebait is held to be vested in the heirs of the founder in default of evidence to show that he has disposed of it otherwise. In an early case 'MT. JAI BANSI KUNWAR v. CHATTARDHARI SINGH', 13 W.R. 396, it was held that where the mutawalli of an endowment dies without nominating a successor, the management must revert to the heirs of the person who endowed the property. The principle of the decision was affirmed by the Judicial Committee in 'GOSSAMI SRI GIRIDHARIJI v. ROMANLALJI GOSSAMI', 17 Cal. 3 (PC):

> "According to Hindu law, where the worship of Thakur has been founded the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution."

In 'GAURANGA SAHU v. SUDEVI MATA', 40 Mad. 612 (FB), it was held by the Full Bench that it was competent to an heir of the founder of an endowment, in whom the trusteeship has vested owing to the failure of the line of the original trustees, to create a new line of trustees. The same principle was laid down by Lord Shaw in 'PRAMATHA NATH v. PRADYAMNA KUMAR', 52 Ind. App., 245 (PC), at p. 251:

> "The person founding a deity and becoming responsible for these duties is de facto and in common parlance called shebait. This responsibility is, of course, maintained by a pious Hindu, either by the personal performance of the religious rites or—as in the case of Sudras, to which caste the parties belonged—by the employment of a Brahmin priest to do so on his behalf. Or the founder, any time before his death, or his successor likewise, may confer the office of shebait on another."

Applying these principles in the present case, it is manifest that Jagatrup Kuer had authority to create a new line of shebaits.

(10) But it was argued by the Advocate-General that the position of Jagatrup Kuer was different and it was not competent on the part of a female heir to nominate or appoint a shebait. The argument cannot be sustained in principle. It is true that the Hindu law of inheritance makes a distinction between the sexes in that a male heir becomes full owner of property inherited by him and transmits it to his heirs while a female heir takes as a limited owner, the property passing on her death not to her heirs but to the next heir of the last full owner. There is a distinction in the nature of the interest as regards future devolution — otherwise the nature of the interest with respect to shebait is much the same in the case of a male or female heir. The powers of alienation by a male shebait are restricted in much the same way as those of a female heir or the manager of an infant heir: 'PROSUNNO KUMARI DEBYA v. GOLAPCHAND BABOO', 2 Ind. App. 145 (PC). It is settled that a widow's estate is not a life estate but her right is in the nature of right of property and the whole estate is for the time vested in her absolutely for certain purposes. I think that the power of nominating new trustees is a right which is appurtenant to the right of management and which the widow is competent to exercise. The right of shebaitship may be an anomalous combination of property and office; it may be a species of property. But the power of appointment is not itself property, but a power which is appurtenant to the right of management. There appears to be no reason why a widow who is an heir of the founder of the endowment and in whom trusteeship has vested ought not to appoint a trustee or create a new line of trustees for the proper management of the dedicated properties. In 'EX PARTE GILCHRIST', (1886) 17 QBD 521, Fry L. J. has pointed out the distinction between property and a power of appointment:

> "No two ideas can well be more distinct the one from the other than those of 'property' and 'power'. This is a 'power' and nothing but a 'power'. A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his 'property' than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognises are they 'property'. In one sense no doubt they may be called the 'property' of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not 'property' within the meaning of that word as used in law. Not only in law but in equity the distinction between 'power' and 'property' is perfectly familiar."

(11) It was also contended for the respondent that the power of appointment is in effect nothing less than a transfer of trusteeship and is therefore void and illegal. To put it in other

words, it was argued that the right of the heirs of the founder was limited to their holding the office themselves and did not include the power to nominate or appoint a trustee. But it is not correct to say that nomination of a trustee by the heir of the founder would tantamount to alienation of office of trustee. This view is supported by the Madras Full Bench case, 'GAURANGA SAHU v. SUDEVI MATA', 40 Madras 612 (FB), in which it was held that the exercise of the power of appointment of a shebait was not tantamount to alienation of the office of trustee and that the heirs of the founder had right to create a new line of trustees if the trusteeship had vested in them owing to the failure of the line of the original trustees. Also in the Allahabad case 'SUKHBIR SINGH v. NIHAL SINGH', 18 Ind Cas 232 the High Court held that a widow could validly appoint and nominate trustees for the proper administration of endowed properties. In support of his argument the Advocate General relied upon 'ANURAGI KUER v. PARMANAND PATHAK', 18 Pat 171 and 'SM. ANGURBALA v. DEBABRATA', 1951 SCJ 394. But these authorities do not assist the case of the respondent.

(12) In 'ANURAGI KUER v. PARMANAND PATHAK', 18 Pat 171 the question arose whether the widow Rajbansi Kuer could execute an ekrarnama in favour of Mahabir with respect to the shebaiti interest. It was found by the High Court that the shebaiti right followed the line of inheritance from the founder and that Mahabir became absolutely entitled to it after the death of Rajbansi Kuar, that the ekrarnama merely acknowledged and ratified the existing right of Rajbansi Kuer and after her of Mahabir in the shebaitship. The High Court reversed the finding of the lower court that though Mahabir was the heir of the founder he could only take life interest of the shebait. The High Court held that Mahabir had taken the shebaiti as full owner and the sebaiti must therefore devolve upon his heirs. In the other case, 'SM. ANGURBALA v. DEBABRATA', 1951 SCJ 394, it was held that although as regards power of alienation the disability of the male and the female shebaits was identical, there was yet a distinction between them as regards the devolution of the shebaiti interest. When a Hindu female heir succeeds to the property of a male propositus, she cannot transmit the interest which she inherits, to her own heirs upon her death. The property goes after her death not to her heirs but to the heirs of the last male owner. This rule applied even when the right which devolved upon a widow was the right of a shebait. After her death the shebaiti right would not pass to her stridhana heirs but would go to the heirs of the last shebait. The question whether a widow who has succeeded as heir to the founder of an endowment could validly create a new line of trustees did not arise in these decisions. The material facts of the present case are manifestly different.

(13) The question next arises whether the plaintiff is seniormost Bairagi chela of Mithila Saran and whether he was validly nominated as shebait by the latter. It was maintained on behalf of the respondent that plaintiff was not initiated as chela by Mithila Saran. The Advocate General did not refer in detail to the evidence but merely pointed out that in the Ladavi deed, exhibit 56, Mahanth Mithila Saran had stated that "he had only one chela named Dhanushdhari Saran who died long before". It is argued on behalf of the appellants that the defendant by exercising undue influence prevailed upon Mithila Saran to execute this Ladavi deed and to make an untrue recital therein. The learned Subordinate Judge has commented upon the circumstance that the document was scribed by the defendant's servant and almost all the attesting witnesses were defendant's employees. A year later Mithila Saran executed a Mokhtarnama, exhibit 64, in which he declared that Rasik Shiromani was his seniormost chela. The Subordinate Judge has examined all the oral and documentary evidence on this aspect of the case and reached the conclusion that plaintiff was seniormost living Bairagi chela of Mithila Saran. In my opinion, the finding of the Subordinate Judge is correct and no cogent argument has been advanced by the Advocate General to shake this finding in any respect. It is plain that the plaintiff though not validly nominated as shebait by Mithila Saran would be heir to Mithila Saran under Hindu Law, and according to the terms of the Samarpannama, exhibit 55, the plaintiff would be deemed to be a shebait. For exhibit 55 states that the widow shall for her lifetime remain shebait and "the man whom I shall select shall be shebait on my death". Later on the document states:

> "If God forbid I the executant be not able to complete the said temple during my lifetime and be not able to instal the Thakurji therein then it will be proper for the said shebait to complete the said temple and instal the said Thakurjis therein after performing necessary 'samaiy' as the said shebait will further be competent to appoint his successor shebait whomsoever he will deem fit. Similarly every shebait will be competent to nominate his own shebait. If any shebait dies without nominating his successor then in that case the man, who will be the heir of the deceased shebait under the law prevalent for the time being will be the shebait of the said Thakurji."

The Subordinate Judge held that the plaintiff had no title as shebait on the ground that in the subsequent document, exhibit 54, clause 6 was vague. Clause 6 states:

> "The said shewait and other shewaits for the time being will one after another appoint shewaits who will succeed them on their death. If any one do not appoint a shewait then out of several shewaits he, who will be a fit and competent person to be the shewait, will be the shewait."

The Subordinate Judge held that clause 6 was vague and ineffective and the office of shebait will revert to the founder's heir namely the defendant. The reasoning of the Subordinate Judge appears faulty. It is not really material to examine whether clause 6 is vague and inoperative. For in any case it was not competent for Jagatrup Kuer to alter the line of succession which she had already laid down in the Samarpannama. It follows that the conditions laid down in the Samarpannama must prevail and the office of shebait must devolve upon the successor who will be nominated by the previous shebait, and, if there is no nomination, the heir of the deceased shebait under the Hindu Law will succeed to the office. Under the terms of Samarpannama, exhibit 55, the plaintiff being the seniormost Bairagi chela of Mithila Saran would succeed to the office of shebait.

(14) It was argued by Mr. Lalnarain Sinha that even if this conclusion is not correct and plaintiff had not validly succeeded to the office

of shebait the present suit will still be competent in view of the admitted or proved facts of this case. Learned Counsel contended that even if the defendant was validly adopted and he was entitled to the office of shebait, still defendant cannot properly represent the deities since his interest is manifestly adverse and he has repudiated the trust. Learned Counsel referred to the written statement in which the defendant denied that Ramanugrah had constructed temple or installed deities or that he made any dedication of properties. The defendant had also impeached the dedication made by Jagatrup Kuer on the ground that the deed was executed under undue influence. In Title Suit, 51 of 1929 the defendant had laid claim to the endowed properties as his own. Upon these facts, it is manifest that the deities should file the suit not through the defendant but through a disinterested next friend to be appointed by the Court. As a rule, the only person who can bring a suit on behalf of the idol is the shebait, and although an idol is a juridical person capable of holding property, it is only in an ideal sense that property is so held. The possession and management of the property with the right to sue in respect thereof are vested in the shebait 'JAGADINDRA NATH v. HEMANTA KUMARI', 31 Ind App 203 (PC). But the statement of the rule requires qualification. Where there is a dispute between rival shebaits or where the shebait denies the right of the idol to the dedicated properties, it is obviously desirable that the idol should file suit through a disinterested next friend, nominated by the Court. The principle is clearly stated by Lord Shaw in 'PRAMATH NATH v. PRADYAMNA KUMAR' 52 Cal 809. That was a suit between contending shebaits about the location of the idol, and the Judicial Committee held that the will of the idol on that question must be respected, and inasmuch as the idol was not represented otherwise than by shebaits, it ought to appear through a disinterested next friend appointed by the Court. In this case there is good evidence that Rasik Shiromani is seniormost Bairagi Chela of Mahant Mithila Saran, that he resides within the Asthal, that he is learned in Sanskrit, that he was in possession of the temple and properties appertaining thereto till he was dispossessed by the defendant. Even should Rasik Shiromani be found not to be a valid shebait of the endowment it is manifest that he has sufficient interest in the deities to represent them as next friend for the purpose of prosecuting the suit.

(15) The question was also debated whether the defendant was validly adopted by Kishun Kishore Narain Singh and whether he was competent to impeach the alienation of the widow Jagatrup Kuer. It was argued for the appellant that adoption was invalid in law since Sarjoo Prasad Singh, natural father of defendant was the brother's son of Genda Kuer, wife of Kishun Kishore, and the adoption was contrary to the "Niyoga Rule". The argument is based upon certain original texts contained in Dattaka Chandrika. In section (ii), para 7, a text of sage Saunaka is quoted:

> "Having taken him by both hands, with the recitation of the prayer, commencing Devasyatwa, etc.' having inaudibly repeated the mystical invocation, 'angad-ange, etc.', having kissed the forehead of the child; having adorned with cloths, and so forth, the boy bearing the reflection of a son."

In para. 8 Dattaka Chandrika contains the following comment on the above text of Saunaka: "The resemblance of a son, or in other words, the capability to have been begotten by the adopter, through appointment, and so forth". In Dattaka Mimamsa also Nanda Pandit cites the text of Sakala which has already been cited in the Dattaka Chandrika, section i, Art. 11. In section v, para 16, the author comments on the words 'the reflection of a son' and says:

> "The resemblance of a son — and that is, the capability to have sprung from (the adopter) himself through an appointment (to raise issue on another's wife) and so forth....."

Nothing is more obscure and unsatisfactory than the manner in which Nanda Pandit deals with this topic. Nanda Pandita concedes that the practice of Niyoga had long become obsolete, nevertheless he assigns no valid reason why the relations prohibited for adoption should be ascertained on the basis of that rule. Nanda Pandit also contradicts himself in another part of Dattaka Mimamsa in which he remarks, after quoting verses of Saunaka and Sakala, that a boy of another gotra may be adopted except a daughter's son, a sister's son, and a mother's sister's son. Section II para 74 states:

> "If no brother's son exist, another even, being the nearest relative, according to the mode mentioned (must be adopted). Conformably Saunaka (continues): 'of Kshatriyas, in their own class positively; and (on default of a sapinda kinsmen even in the general family, following in the same primitive spiritual guide (Guru); of Vaisyas, from amongst those of the Vaisya class (Vaisyajateshu); of Sudras, from amongst those of the Sudra class. Of all, and the tribes likewise, (in their own) classes only; and not otherwise. But a daughter's son, and a sister's son, are affiliated by Sudras. For the three superior tribes, a sister's son, is nowhere (mentioned as) a son."

Section (II) para 107 states: "Sakala has clearly laid down the above points:

> "Let one of a regenerate tribe destitute of male issue, on that account, adopt as a son, the offspring of a sapinda relation particularly; or also next to him, one born in the same general family; if such exist not, let him adopt one born in another family; except a daughter's son, a sister's son and the son of the mother's sister."

Section (II) para 108 states:

> "By this it is clearly established that the expression 'sister's son' (in the last sentence, of Saunaka's text S. 74), is illustrative of the daughter's son, and mother's sister's son, and this is proper, for prohibited connection is common to all three. To enlarge would be useless." (The text in Sanskrit beginning from "Tadetat spashtamachashte Shakalah" to "trishwapi samanatwat" quoted in the judgment is omitted.—Ed.).

The same contradiction occurs in Dattaka Chandrika which quotes Sakala's verse.

(16) Another serious objection is that the rules of Niyoga are vague; and the ancient texts furnish no definite information on the point. Manu states:

> "On the failure of issue (by the husband) the desired offspring may be procreated either by her (Devara) brother-in-law or any other sapinda on a woman duly authorized (Niyukta: ordered or directed)."

Yajnavalkya states:

> "The son of the wife is one begotten on a wife by a Sagotra or any other."

In another passage he declares :

"The (Devara) brother-in-law or a sapinda or a Sagotra being directed by the Guru (such as the father-in-law) and being sprinkled with clarified butter, should approach the sonless woman after each catamenia for the purpose of procreating a son; should approach until conception, otherwise he would be degraded; a son begotten in this mode becomes the husband's wife's son."

The passages from Manu and Yajnavalkya therefore lay down that any sapinda or sagotra without any distinction may be appointed to raise issue. In this context, it is important to notice that certain Dharma-sastras have strongly condemned the practice of Niyoga. Apastamba states (II.10.27) that

"The hand (of a sagotra is considered to be) that of a stranger; that if (the marriage vow) is transgressed, both (husband and wife) certainly go to hell and that the reward obtained from observing the restrictions of the law is preferable to offspring obtained in this manner (by Niyoga)".

Manu also condemns the practice of Niyoga in the strongest terms possible (IX.64.68). He states that

"Among dvijatis a widow should never be appointed to raise issue from another, for by doing so ancient dharma would be violated, that in the mantras relating to marriage there is no reference to Niyoga nor is the remarriage of a widow spoken of in the procedure about marriage, that Niyoga is a beastly way and was first brought into vogue by King Vena who thereby caused verna-samkara, and that since that time good men condemn him, who through ignorance, appoints a widow to produce offspring."

In the course of his elaborate address Mr. Lalnarain Sinha did not refer to any decision in which the Niyoga Rule has been applied and adoption has been held invalid for that reason. In any case on principle it is difficult to hold that the rule of the immoral and obsolete practice of Niyoga should be invoked in order to ascertain who could or could not be adopted. In my opinion the legal objection raised on behalf of the appellants to the validity of adoption cannot be sustained.

(17) The last question is whether the suit is barred on principle of res judicata. It was contended on behalf of the respondent that in Title Suit, 51 of 1929 Mithila Saran acknowledged that the endowment was not binding upon the defendant and that upon the death of Mithila Saran defendant was entitled to get possession of the endowed properties through Court. The compromise petition is exhibit 39 and the decree embodying the compromise petition is exhibit J. It is manifest on a perusal of these documents that the right of the deities to the endowed properties became extinct and the defendant was entitled to recover possession as full owner after the death of Mithila Saran. Paragraph 5 of the compromise decree states :

"On the death of defendant No. 2 the plaintiff will be entitled to khas possession and to enter into possession by taking out execution of the decree and will be entitled to get possession over the properties entered in schedules Nos. 1 and 2 given below. At that time, the plaintiff will be fully competent and entitled to appropriate the said properties and the income therefrom in the manner as he will take. The plaintiff will also be competent to make arrangements for pujapath, sewa, tahal, ragbhog, parab, and samaiya of the deities of Shri Ram and Jankiji aforesaid, in the manner he will deem proper. Moreover, the plaintiff is and will be fully competent to use and appropriate the income from the said properties in the manner he will like i.e., the plaintiff will have full right and power to bring the said properties in his own use or to use a part thereof in charitable purposes and pujapath etc., as he will like. Whatever right and power that have been allowed to the plaintiff will all pass to his heirs and representatives."

It is manifest that the compromise was wholly prejudicial to the interest of the deities and Mithila Saran had no authority to annihilate the interest of the deities in the endowed properties. The compromise petition and the decree based thereon are in consequence void and illegal and cannot operate as res judicata. The finding of the learned Subordinate Judge on this issue is obviously right and the finding has not indeed been seriously challenged in the argument of the appeal.

(18) For the reasons assigned, I would set aside the decree of the lower court and declare that plaintiffs 1 and 1(a) have title to the properties in Schedules 1 to 1/f and the plaintiff No. 2 is a shebait for the endowed properties, of which he is entitled to get possession from the defendant. Plaintiffs 1 and 1(a) are also entitled to a decree for mesne profits from the date of dispossession to the date, on which possession will be restored. I would accordingly allow the appeal with costs throughout.

(19) SARJOO PROSAD J. : It is unnecessary for me to recapitulate the facts which have been elaborately set out in the judgment of my learned brother Ramaswami J. Nor do I consider it useful to refer to the other points already decided by him with which I am in complete agreement. The appeal, however, raises some very serious questions for consideration. They are: (1) whether the female heir of a founder is competent to lay down a line of succession of shebaits, when the founder himself has not otherwise disposed of the shebaitship of the endowment and worship founded by him; (2) whether the 'Niyoga rule' could be applied to invalidate an adoption which may otherwise be valid in law; and (3) whether a de facto shebait is entitled to a declaration of his right to manage the properties of the endowment and to recover possession of the properties on behalf of the idol to whom the endowed properties are dedicated as against the heir of the founder who has repudiated the endowment. These are all important and vexed questions of law, and I wish to add a few observations of my own in regard to them. I will take up the questions seriatim.

(20) The principle is well settled that the shebaitship is held to be vested in the heirs of the founder in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing or some circumstances to show a different mode of devolution. In the present case, Ramanugrah Narayan Singh had built the temple and installed the deities and was the founder of the endowment. It was, therefore, competent for him to lay down the course of devolution of the office of

shebait. This he does not appear to have done. It has not been seriously disputed, nor can it be disputed that the right of the founder to lay down the line of devolution of the shebaitship is a heritable right, and the successor of the founder was entitled to exercise that right. There are numerous decisions to show that it is competent to the heir of the founder of an endowment in whom the trusteeship is vested, owing to the failure of the line of original trustees, to create a new line of trustees. The principle is illustrated by a Full Bench decision of the Madras High Court in 'GAURANGA SAHU v. SUDEVI MATA', 40 Mad. 612 (FB) and also by the decision of the Judicial Committee of the Privy Council in 'PRAMATHA NATH v. PRADYAMNA KUMAR', 52 Ind. App. 245 (PC). It is, therefore, impossible to entertain the extreme contention of the learned Advocate General that once the founder has failed to indicate the line of shebaits, his heirs cannot do so.

(21) The question, however, still remains whether a female heir of the founder who could not transmit the succession to her own heirs after her death could by appointment lay down a line of succession to the shebaitship. There is no doubt that the powers of alienation by a male shebait are limited just in the same manner as the powers of alienation by a female shebait. In regard to the management of the endowed properties, they stand on the same footing and there is no distinction between them in regard to their powers qua shebait or manager of the idols. The learned Advocate General, however, has contended that there is a distinction in the nature of their respective interests as to the future devolution of the shebaitship. It is said that distinction is inherent in the general law of inheritance which governs the two sexes. He relies in support of his contention on a decision of this Court in 'ANURAGI KUER v. PARMANAND PATHAK', 18 Pat. 171. It was there laid down by a Bench of this Court that the management and control of the endowed property, besides the right of acting as ministrant to the deities, which together constitute the shebaiti right, follow the line of inheritance from the founder. If the founder is succeeded by a female, she takes only a life interest under the ordinary Hindu law, and after her death the next male heir in the line of inheritance, takes the shebaiti as full and absolute owner. Dhavle J. pointed out in the case that:

> "The Hindu Law of inheritance makes a distinction between the sexes in that a male heir becomes full owner of the property inherited by him and transmits it on death to his own heirs, while a female heir (barring such Bombay exceptions as gotraja females) only takes as a limited owner, the property passing on her death not to her heirs but to the next heir of the last full owner."

These principles cannot be gainsaid. What is important to notice is that in the above case there was no question of any female heir of the founder having laid down a line of devolution of the shebaitship. The learned Counsel for the appellants has, on the contrary relied upon this decision in support of his contention that a female heir does not take a mere life estate in the office with the remainder vested 'in praesenti' in the next taker, but as a matter of fact the entire estate is vested in her though her powers of alienation are qualified and restricted much in the same manner as the powers of the male heir of the founder.

(22) This decision was approved by the Supreme Court in 'SM. ANGURBALA v. DEBABRATA', AIR 1951 S.C. 293. There again, there was no question of any line of inheritance to the shebaitship being indicated by a female heir of the founder in whom the shebaitship had become vested for the time being. The question there was whether the word 'property' in the Hindu Women's Rights to Property Act (XVIII of 1937) as amended by Act 11 of 1938 includes succession to shebaitship as an heir of the founder, and it was held in that case that the word 'property' as used in the Act does include succession to shebaitship as well. It was also held there that succession to shebaitship, even though there is an ingredient of office in it, follows succession to ordinary or secular property, and it is the general Hindu law of succession that governs such cases. The general law having been changed by reason of the aforesaid Act, there was no reason why the law as it stood after the alteration should not be also made applicable in the case of devolution of shebaitship. In this connection, it would be just as well to quote the very illuminating observations of Mukherjea J. when dealing with the nature of shebaiti right and its devolution. The learned Judge observed:

> "It is argued that this distinction between the Hindu woman's estate and the unrestricted rights of a male heir can be predicated only of ordinary secular property. but this distinction is unmeaning when applied to shebaiti right, for the nature of the interest enjoyed by a male or a female shebait is exactly the same. This argument does not appear to us to be at all convincing. Precisely the same thing happens when the shebaiti right devolves upon a female heir under the ordinary law of inheritance. If a shebait dies leaving behind him a widow and no male issue, the widow, would succeed to shebaitship under ordinary law but her rights in respect of the shebaiti would be restricted in the same manner as they would have been if the successor was the son. This is because there are certain limitations and restrictions attached to and inherent in the shebaiti right itself and they exist irrespective of the fact as to whether the shebaitship devolves upon a male or a female heir. But although as regards powers of alienation the disability of the male and the female shebaits may be identical, there is yet a distinction between them as regards the other limitation or characteristic of a Hindu woman's estate. When a Hindu female heir succeeds to the property of a male propositus, she cannot transmit the interest which she inherits, to her own heirs upon her death. The property goes after her death not to her heirs but to the heirs of the first male owner. This rule applies even when the right which devolves upon a widow is the right of a shebait. After her death the shebaiti right would not pass to her stridhana heirs but would go to the heirs of the last shebait: 'ANURAGI KUER v. PARMANAND', AIR 1939 Pat 1."

(23) On these decisions, of course, there can be no doubt that the devolution of the shebaiti interest is governed by the ordinary law of inheritance regulating the heirs of the founder, and the Hindu female who succeeds

as shebait cannot transmit the interest which she inherits to her own heirs upon her death. But there is nothing in the decision to indicate that she cannot lay down a line of succession to the shebaitship as an heir of the founder acting in the best interest of the idol and the endowed properties; because the exercise of the power of nomination of the succeeding shebait is undoubtedly vested in the heir of the founder who is also the shebait for the time being. Such an act cannot be considered to be an alienation of the shebaiti interest. It seems to be well settled that this power could be exercised under the circumstances by a male heir of the founder. On principle, therefore, I find no adequate reason to differ from the decision of my learned brother on this point, and I hold in agreement with him that it was legally open to Jagatrup Kuer to create a new line of shebaits by virtue of the shebaitnama (Ext. 54).

(24) The next contention of the appellants that the adoption was illegal since Sarju Prasad Singh, the natural father of the defendant, was the brother's son of Genda Kuer, wife of Kishun Kishore, and as such contrary to the 'Niyoga rule' now requires to be examined. The learned Counsel for the appellants has submitted that the adoptive father could not perform niyoga on the mother of the defendant who was in the position of a niece-in-law, or, in other words, the wife of the son of the wife's brother of the adoptive father. My learned brother, if I may say so with respect, has very rightly observed in his judgment that on principle it is difficult to hold that the rule of the immoral and obsolete practice of Niyoga should be invoked in order to ascertain who could or could not be adopted. Even though this barbarous practice of Niyoga prevailed at some stage in the dark ages, all the ancient writers and sages have almost unanimously condemned it; and at any rate under the spotlight of rapidly advancing Hindu culture, it appears to have completely vanished some three thousand years ago. The rule is really so repugnant to conscience that it is difficult to imagine that a modern jurist would take any notice of the rule much less adopt it as a test for invalidating an otherwise valid adoption. No specific precedent has been cited on the point by the learned Counsel for the appellants. He has, however, strongly founded his argument upon a decision of the Calcutta High Court in 'HARI DAS v. MANMATHA NATH', ILR (1937) 2 Cal. 265 wherein it was held that a Hindu of the regenerate class not adopt a person whose mother the adopter could not have legally married. The case arose under the Bengal School of Hindu Law and related to the adoption of a brother's daughter's son. They held such an adoption to be invalid and they further observed that the marriage rule is not merely recommendatory but mandatory and the doctrine of factum valet did not apply to adoption prohibited by the texts. Incidentally their Lordships refer to various passages in the Dattak Mimansa and the Dattak Chandrika, two well-known treatises on adoption, and in particular to the commentary of Nanda Pandit, the author of the latter work with reference to the words occurring in the text which mean "the reflection of a son". Of course, there are isolated passages in the judgment which lend colour to the contention of the learned Counsel but the case is no authority for the proposition that the 'Niyoga rule' was applied in that case for the purpose of invalidating the adoption. What was actually adopted and recognised was the 'marriage rule' and in the circumstances the decision was justified. I can understand the prohibition that the adoptive father could not take in adoption a boy whose mother he could not have legally married in her maidenhood. In the present case the rule will have no application because there could be no legal bar to Kishun Kishore marrying the mother of the defendant if she were a maiden. I therefore find myself in agreement with my learned brother on this point and cannot see my way to accede to the contention of the learned Counsel for the appellants that the adoption of the defendant should be declared invalid on this ground.

(25) The only other point which needs attention now is the point whether the plaintiff as de facto shebait could sue the defendant for possession of the endowed properties, even assuming that the defendant is the heir of the founder. If it is held that the plaintiff is the rightful shebait, this question does not arise; but the contention has been put forward on the alternative assumption that Jagatrup Kuer had no right to create a new line of shebaits. It is to be remembered that the suit is on behalf of the idols through the appellant as shebait. The idols cannot speak for themselves. Their interest has to be consulted and safeguarded through some one who is a fit and proper person to speak and act for them. The idol is a perpetual minor; and like any other incapacitated person, it is primarily the duty of the Court to protect the interest of the idol. As a general rule the interest of the idol can be protected through the shebait who is competent to sue and be sued on behalf of the idol, but where the shebait himself repudiates the endowment to the prejudice of the idols concerned in whom the endowed properties are vested, it is impossible for the Court to leave the idols to the sweet mercies of such a shebait. In such a case the Court has to find out some other next friend or guardian of the idols from amongst the persons competent to act as shebaits. In the present case the defendant having completely repudiated the endowment and dedication of the properties whether by Ramanugrah or his widow Jagatrup, the interest of the idols cannot be safe in his hands. I am also, therefore, of the opinion that the appellant who was in possession of the temple and properties appertaining thereto until his dispossession by the defendant, was a fit and proper person to act as shebait of the idols and had sufficient interest in the deities to represent them for the purpose of prosecuting the suit out of which this appeal arises and to recover possession of the endowed properties from the defendant.

(26) For the reasons set forth above, I agree that the appeal should be allowed with costs and that the judgment and decree of the court below should be set aside.

A/V.S.B. Appeal allowed.

A. I. R. 1952 PATNA 447

JAMUAR AND RAI JJ.

Arthur Butler Worker's Union, Petitioner v. The Management of the Arthur Butler and Co. (Muzaffarpur), Ltd. and others, Opposite Party.

Misc. Judicial Case No. 322 of 1951, D/- 18-2-1952.

Industrial disputes — Reference — Discretion of State Government — Issue of writ — (Industrial Disputes Act (1947), S. 10 (1)) — (Constitution of India, Art. 226 (1)).

The matter of reference for adjudication of an industrial dispute is purely within the discretion of the State Government and the High Court cannot give a direction to it to exercise that discretion in any particular manner: AIR 1950 Pat 387 (FB), Rel. on. (Para 12)

Thus, where the appellate Tribunal sets aside an award relating to a certain question and recommends to the State Government to make a fresh reference on that question, if the Government fails to make the reference, the High Court cannot issue a writ in the nature of mandamus or any other writ upon the State requiring it to do so. (Para 13)

Anno: C. P. C. Appendix III, Constitution of India, Art. 226 N. 7.

B. C. Ghosh, for Petitioner; Govt. Advocate and S. N. Bhattarya and K. D. Chatterji, for Opposite Party.

REFERENCE..... Para.

('51) 29 Pat 491: (AIR 1950 Pat 387: 51 Cri LJ 1509 FB) 12

JAMUAR, J.: This is an application under Articles 226 and 227 of the Constitution of India for the issue of a writ in the nature of mandamus or any other appropriate writ and a direction upon the opposite party in the following circumstances.

(2) The petitioner is a union of workmen under the employment of Arthur Butler & Co. Ltd., Muzaffarpur. The union has been registered as a trade union under the Trade Unions Act (XVI (16) of 1926). The opposite party are the management of the Arthur Butler & Co., the company's manager, the Company's Secretary, the State of Bihar, the Secretary to the Government of Bihar in the Labour Department, and the Assistant Labour Commissioner, Muzaffarpur.

(3) The said union has been recognised both by the management of the Arthur Butler and Co., as also by the Government of Bihar which is the appropriate Government under the Industrial Disputes Act (XIV (14) of 1947) for regulating industrial disputes in such industries. There having arisen industrial disputes between the management of the Arthur Butler & Co., and their workmen represented by the said union regarding certain matters connected with employment, etc., the Government of Bihar in the Labour Department, under notification No. D10-6/50 L-5012, dated the 24th July 1950, referred the disputes in exercise of the powers conferred upon it by Section 7 read with sub-section (1) of Section 10 of the Industrial Disputes Act (XIV (14) of 1947), to an industrial tribunal constituted by it for adjudication. The disputes referred to the tribunal were several in number, and it is only necessary to state the first one, namely, "the grades and scales of pay of the employees should be suitably revised, retrospective effect should be given to the same from the 4th April 1950." (The grades suggested by the union had been submitted in its letter No. 13/50-51, dated the 1st July 1950).

It appears that prior to this reference, that is, with effect from the 20th July 1950, the union had declared a strike by the workmen. When, however, the contents of the above notification were communicated to the union, it called off the strike. It is, however, alleged that, in spite of this, the management of the Arthur Butler and Co. (hereinafter called "the management") continued a lock-out in contravention of the provisions of law, as eighteen of the workmen were not taken in by the management. The strike was, therefore resumed by the union. It is further alleged that the management imported new labourers in place of the workmen not taken in. In the first week of August 1950, according to the petitioner's case, a new union, consisting of the newly appointed labourers and called the Arthur Butler Rashtriya Mazdoor Sangh (hereinafter called "the sangh"), was formed, and it is alleged that this was under the patronage, and at the instance, of the management. This 'sangh' was duly registered by the Labour Commissioner, Bihar who was also the Registrar of trade unions and Secretary to the Government of Bihar in the Labour Department.

(4) On the 14th March 1951, the tribunal, to which the industrial disputes, as stated above, had been referred for adjudication, gave its award which was published in the Bihar Gazette (Extraordinary), dated March 30th 1951. An appeal was then taken from this award to the appellate tribunal which, on the 19th June 1951, affirmed the award excepting in one particular namely, the dispute quoted in the earlier part of this judgment relating to the grades and scales of pay of the employees.

(5) Since Mr. B. C. Ghosh, the learned Advocate for the petitioner, has made a point, which he has strenuously argued, arising out of the concluding portion of the judgment of the appellate tribunal, I propose to set out that part of the judgment in full, that is, paragraph 10, which runs as follows:

"In this state of the evidence one of three courses seems to us to be open, namely:

1. to remand the case for further investigation of the question, opportunity being given to both the parties to lead fresh evidence;
2. to take additional evidence ourselves; or
3. to make a recommendation to the Bihar Government for fresh reference on the question.

In substance, there would be no material difference if any one of those courses be adopted, for practically there would be a de novo trial. There is, however, a practical difficulty in the first course, for the Tribunal which gave the award under appeal has now become functus officio. The second course would be inconvenient to both the parties and would involve them in additional expenses, if the additional evidence is to be taken here. These could be avoided only if we were to go to some convenient place in Bihar, but that is not possible at present and delay is not desirable. The third course, therefore, seems to us to be the best. There cannot be any question of the parties losing the bene-

fit of the evidence already on the record, for, as we have already pointed out, that evidence is not helpful to them. We, therefore, set aside the award relating to basic wages in all its aspects. but at the same time feeling the necessity for the review of the scale of basic wages as fixed by Sri C. B. Prasad, we strongly recommend to the Bihar Government to make a reference on the point, unless the parties arrive at settlement in the meantime."

(6) It appears that there also arose industrial disputes between the management and the 'sangh.' The 'sangh' presented a list of demands to the manager of Messrs. Arthur Butler and Co.. Ltd. As no settlement was possible between them. the matter was referred to the Assistant Labour Commissioner, Muzaffarpur, for conciliation. The Assistant Labour Commissioner held a conciliation proceeding on the 9th August 1951, when an agreement was arrived at between the management and the 'sangh.' A copy of this agreement has been filed along with the petition as Annexure E. It is the case of the petitioner, that is, the union, that this was a collusive agreement between the management and the 'sangh', and, as such, is fraudulent and illegal, and is to the detriment of the workmen of the union and against their interest. It was also alleged that this agreement had been arrived at without notice or information to the union which was not represented at the time.

(7) On the 24th July 1951, the General Secretary of the union addressed a letter to the Labour Commissioner, Bihar, in which the Labour Commissioner was asked to refer the question of grades of pay to a tribunal for adjudication, as recommended by the appellate tribunal, and it is stated that a copy of that letter was sent to the management on the same date.

(8) Mr. B. C. Ghosh has contended, in the first place that the appellate tribunal having set aside the award relating to the question of basic wages, and having made a recommendation to the Bihar Government to make a reference on the point, the Bihar Government was bound to follow that recommendation, and that, since it has failed to do so in spite of the letter addressed to the Labour Commissioner on the 24th July 1951, by the General Secretary of the Union, this Court should issue a writ in the nature of mandamus upon the State of Bihar for constituting an industrial tribunal and referring that particular dispute to that tribunal for adjudication.

(9) Mr. B. C. Ghosh contended, in the second place that the agreement arrived at between the management and the 'sangh' on the 9th August 1951, being fraudulent and illegal, is not binding upon the members of the union which represents the majority of the workers of the Arthur Butler & Co. The prayer in the petition, therefore, is to quash the settlement arrived at on the 9th August 1951, as also for the issue of a writ and a direction prohibiting the opposite party from enforcing the said agreement on the workers or, at least, on such of them as are not members of the 'sangh'.

(10) Dealing with his first contention, Mr. Ghosh contended that what the appellate tribunal in fact did was to remand that part of the award of the tribunal which dealt with the grades and scales of pay of the employees, and that, therefore, this order of remand should be given effect to. Clearly, this contention cannot prevail. The order of the appellate tribunal can in no way amount to an order of remand. The tribunal, after giving its award, became functus officio and there was no tribunal existing to which the appellate tribunal could remand any issue; indeed, the appellate tribunal itself recognised that difficulty, and stated in so many words that it could pass no order of remand. In the circumstances, the appellate tribunal adopted the third and the last alternative which suggested to itself, namely, to make a recommendation to the Bihar Government for a fresh reference on that point. When Mr. Ghosh saw the force of the reply to that part of his argument, he proceeded to contend that, after the recommendation made by the appellate tribunal, the State Government had no option left but to constitute a fresh tribunal to give its award in respect of the dispute regarding the grades and scales of pay of the employees.

(11) Now, the only provision in the Industrial Disputes Act (XIV (14) of 1947) which deals with reference of disputes to tribunals is Section 10, and it is necessary to quote that section so far as is relevant to the present question in issue:

"Reference of disputes to Boards, Courts or Tribunals:— (1) If any industrial dispute exists or is apprehended, the appropriate Government may, by order in writing:—

(a) refer the dispute to a Board for promoting a settlement thereof; or

(b) refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry; or

(c) refer the dispute to a Tribunal for adjudication;

Provided that where the dispute relates to a public utility service and a notice under Section 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced."

(12) Clearly, the matter of reference for adjudication of any industrial dispute is one which is discretionary with the State Government. If the State Government does not choose to make any such reference, this Court can issue no writ upon it so to do. This has been held by a Full Bench of this Court in the case of 'BAGARAM TULOPULE v. STATE OF BIHAR', 29 Pat. 491 (F.B.). Mr. Ghosh, however, sought to distinguish that case in two ways. He said that that case turned on the interpretation not so much of Section 10 (1) of the Industrial Disputes Act but of the proviso (quoted above) to that section. It is true that it was the proviso which called for attention in that case; but the interpretation of Section 10 (1) was also involved, and it was pointed out that this section is "clearly purely discretionary".

Mr. Ghosh then attempted to distinguish that case by arguing that in the present case before us the State Government did make a reference to an industrial tribunal for adjudication of that dispute, and the tribunal gave its award; but that part of the award was set aside by the appellate tribunal. That being so, that particular

dispute cannot be said to have received adjudication, and, therefore, it is no longer discretionary upon the State Government to choose not to make any further reference. The State Government having once decided to make that reference, the reference must again be made by it to another industrial tribunal, the former tribunal being functus officio, and the State Government has no more discretion in this matter. In my opinion, even then the reference can be made only under Section 10 of the Industrial Disputes Act, there being no other provision in the Act for making such a reference. Mr. Ghosh conceded that his (sic) was an argument of first impression, and that he could not find any authority in support of it. He, however, drew our attention to a passage from Stephen's Commentaries on the Laws of England, 21st Edition, Volume III, Book II, page 575, which reads as follows:—

"We must now deal briefly with the limitations upon the use of the order (mandamus). In the first place, as we have already indicated and in conformity with the principles laid down in Chapter II (ante, pp. 273 et seq.) mandamus will not be available to compel an authority to exercise a discretion unless it is under a duty to exercise it; even so, the authority is only commanded to face up to its duty and the order will leave the authority as free as before to decide for itself without any interfering direction from the Court. Even if, by the omission of one of the requirements of natural justice, the authority has failed in the eye of law to exercise a discretion, the mandamus will only command the authority to exercise it fairly and properly, and the same will be true if it has exercised its discretion mala fide or for purpose other than that for which it was entrusted with the discretion."

Section 10 (1) of the Industrial Disputes Act gives power to the appropriate Government to refer any industrial dispute to a tribunal for adjudication; it does not impose any duty to do so; in other words, the statute confers a discretion rather than an obligation. In my opinion, the passage cited by Mr. Ghosh does not help him in his contention. The provisions of Section 10 of the Industrial Disputes Act clearly show that making a reference is purely within the discretion of the State Government. And this Court cannot give a direction to it to exercise that discretion in any particular manner.

(13) Mr. Ghosh also referred to the following passages from Maxwell on Interpretation of Statutes, 9th Edition, page 215:

"The Supreme Court of the United States similarly laid it down that that which public officers are empowered to do for a third person the law requires, shall be done whenever the public interest or individual rights call for the exercise of the power, since the latter is given, not for their benefit, but for his, and is placed with the depository to meet the demands of right and to prevent the failure of justice. In all such cases, the Court observed, the intent of the legislature, which is the test, is not to grant a mere discretion but to impose a positive and absolute duty."

I have already expressed my opinion that the provisions of Section 10 (1) of the Industrial Disputes Act show that the appropriate Government shall have a mere discretion, and no positive or absolute duty has been imposed upon it to make references. Although, in the first instance, the State Government had referred a certain dispute to a tribunal for adjudication, and, after the award of the tribunal on appeal to the appellate tribunal, the latter set aside that award it may well be that, in the time that elapsed between the date of the award given by the tribunal and the date of the order of the appellate tribunal or even thereafter, new set of circumstances came into existence by reason of which the State Government may not consider that any further step need be taken for getting an award by another tribunal on that particular dispute. For all these reasons, in my opinion, no case has been made out for the issue of a writ in the nature of mandamus or any other writ upon the State of Bihar.

(14) Coming to the second contention put forward by Mr. Ghosh, he suggested that the agreement arrived at on the 9th August 1951, was not as a result of any conciliation proceeding within the meaning of the Industrial Disputes Act, but that it was a result of a mere reference to the Assistant Labour Commissioner, Muzaffarpur, who accepted some settlement already agreed upon by the parties. This argument is not borne out from the materials produced before us. It appears that, on 23rd July 1951, the 'sangh' addressed a letter to the manager, Arthur Butler & Co., Muzaffarpur, drawing attention to a resolution passed by the working committee of the 'sangh' and forwarding a list of the demands of the workers for consideration and necessary orders within a fortnight, and further asking the manager to accept those demands. It then appears that the management did not accept those demands.

The matter was then referred to the Assistant Labour Commissioner, Muzaffarpur, for conciliation and he on the 4th August 1951, sent notices by Memo No. 1319 of that date to the manager, Arthur Butler & Co., Ltd., Muzaffarpur, and to the Secretary, Arthur Butler Rashtriya Mazdoor Sangh, Muzaffarpur, on the subject "conciliation proceeding." These notices informed the parties that he had fixed the 9th August 1951, at 10-30 a.m. for a conciliation proceeding at his office at Muzaffarpur. This correspondence clearly shows that the agreement was the outcome of a conciliation proceeding.

(15) Mr. Ghosh suggested that it was untrue to say that, on the 23rd July 1951, the 'sangh' had addressed a letter to the manager, Arthur Butler & Co., Muzaffarpur, to the effect stated above, and he suggested that it was on the 31st of July 1951, that the 'sangh' had presented its list of demands. In the first place, I do not think that the date matters, and in the second place there is no reason to disbelieve the annexures filed along with an affidavit on behalf of the management showing that it was on the 23rd July 1951 that the 'sangh' had addressed its demands to the management.

(16) In the circumstances, I am clearly of the opinion that the Memorandum of settlement, that is, the agreement arrived at on the 9th April 1951, between the 'sangh' and the management, was the result of a conciliation proceeding within the meaning of the Industrial Disputes Act, and was not a result of only a reference to the Assistant Labour Com-

missioner who merely accepted a settlement already agreed upon between the parties. Indeed, even the Memorandum of settlement (Annexure E) shows that "no settlement being mutually possible, the matter was referred to the Assistant Labour Commissioner, Muzaffarpur, for conciliation", and that "a conciliation proceeding was held by the Assistant Labour Commissioner on 9-8-51."

(17) Mr. Ghosh then argued that this Court should quash the settlement of the 9th August 1951, and issue a writ and a direction prohibiting the opposite party from enforcing that agreement on the ground that it is against the provisions of Section 19 of the Industrial Disputes Act. He pointed out that it will appear from the award made by the tribunal that once before, that is, on the 21st November 1948, there had been a settlement between the parties which had been reduced to writing, and that the parties had agreed that the settlement would remain in force for a period of three years commencing from the 21st November, 1948, and hence it is not open to either of them to terminate it before the 20th November 1951. It is true that under the provisions of sub-section (2) of Section 19 of the Industrial Disputes Act, a settlement arrived at in the course of a conciliation proceeding shall be binding for such period as may be agreed upon by the parties. But Mr. Ghosh has not produced before us a copy of the settlement arrived at on the 21st November 1948. We are, therefore, unable to say that any of the disputes which were settled on the 9th August 1951, was a subject-matter of the settlement on the 21st November 1948, also. Mr. Ghosh then conceded that, in the absence of the settlement of the 21st November 1948, he could not press this point any further. Mr. Ghosh also submitted that we should quash the settlement of the 9th August 1951, as being fraudulent. But it was pointed out to him that sufficient materials had not been produced before us to enable us to do so. Here, again, Mr. Ghosh conceded that the materials on the record are not sufficient to enable us to hold that the said settlement with the 'sangh' was fraudulent.

(18) In the result, the petitioner has failed to make out a case for the exercise of our power either under Article 226 or under Article 227 of the Constitution Act. The application fails, and is dismissed but, in the circumstances of the case, each party will bear its own cost.

(19) RAI, J.: I agree.

A/V.R.B. Application dismissed.

A. I. R. 1952 PATNA 450

LAKSHMIKANTA JHA C. J. AND CHATTERJI J.

Lalmina Singh, Petitioner v. Kumar Kamal Singh, Opposite Party.

Supreme Court Appeals Nos. 116 and 117 of 1951, D/- 29-11-1951.

† **(a) Constitution of India, Art. 133 (1) (a) and (b) — Final order in civil revision — Grant of leave — (Civil P. C. (1908), Ss. 109 (a) and 115).**

S. 109, Civil P. C., as it now stands, itself shows that it must be read subject to the provisions of Art. 133 which are wider in scope. Leave to appeal to the Supreme Court can therefore be granted under Art. 133 (1) (a) from the final order of a High Court passed in the exercise of its revisional jurisdiction.

Even if it be assumed that the case does not fall within the purview of Art. 133 (1) (a), it is clearly covered by the provisions of Art. 133 (1) (b) which must be read independently of Cl. (a). **(Paras 5, 6)**

Anno: C. P. C., S. 109 N. 5 Pts. 18 to 20; Appendix III, Constitution of India, Art. 133 N. 3.

(b) Constitution of India, Art. 133 (1) — Conflict between provisions of Article with those of O. 45, R. 3 and S. 110, Civil P. C. — Constitution will prevail — (Civil P. C. (1908), S. 110 and O. 45, R. 3). **(Para 7)**

Anno: C. P. C., S. 110 N. 2; O. 45 R. 3 N. 2; Appendix III, Constitution of India, Art. 133 N. 1.

A. B. N. Sinha, Lalnarain Sinha and Rasbihari Singh, for Petitioner; B. C. De and Kanhaiya Jee, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras

('49) 76 Ind App 131: (AIR 1949 PC 239) 5
('26) 48 All 226: (AIR 1926 All 202) 5
('11) 13 Cal LJ 688: (11 Ind Cas 65) 5
('36) 15 Pat 659: (AIR 1936 Pat 465) 5
('51) AIR 1951 Pat 177: (30 Pat 690) 6, 7

ORDER: These two applications are directed against a judgment of a Division Bench of this Court dated the 16th May 1951, passed in First Appeal No. 202 of 1946 and in Civil Revision No. 610 of 1946, by which the first appeal was dismissed and the civil revision was allowed, the two cases being heard together.

(2) The petitioner in these two applications is the same; the opposite party is also the same. The facts giving rise to the dispute may shortly be stated as follows: The petitioner had an occupancy holding measuring 99.46 acres, being 'khata' No. 13 of village Jahua, under the opposite party. There was default in the payment of rent and the opposite party instituted a suit against the petitioner for recovery of arrears of rent in respect of the holding and a decree was obtained. The decree was executed in execution case No. 883 of 1936 in the court of the Second Munsif of Buxar. The petitioner filed an objection under Section 47 of the Code of Civil Procedure on the ground, 'inter alia', that the execution was time-barred. The objection was dismissed by the Munsif and thereupon an appeal was preferred by him to the District Judge. During the pendency of the appeal the holding was put up to sale and auction-purchased by the decree-holder on the 17th May 1937. On the 16th June 1937, the petitioner deposited the amount under Order 21, Rule 89, Code of Civil Procedure, and prayed that the amount deposited by him be not allowed to be withdrawn by the decree-holder, and although the prayer was rejected, the money was not withdrawn by the decree-holder.

The appeal filed by the petitioner against the order dismissing his application under Section 47 of the Code of Civil Procedure was, however, allowed and the application for execution was held to be time-barred. Thereupon the decree-holder preferred a second appeal to this Court, and before the appeal was finally decided the Munsif set aside the sale and held that the judgment-debtor "will get back the money deposited," and on the 22nd April 1938, a payment order for the sum deposited was is-

sued to the judgment-debtor and he withdrew the money. The decree-holder's appeal was, however, allowed by this Court and the case was remanded to the District Court. The District Court, after remand, held that the execution petition was not barred. Thereafter, on the 16th March 1939, the decree-holder applied for re-deposit of the amount withdrawn by the petitioner, but he did not deposit the money. On the 22nd August 1949, the decree-holder auction-purchaser applied to the Munsif to confirm the execution sale and it was duly confirmed. Thereafter the auction purchaser applied for delivery of possession and after several unsuccessful attempts he got delivery of possession in October, 1942, and the execution case was finally disposed of.

(3) After the delivery of possession was obtained, the opposite party, auction-purchaser, instituted a suit on the 19th April 1943, against the petitioner in the court of the Subordinate Judge at Arrah, claiming Rs. 7698/- by way of mesne profits for the period between the confirmation of the sale and the delivery of possession that is, for the years 1347 to 1349 'Fasli'. The petitioner resisted the claim on various grounds. This suit was decreed on the 24th January 1946. An appeal was preferred to this Court against the decree, being First Appeal No. 202 of 1946, and this Court by its judgment dated the 16th May 1951, affirmed the decision of the trial court and dismissed the appeal. Supreme Court Appeal No. 116 of 1951 is directed against the decree in this appeal.

(4) After the suit for mesne profits was decreed by the trial court the petitioner filed a petition on the 8th February 1946, under Section 151 of the Code of Civil Procedure before the Second Munsif of Buxar for vacating the Order in Execution case No. 883 of 1936, confirming the sale of the 17th May 1937. The learned Munsif held that there was no subsisting sale to be confirmed and in that view of the matter allowed the petition and set aside the sale. Against this order the opposite party filed a Civil Revision to this Court, being Civil Revision No. 610 of 1946, which was heard along with the appeal, and this Court reversed the order of the Munsif setting aside the sale. Supreme Court Appeal No. 117 of 1946 is directed against this order.

(5) If leave to appeal from the order passed by this Court in Civil Revision No. 610 of 1946 be given, we must also grant leave to appeal from the judgment of this Court passed in First Appeal No. 202 of 1946. The point for consideration at the outset is whether an application for leave to appeal from an order passed by a High Court in the exercise of its revisional jurisdiction is maintainable. It is conceded by Mr. De, appearing on behalf of the proposed respondent, that the order is final and the value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal to the Supreme Court was and is not less than Rs. 20,000/-. But his contention is that, having regard to the language of Section 109 (a) of the Code of Civil Procedure, the application for leave to appeal from an order passed by this Court in the exercise of its revisional jurisdiction is not maintainable under Section 109 (a) of the Code of Civil Procedure, as it stood before the Constitution of India came into force; leave to appeal from a final order could be granted only if the final order was passed by the High Court "on appeal". There are some authorities in support of the view that an order passed by a High Court in the exercise of its revisional jurisdiction is an order passed on appeal within the meaning of clause (a) of section 109 of the Code of Civil Procedure, Vide 'HARISH CHANDRA v. NAWAB BAHADUR OF MOORSHIDABAD', 13 Cal L J 688 and the cases referred to therein.

But a contrary view was taken by the Allahabad High Court in 'SURAJ SINGH v. PHUL KUMARI', 48 All 226. It was held in that case that an order passed by a High Court in the exercise of its revisional jurisdiction was not an order passed on appeal, and, therefore, an application for leave to appeal to His Majesty in Council did not lie. A similar view was taken by this Court in 'KRISHNA CHANDRA v. RAJENDRA NARAYAN', 15 Pat 659 and it was held that an order passed by a High Court in the exercise of its revisional jurisdiction under section 115 of the Code of Civil Procedure is by no means an order passed "on appeal" within the meaning of Section 109(a) of the Code. The point came up for consideration before the Judicial Committee in 'JOY CHAND LAL v. KAMALAKSHA CHAUDHURY', 76 Ind App 131 (PC) and their Lordships, on an examination of the view points taken by different High Courts in India, approved of the view taken by this Court and observed:

> "The view that orders passed in revision do not fall within Section 109 (a) has been accepted by High Courts in India other than the High Court at Calcutta, and their Lordships think it is correct."

Therefore, leave to appeal cannot be granted if the law after the Constitution came into force be the same as it was before. But after the Constitution of India came into force the law has been changed. Now certificate for leave to appeal has to be granted under the provisions of Article 133 (1) of the Constitution which runs as follows:

> "Section 133 (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—(a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law; or
>
> (b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or
>
> (c) that the case is a fit one for appeal to the Supreme Court; and, where the judgment, decree or final order appealed from affirms the decision of the court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law."

In view of the provisions of Article 133 (1) of the Constitution, Section 109 of the Code of Civil Procedure has been modified by the Adaptation of Laws Order, 1950, and now it reads thus:

> "S. 109. Subject to the provisions in Chapter IV of Part V of the Constitution and such rules as may, from time to time, be made by

the Supreme Court regarding appeals from the courts of the States, and to the provisions hereinafter contained, an appeal shall lie to the Supreme Court

(a) from any judgment, decree or final order passed on appeal by a High Court or any other court of final appellate jurisdiction;

(b) from any judgment, decree or final order passed by a High Court in the exercise of original civil jurisdiction; and

(c) from any decree or order, when the case, as hereinafter provided is certified to be a fit one for appeal to the Supreme Court."

For a certificate under Article 133 (1) two conditions have got to be fulfilled: (1) the final order from which leave to appeal is sought must be of a High Court in a civil proceeding and (2) the value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal to the Supreme Court must not be less than Rs. 20,000/-. There is nothing in this Article to indicate that the final order must be passed by the High Court on appeal, whereas under Section 109 (a), read with S. 110, Code of Civil Procedure, not only the value of the subject-matter of "the suit" in the court of first instance and of the subject-matter of dispute in the Supreme Court must be not less than Rs. 20,000/- but also the final order of the High Court must be one passed on appeal. Thus, a comparison of the provisions of Article 133 (1) (a) of the Constitution with the provisions of Section 109 (a) of the Code of Civil Procedure shows that the provisions of the Constitution are wider than the provisions of Section 109(a) of the Code. Section 109, as it now stands, itself shows that it must be read subject to the provisions of Article 133 of the Constitution, this Article being in Chapter IV of Part V of the Constitution. Leave in the present case can be granted under Article 133 (1) (a) to appeal from the final order of this Court passed in the exercise of its revisional jurisdiction because the order was passed by this Court in a Civil proceeding and the value of the subject-matter of the dispute in the court of first instance was not less than Rs. 20,000/- and the value of the subject matter still in dispute on appeal to the Supreme Court is also the same sum.

(6) But even if it be assumed that the case does not fall within the purview of Article 133 (1) (a) of the Constitution, it is clearly covered by the provisions of Article 133 (1) (b) of the Constitution, because the final order of this Court under Section 115 of the Code of Civil Procedure was passed in a civil proceeding and it involves, directly or indirectly, question respecting property of the value of Rs. 20,000/- or upwards. It may be observed that the provisions of clause (b) of Article 133 (1) of the Constitution are substantially the same as those of the second paragraph of S. 110 of the Code of Civil Procedure. It was held by us in 'CHAMPAMANI BIBI v. MOHAMMAD YUNUS', AIR 1951 Pat 177 that the second paragraph of Section 110 of the Code is only an alternative to the second part of the first paragraph. But such construction is not permissible on the language of Article 133, clause (1), as it stands. The separate numbering of two clauses (a) and (b), coupled with the use of "that" before each clause, makes it quite clear that clause (b) must be read independently of clause (a). Clause (b) is wide enough to cover a case where the judgment, decree or final order is passed by a High Court in a civil proceeding in the exercise of its revisional jurisdiction.

It seems that the Constitution has widened the scope and provided for appeal to the Supreme Court even in a case where the final order is passed by a High Court in the exercise of its revisional jurisdiction. In our opinion, therefore there is no force in the contention of Mr. De. As the dispute is with respect to property of the value of not less than Rs. 20,000/- and the order is one of reversal, leave must be granted. We accordingly grant leave to appeal to the Supreme Court and certify that as regards the amount or value or nature the case fulfils the requirements of clause (a) as well as clause (b) of Article 131 (1) of the Constitution.

(7) The next question for consideration is whether leave to appeal to the Supreme Court can be granted from the judgment and decree of this Court in the first appeal. The amount of the subject matter of the dispute in the court of first instance was less than Rs. 20,000/- and, therefore, it is contended by Mr. B. C. De, on the authority of the above cited decision of this Bench 'CHAMPAMANI BIBI v. MOHAMMAD YUNUS', AIR 1951 Pat 177, that the requirements, as to valuation of Section 110 of the Code of Civil Procedure, which along with the connected provision of Order 45, Rule 3 of the Code of Civil Procedure is still in the force by virtue of the Adaptation of Laws Order 1950 are not fulfilled. Order 45, rule 3 (1) provides:

"Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of Section 110, or that it is otherwise a fit one for appeal to the Supreme Court."

According to this rule, it is argued, the certificate is to be granted with reference to the provisions of section 110. And it has been held by this Court in the aforesaid case 'AIR 1951 Pat 177', that the requirements of Section 110 as to valuation are not fulfilled if the value of the subject-matter of the dispute in the court of first instance is less than Rs. 10,000/-, now Rs. 20,000/-. Consequently, it is said, the present case does not satisfy the requirements of Section 110. But, as already pointed out, the certificate, since the Constitution came into force, is to be granted under Article 133 (1) of the Constitution. If there is any conflict between the provisions of this Article with those of Order 45, Rule 3 and Section 110, Code of Civil Procedure the Constitution will prevail. The present case is fully covered by Article 133 (1) (b) of the Constitution as the judgment indirectly involves questions respecting property of the value of not less than Rs. 20,000/-. Therefore, as the judgment is one of affirmance, leave can be granted under clause (b) if we are satisfied that the appeal involves a substantial question of law.

There would have been difficulty in granting a certificate if leave to appeal had been refused from the order in the civil revision; but leave having been granted in that matter, it ought not to be refused in this case. If the judgment of this Court in the civil revision be reversed by the Supreme Court, the very foundation of the claim for mesne profits in the appeal will disappear; the plaintiff would not be entitled to mesne profits if he has no title to the property. Therefore, if leave is refused in this matter, he will get a decree without having title in respect

of the property for which mesne profits have been claimed. The question of title is a substantial question of law as between the parties. In such circumstances, we think leave must be granted in this case also.

(8) We accordingly certify that a substantial question of law is involved in Supreme Court Appeal No. 116 of 1951, which arises out of First Appeal No. 202 of 1946, and it fulfils the requirement of clause (b) of Article 133 (1) of the Constitution, and Supreme Court Appeal No. 117 of 1951, which arises out of Civil Revision No. 610 of 1946, fulfils the requirements of clauses (a) and (b) of Article 133 (1) of the Constitution, and grant leave to appeal to the Supreme Court in both these cases. The petitioner is entitled to costs: hearing fee five gold mohurs.

A/V.R.B. Application allowed.

A. I. R. 1952 PATNA 453

RAMASWAMI AND SARJOO PROSAD JJ.

P. C. Lal Chaudhury, Petitioner v. State of Bihar.

Misc. Judicial Case No. 149 of 1949, D/- 2-3-1951.

Bihar Agricultural Income-tax Act (32 of 1948), Ss. 6K and 28 (3) — Payment towards debt without appropriation — Presumption — Board of Revenue ordering remand for further findings — Propriety of order — Reference to High Court — Competency of — (Contract Act (1872), Ss. 60 and 61).

Where money is received without a definite appropriation on the one side or on the other, the money ought first to be applied in payment of interest and then, when that is satisfied, in payment of the capital.

The assessee claimed a deduction of a certain sum paid by him towards his mortgage debt alleging that it was paid towards interest. The income-tax department &, on appeal, the Commissioner allowed a deduction of only half the amount on the grounds that there was no specific apportionment of the payment towards interest either by the creditor or by the debtor and that there was no mention in the compromise decree which was subsequently passed that the amount had been appropriated towards interest. The Board of Revenue, on being moved, ordered a remand for further findings. On a reference being made to the High Court:

Held, (1) that the assessee was entitled to a deduction of the entire sum claimed by him under S. 6K. (Para 6)

(2) that the Board of Revenue in ordering a remand had passed an order prejudicial to the assessee and therefore the reference was competent. (Para 6)

(3) that the Board of Revenue was not justified in law in ordering a remand for further findings in the circumstances of the case. (Para 7)

Anno: Contract Act, S. 60 N. 4.

S. K. Majumdar, for Petitioner, Govt. Pleader with R. Prasad, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('21) 48 Ind App 150: (AIR 1922 PC 233) 6
('33) 12 Pat 318: (AIR 1933 PC 108) 6
(1898) 2 QB 460: (67 LJQB 851) 6

RAMASWAMI J.: Pursuant to an order of the High Court dated 8th August 1949 the Board of Revenue has made this reference under Section 28(3) of the Bihar Agricultural Income-tax Act.

(2) The material facts are that for the year 1946-47 the assessee Raja P. C. Lal Chaudhry claimed a deduction of Rs. 63,500 paid on 24th July 1946 towards his mortgage debt due to Kumar P. N. Ray of Calcutta. It was alleged by the assessee that the amount was paid towards interest on the mortgage debt. It appears that on a subsequent date there was a compromise decree prepared in the High Court of Calcutta, according to which the decretal amount was fixed at Rs. 10,50,227. The Agricultural Income-tax department did not concede the whole claim of the assessee but calculated the tax on the ground that half the amount, viz., Rs. 31,750 should be deducted on account of payment towards interest.

An appeal was preferred by the assessee before the Commissioner of Bhagalpore Division who dismissed the appeal & upheld the order of the Assistant Commissioner on the ground that there was no specific apportionment of the payment towards interest either by the creditor or by the debtor and there was no mention in the compromise decree that this amount had been appropriated towards interest. Against the order of the Commissioner the assessee moved the Board of Revenue who held that the matter called for further enquiry but since there was negligence on the part of the assessee to produce the relevant books of account, further enquiry would be made only if the assessee made payment of Rs. 200 towards the cost of the department.

(3) At the instance of the assessee the High Court had ordered the Board of Revenue to make statement of the case upon the following question of law , viz., "whether the Board was justified in law in ordering a remand for further findings in the circumstances?"

(4) Upon the facts of this case it is plain that the Board of Revenue was not justified in ordering a further enquiry for deciding the question whether there was any appropriation made towards principal or interest in the books of the creditor or in the books of the assessee.

(5) On behalf of the assessee, Mr. Majumdar pointed out that before the Agricultural Income tax Officer the assessee did produce his books of account through his agent Mr. J. N. Das Gupta. These books of account appear to have been accepted as genuine by the Agricultural Income-tax Officer who computed the income of the assessee on the basis of the entries therein. Learned counsel also pointed out that the estate was in charge of a receiver in the year 1353 Fs. for which period the assessment in question has been made. The Commissioner in disposing of the appeal also reached the findings; (a) that there was no specific apportionment of the payment towards interest by the debtor; (b) there was no apportionment by the creditor of the payment towards interest and (c) the High Court of Calcutta did not treat it specifically as payment towards interest but reduction of the total debt was made up of equal moities of interest and principal.

Upon these findings, it is difficult to see how there is any justification for the order of remand made by the Board of Revenue in this case. In my opinion, the assessee had produced his ac-

count books for the period in question and there was no negligence on his part in the production of relevant evidence. It is important to notice that the assessee did produce the receipt granted by the creditor which did not mention as to how the amount was appropriated but it wrongly stated that the payment was made in part payment of "decretal amount" though there was no decree in existence on that date. It is manifest that the Board was not justified in ordering a remand for further findings in the circumstances of the case & the question referred to the High Court must be answered in the negative.

(6) On behalf of the State of Bihar, it was objected by the learned Government Pleader that the reference was not competent since the order of the Board of Revenue was not prejudicial to the assessee. In my opinion, this argument is wholly untenable; for upon the facts proved the assessee was legally entitled to reduction for the entire sum of Rs. 63,500 paid towards the mortgage debt as interest under Section 6K of the Bihar Agricultural Income-tax Act. It is of importance to remember that the Commissioner definitely reached the finding that there was no evidence to show that the assessee or his creditor had treated the whole of this amount as payment towards interest and there was no specific mention in the compromise decree of the High Court that this payment should be set off against principal or interest.

Upon these findings of fact the presumption of law would apply that the payment is attributed in the first instance towards the outstanding interest. The principle is that where money is received without a definite appropriation on the one side or on the other, the money ought first to be applied in payment of interest and then when that is satisfied, in payment of the capital. The principle stated by Ribgy L. J. in the case of 'PARR'S BANKING CO. v. YATES', (1898) 2 Q.B. 460 at p. 466, is as follows:

> "The defendant's counsel relied on the old rule that does, no doubt, apply to many cases namely that where both principal and interest are due, the sums paid on account must be applied first to interest. That rule, where it is applicable, is only common justice. To apply the sums paid to principal where interest has accrued upon the debt, and is not paid, would be depriving the creditor of the benefit to which he is entitled under his contract."

The rule was applied by the Judicial Committee in 'COMMR. OF INCOME TAX, BIHAR AND ORISSA v. MAHARAJADHIRAJ OF DARBHANGA', 12 Pat 318 in which the assessee had received a sum on account of principal and interest due, without an appropriation between them by the debtor, and the Income-tax Officer had appropriated the sum first to outstanding interest, although the assessee in his accounts had not credited any receipt of interest. In pronouncing the opinion of the Judicial Committee, Lord Macmillan referred to 'VENKATADRI APPA RAO v. RAJA PARTHASARATHY APPA RAO', 48 Ind App 150 (PC) and states that the presumption was no doubt operative primarily in question between debtor and creditor, but the Income-tax Officer was entitled in the circumstances of the case to treat the sum in question as applicable to the outstanding interest and accordingly to treat the payment to that extent as income of the assessee in the year of payment. In my opinion, the present case falls within the principle established by these authorities and it ought to be held that the assessee is entitled to a deduction of the entire sum of Rs. 63,500 under Section 6K of the Bihar Agricultural Income-tax Act. It follows therefore that the Board of Revenue in ordering a remand had passed an order prejudicial to the assessee and the present reference made by the petitioner in pursuance of the order of the High Court is competent.

(7) For these reasons I hold that the Board of Revenue was not justified in law in ordering a remand for further findings in the circumstances of the case and I would answer the question referred in the negative. The assessee is entitled to the cost of this reference. Hearing fee Rs. 250/-. He is also entitled to a refund of the amount in deposit with the Board of Revenue for obtaining the reference.

(8) SARJOO PROSAD J.: I agree.

B/V.R.B. Reference answered.

A. I. R. 1952 PATNA 454

SARJOO PROSAD J.

Bishundeo Singh, Appellant v. Leyakat Ali Khan and others, Respondents.

A. F. A. D. Nos. 1428 to 1445 of 1945, D/- 15-1-1952.

Tenancy Laws — Bihar Tenancy Act (8 of 1885), S. 40 — Rent Suit — Produce rent claimed — Commutation proceedings under S. 40 decided pending suit — Decree in rent suit held could be passed on basis of commutation proceedings especially when it was not challenged — (Civil P. C. (1908), O. 7 R. 7) (Para 2)

Anno: C. P. C., O. 7 R. 7, N. 4.

Lal Narayan Sinha and Lakshman Saran Sinha, for Appellant; Syed Akbar Imam and T. Nath, for Respondents.

REFERENCE..... Para

('51) AIR 1951 Pat 629: (30 Pat 97) 2

JUDGMENT: This is a batch of 18 second appeals arising out of as many rent suits. The plaintiff in those suits had claimed produce rent for the period in suit. The substantial defence was in regard to the rate of produce, and the defendants also pleaded that they had divided the produce but the landlord had not granted them any receipt and had instituted these suits being annoyed with the fact that the defendants had filed applications under Section 40 of the Bihar Tenancy Act for commutation of rent of their holdings. During the pendency of the suit it appears that these commutation proceedings were decided, and the courts below have decreed the suit on the basis of the commuted rent except in the case of Second Appeal No. 1428 where there was no commutation schedule and where the suit has been decreed in respect of produce rent. So far as this appeal is concerned, it is conceded that there is no question of law at all, and, therefore, that appeal has to be dismissed.

(2) In regard to the other appeals, the only question raised is that in the written statement there was no specific plea about the rent of the holdings having been commuted, and, therefore, no decree could be passed on the basis of the rent schedules so long as the written statement had not been amended. It is to be remembered that in the written statement the defendants had definitely stated that applications for commutation of rent had been filed by them. The commutation proceedings were pending at the date

of the institution of the suits, and before the cases came to be decided, the commutation proceedings had become effective and the rent schedules had been prepared for 'nakdi' rent. The landlord appears to have contested these proceedings, and in his presence the commutation order was passed.

Mr. Lalnarayan Sinha appearing on behalf of the appellant states that there may have been certain defects in the commutation proceedings which could not be investigated unless the written statements were amended, and then the court had proceeded to decide the matter afresh after considering the evidence of the plaintiff on the point. It is now too late for him to raise this contention in second appeal. I find that no such question was raised either before the learned Munsif or before the lower appellate court. For the respondents Mr. Akbar Imam has drawn my attention to a decision of this Court in 'DEORAJ SINGH v. RAMBILAS SINGH', AIR 1951 Pat 629 where the commutation orders were actually passed when a second appeal was pending before this Court and the rent schedules prepared in the proceedings under Section 40 of the Bihar Tenancy Act were taken as additional evidence in the case, and the suits were decreed on the basis of those schedules.

In dealing with this matter, C. P. Sinha, J. pointed out that in view of the provisions of Order 41, Rule 33, Civil Procedure Code, he had no doubt that the appellate court in finally deciding the case and pronouncing upon the rights of the parties was bound to take notice of the subsequent Section 40 proceedings and the rent commuted therein, and to decree the suit on the basis of the commuted rent. I see no reason why the two courts below could not have passed the decree on the basis of the commutation proceedings in these cases especially when the commutation proceedings were not challenged before either of the courts below. The learned Subordinate Judge who decided the appeals observed that the plaintiff did not challenge the order of the rent commutation officer as being without jurisdiction, and he admitted that he contested the proceedings. The court was, therefore, justified in relying upon the commutation proceeding which was in presence of the plaintiff-landlord and which was binding upon him.

(3) In my opinion, there is no merit in these appeals which, therefore fail and must be dismissed with costs. There will be only one hearing fee in all these appeals.

B/V.R.B. Appeals dismissed.

A. I. R. 1952 PATNA 455

SARJOO PROSAD J.

Abhi Singh and others, Appellants v. Daso **Bhogta** and another, Respondents.

A.F.A.D. No. 540 of 1951, D/- 6-5-1952.

Contract Act (1872), S. 65 — Contract by person under disability — Incapacity in relation to subject-matter of contract and not personal — Refund of consideration — Sale ab initio void under S. 46, Chota Nagpur Tenancy Act — Right of vendee to refund of price paid — (Tenancy Laws — Chota Nagpur Tenancy Act (6 of 1908), S. 46).

Section 65, Contract Act, may apply even to those cases where a contract is discovered to be void by reason of the fact that it was void from its inception as distinct from a contract that becomes void. (Para 7)

Where the incapacity is in relation to the property and not a general incapacity to contract, then even if a contract is ab initio void, S. 65 must come into operation. (Para 8)

Consequently, where a sale of land by a Bhogta to a non-scheduled caste person fails by reason of S. 46, Chota Nagpur Tenancy Act, S. 65 of the Contract Act applies and the vendee is entitled to get back the money paid by him as consideration for the sale. Therefore where the heirs of the vendor under such a sale sued for a declaration that the sale deed was void and for recovery of possession the Court granted the declaration and ordered that the plaintiffs could recover possession of the land subject to their paying the vendee the entire amount of consideration paid under that contract of sale: Case law Ref. to. (Para 8)

Anno: Cont. Act, S. 65 N. 3.

B. C. De and Lala Atul Chandra, for Appellants; C. C. Mukherji and K. D. De, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('03) 30 Ind App 114: (30 Cal 539 PC) 8
('22) 50 Ind App 69: AIR 1922 PC 403 7
('43) 70 Ind App 1: AIR 1943 PC 29 7

JUDGMENT: The only material point which arises for consideration in this appeal is whether the defendants are entitled to refund of the consideration money which they paid to their vendor before the sale in defendant's favour could be avoided by the plaintiffs.

(2) The facts giving rise to this appeal are that one Dipan had two sons, Bhagirath and Megho. Bhagirath was the father of plaintiff No. 1 and Megho, the father of plaintiff No. 2. The dispute relates to khata No. 22 of village Dumaria Khalar which was recorded in the name of Bhagirath and Megho in the record of rights. The plaintiffs' case was that after the survey there was a separation between the two brothers, Bhagirath and Megho, and the lands were divided half and half between the two. It was further alleged that Megho, who worked as a labourer of the defendants and was possessed of weak intellect, executed three kabalas in favour of the defendants on the 21st of April, 26th of April and 23rd of June 1943 respectively. The plaintiffs challenged these kabalas as being without consideration, and that no title or possession passed to the defendants under them. It is stated that Megho died some three years ago, and thereafter the plaintiffs came in possession. The defendants, however, endeavoured to interfere with plaintiffs' possession which led to various litigations ending in the conviction of the plaintiffs under Section 379, I. P. C. The plaintiffs, therefore were compelled to institute the suit for declaration of title and for confirmation of possession, or for recovery of possession. The plaintiffs further alleged that they were 'Bhogtas' by caste and not 'Nayas', and that the survey entry in that connection was wrong, and they being 'scheduled caste', the sales in favour of the defendants were void ab initio.

(3) The defence inter alia was that Bhagirath and Megho were joint and Bhagirath died

in a state of jointness; and after his death Megho came in possession of his properties as Karta of the plaintiffs' family. The defendants denied that Megho was of weak mind or worked as their labourer, and that the plaintiffs were not 'Bhogtas' or scheduled caste but they were Nayas as recorded in the survey. They, therefore, contended that the kabalas were for consideration and legal necessity and conveyed a good title to them, and they also stated that they had after their purchase built a house on the land in which the plaintiffs had been allowed to reside, but the plaintiffs were not vacating the same.

(4) The trial Court found that there was no separation amongst the two brothers, Bhagirath and Megho, and that Bhagirath actually died in a state of jointness with the latter. It however found that plaintiff No. 1 was not the son of Bhagirath but was another son of Megho, & that the plaintiffs were 'Nayas' & not 'Bhogtas' by caste, and that the sale deeds were genuine and for consideration and legal necessity. On these findings it dismissed the suit.

(5) The decision has been affirmed on appeal by the learned Subordinate Judge who appears to have accepted all the other findings of the trial Court except the finding that the plaintiff No. 1 was the son of Megho on which point he found as alleged by the plaintiffs that the plaintiff No. 1 was the son of Bhagirath.

(6) The most important point which appears to have been urged before the lower appellate court was the question whether the plaintiffs were 'Bhogtas' by caste or not; in other words, whether they came in the category of scheduled caste so that a transfer made by them was hit by Section 46 of the Chota Nagpur Tenancy Act. In this connection the Court examined both the oral and documentary evidence and after a full consideration thereof, the learned Subordinate Judge found that the plaintiffs belonged to 'Bhogta' caste who also called themselves 'Nayas'; and the description in the survey of the plaintiffs as 'Nayas' by caste was immaterial because the evidence showed that the 'Bhogtas' sometimes also described themselves as 'Nayas'. In view of that finding, the learned Subordinate Judge was justified in holding that the sale deeds executed by Megho could not be said to be legal and valid and convey a good title to the vendees, the defendants because Section 46 of the Chota Nagpur Tenancy Act invalidated the transfers. Section 46 requires that a sale deed by a member of the scheduled caste to which the 'Bhogtas' belong could only be in favour of a member of that caste, and the defendants not being members of a scheduled caste, the sales were ab initio void.

(7) The question then remains whether in a case like this, Section 65 of the Indian Contract Act should come into play and whether the defendants should get back the money which they paid as consideration for the sale deeds executed in their favour. Megho, the vendor of the defendants who executed the sale deeds, was not a party to the suit. The court below appears to be somewhat dubious about the actual passing of consideration, but eventually in agreement with the trial Court, it came to a definite finding that the kabalas were executed for consideration and that the finding of legal necessity was not questioned before that court. The plaintiffs also do not appear to have seriously questioned the fact that the defendants came into possession by virtue of these kabalas—a fact which was supported by overwhelming evidence, and that they were also recorded in the landlord's serishta. In view of these findings, there can be no doubt that the plaintiffs profited by the consideration which was paid in respect of these documents. The learned Counsel for the appellants, therefore, contends that under the circumstances the principle of Section 65 of the Contract Act should have been applied to the case, and a decree setting aside the kabalas should have been passed subject to the refund of the consideration money paid under the documents.

The Judicial Committee of the Privy Council has repeatedly held that Section 65 may apply even to those cases where a contract is discovered to be void by reason of the fact that it was void from its inception as distinct from a contract that becomes void. In 'HARNATH KUER v. INDAR BAHADUR SINGH', 50 Ind. App. 69: AIR 1922 PC 403 the Judicial Committee applied Section 65 to give relief to a vendee who had purchased a mere right of reversion which was manifestly void from its inception, the subject-matter being incapable of being bound by sale, yet their Lordships directed that the vendee in the case was entitled to the purchase money and interest at 6 per cent. from the date of the suit. To a similar effect is another decision of the Judicial Committee in 'MOHAN MANUCHA v. MANZOOR AHMAD KHAN', 70 Ind. App. 1: AIR 1943 P.C. 29 where Sir George Rankin is reported to have observed:

> "The principle underlying S. 65 is that a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation. If it be settled law that the incapacity imposed on a judgment-debtor by para. 11 of Sch. 3 is an incapacity to affect his property and not a general incapacity to contract, it follows that the covenant to repay is not made void by the mere operation of the paragraph. But the lender who has agreed to make a loan upon security and has paid the money, is not obliged to continue the loan as an unsecured advance. The bottom has fallen out of the contract and he may avoid it. If he does so avoid the contract, he brings himself within the terms of S. 65 and within the principle of restitution of which it is an expression—whether for all purposes adequate or exhaustive need not here be considered."

(8) The observations are significant. Where the incapacity is in relation to the property and not a general incapacity, then even if a contract is ab initio void, section 65 must come into operation. There is a distinction, however, where there is utter want of capacity to contract. To that class is the case of 'MOHORI BIBEE v. DHARAMODAS GHOSH', 30 Ind. App. 114 (PC) where Section 65 could not be invoked because a minor had no capacity to contract at all. The defendants having been already in possession of the property, I do not think that they should be entitled to any interest from the date of the kabalas. It would, therefore, be sufficient to direct that the plaintiffs are entitled to a declaration that the kabalas are void and conveyed no title to the de-

fendants, and that they can recover possession of the lands sold under the aforesaid kabalas subject to their paying the entire amount of consideration paid under the documents in question.

(9) The appeal will, therefore, be allowed and the decree of the learned Subordinate Judge will be modified but there will be no order for costs of this appeal.

B/M.K.S. Appeal allowed.

A. I. R. 1952 PATNA 457

NARAYAN J.

Roshan Mistri, Appellant v. Balbir Tewari and others, Respondents.

A.F.A.D. No. 173 of 1950, D/- 2-5-1952.

Civil P.C. (1908), O. 23, R. 1 — Erroneous order granting permission — Effect of.

An order granting permission to withdraw a suit even if it is an erroneous order, is not to be regarded as an order without jurisdiction so long as it is an order made by a Court of competent jurisdiction. In all cases where a suit is allowed to be withdrawn with permission to bring a fresh suit on the same cause of action it must be presumed, in the absence of proof to the contrary, that the Court was satisfied that the conditions in clauses (a) or (b) of sub-rule (2) existed and it is not sufficient for a party challenging such order merely to point out that no reasons were assigned by the Court in making the order. This principle has to be applied especially, when one of the two sets of plaintiffs claiming different parcels of land has withdrawn with permission and the remaining plaintiffs proceeded with the trial without raising any objection on account of the withdrawal by that plaintiff: AIR 1922 Pat. 44 (FB) foll; AIR 1922 Pat. 489 Disting. (Para 3)

Anno: Civil P.C. O. 23, R. 1 N. 36.

Kedarnath Varma, for Appellant; Bajrang Sahai, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('22) 1 Pat 228: (AIR 1922 Pat 489) 3
('22) 1 Pat 90: (AIR 1922 Pat 44 FB) 3

JUDGMENT: This is an appeal by the defendant in a suit for declaration of title and recovery of possession with regard to 7 bighas of land along with 21 trees standing thereon recorded in the Survey within plot No. 2139 of khata No. 1 and situate in village Purnanagar. The case which the plaintiffs sought to make out was that they had taken raiyati settlement of the said land under a hukumnama dated 14-8-1930 granted by the 16 annas landlord and that they had been in possession of the land with the trees standing thereon by virtue of the settlement until there was an interference with their possession by the father of the defendants 1 and 2 and the defendant 3, the present appellant, in the year 1936. The remaining portion of the plot had, according to the case put forward by the plaintiffs, been settled with one Ledu, and in the year 1937 Ledu and the present plaintiffs instituted a suit against the father of the defendants 1 and 2 and the defendant No. 3 for declaration of title with regard to the lands of which they had taken settlement. The plaintiffs withdrew from this suit with liberty to sue afresh on the same cause of action.

They then brought another suit which was Title Suit No. 172 of 1944 for declaration of their title with regard to this land in dispute, and this suit was also withdrawn on 28-4-1946. The plaintiffs were again permitted to bring a fresh suit on the same cause of action. The plaintiffs then instituted the present suit on 6-9-1946, and the suit was resisted only by the defendant 3 who pleaded that the hukumnama propounded by the plaintiffs was a fabricated document and that the plaintiffs had never been in possession of the land in question. The defendant further contended that this suit was not maintainable.

(2) The Courts below have decreed the suit, and hence this second appeal by the defendant 3.

(3) The finding of the Courts below on the question of title and possession is entirely in favour of the plaintiffs. The learned Subordinate Judge has held that the plaintiffs had title to the land and that they were in possession thereof until they were dispossessed in the year 1936. The learned Counsel for the appellant did not and could not challenge these findings, but the contention which he has seriously urged is that the Court which disposed of Title Suit No. 61 of 1937 had no jurisdiction to permit the plaintiffs to withdraw their claim with regard to the land claimed by them with liberty to sue afresh for the same. It appears that one of the present plaintiffs was plaintiff No. 3 in that litigation, and he had filed a petition withdrawing his claim with regard to the lands described in Schedule Kha of the plaint and had sought permission to sue afresh with regard to those lands. This prayer was allowed, and the plaintiff No. 3 was permitted to withdraw his claim with liberty to sue for it afresh.

It is important to note that there were two sets of plaintiffs in that case, and each set claimed a different parcel of land. I have already said that Ledu was a settlement-holder with regard to the remaining portion of plot No. 2139. While 7 bighas out of this plot had been settled with the plaintiffs, the rest of the plots had been settled with Ledu. Though, therefore, Ledu and the plaintiff No. 3 had instituted one suit to recover possession of the lands, virtually there were two claims, in as much as plaintiff No. 3 claimed one portion and the remaining plaintiffs claimed another portion of plot 2139. This is a very important circumstance to be considered in this case. There were really two claims in that suit, one by plaintiff No. 3 with regard to Schedule Kha lands and the other by the other plaintiffs with regard to Schedule Ka lands. After the withdrawal of the claim by plaintiff No. 3 with regard to Schedule Kha lands, the suit proceeded in respect of the claim of the remaining plaintiffs with regard to Schedule Ka lands, and it seems manifest that neither the remaining plaintiffs nor the defendants of the suit ever raised any objection as to the maintainability of that suit on account of the plaintiff No. 3 having withdrawn his claim. The learned Counsel for the appellant has relied on sub-rule (4) of rule 1 of Order 23 which says that nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others.

And the learned Counsel has referred to a decision of this Court in 'MT. RAM DEI v. MT. BAHU RANI', 1 Pat 228 in which it was held that where a Court allows a suit to be withdrawn in contravention of sub-rule (4) and grants leave to institute a fresh suit without the consent of the other plaintiffs, the second suit is barred. But the learned Counsel had to concede that because that was a suit for partition, the decision of their Lordships on the question of jurisdiction cannot but be regarded as obiter dictum. Their Lordships ultimately held that because the suit was a suit for partition and because the cause of action in a suit for partition is a recurring one, a joint owner at any time has a right to come to Court, provided he proves that he has a subsisting joint title and possession in the property. This being the ultimate decision, their Lordships' observation on the question of jurisdiction must be regarded as obiter dictum. Even, if however, the principles laid down by their Lordships in that case are taken to be binding on us, those principles cannot, in my opinion, be invoked in this present case. From the facts, as they have been indicated in the judgment of their Lordships, it appears that two of the plaintiffs in that litigation had been left out of account altogether, and, in fact, to quote the language of Jwala Prasad J., they had turned back upon their promise. It is therefore that his Lordship observes that it was absolutely essential for the Court to find out whether those plaintiffs had consented to the withdrawal of the suit or not.

What has happened in this present case before me is that the other plaintiffs never raised any objection to the withdrawal of the claim by the plaintiff No. 3, and indeed they could not raise any objection to the withdrawal of the claim by the plaintiff No. 3, because the claim of the plaintiff No. 3 was confined to a particular piece of land with which they had no concern whatsoever. Neither the defendants in that case nor the remaining plaintiffs raised any objection on account of the withdrawal of the plaintiff No. 3 and the case proceeded to trial with regard to the remaining portion of the land, that is, the Schedule Ka property. From the order of the learned Munsif dated 8-9-1938 it appears that the pleaders representing the parties were heard and no objection was raised by any of them. The order of the learned Munsif runs thus:

"Plaintiff No. 3 files a verified petition withdrawing the claim to the lands in Schedule 'Kha' with permission to sue afresh and also prays for expunging his name from the category of the plaintiffs.

ORDER: Heard pleaders. There can be no objection to the prayer. Let the plaint be amended as prayed for and the name of plaintiff No. 3 be expunged. The suit after this amendment will be continued to Schedule Ka property only for which the value already given, namely Rs. 160/- will be deemed sufficient. In view of the amendment the plaintiffs 1 and 2 now need that (not?) comply with the order No. 32 dated 8-9-38."

The law only requires that the other plaintiffs should consent to the withdrawal, and it cannot be urged that the consent has to be given in any particular form. The conduct of the remaining plaintiffs together with the note in the order-sheet ("Heard pleaders. There can be no objection to the prayer") unmistakably goes to show that the remaining plaintiffs had consented to the withdrawal. I need not repeat that they could not refuse consent for the simple reason that they had no interest whatsoever in the particular portion of the land which had been claimed by the plaintiff No. 3. If the circumstances leading to that withdrawal are considered carefully, there can be no doubt left that the other plaintiffs had raised no objection and had practically given their consent to the withdrawal of the claim by the plaintiff No. 3.

A Full Bench of this Court had held in 'Raj Kumar v. Ram Khelawan Singh', 1 Pat 90 (FB) that in all cases where a suit is allowed to be withdrawn with permission to bring a fresh suit on the same cause of action it must be presumed, in the absence of proof to the contrary, that the Court was satisfied that the conditions in clauses (a) or (b) of sub-rule (2) existed and that it was not sufficient for a party challenging such order merely to point out that no reasons were assigned by the Court in making the order. I think this principle has to be applied in this case, especially, when we find that the two sets of plaintiffs claimed different parcels of land, and the remaining plaintiffs proceeded with the trial without raising any objection on account of the withdrawal by the plaintiff No. 3 of his claim with regard to Schedule Kha lands. An order, even if it is an erroneous order, is not to be regarded as an order without jurisdiction so long as it is an order made by a Court of competent jurisdiction. On the facts which have emerged from the materials on the record, there is no reason for supposing that the order that was passed by the learned Munsif on 8-9-1938 is null and void. No argument was addressed to me so far as the withdrawal of the subsequent suit is concerned. I find from the order of the subsequent suit that the plaintiff was permitted to withdraw with liberty to bring a fresh suit on the same cause of action, provided he had been given such permission in the previous suit and provided he paid the costs of this suit. The learned Counsel has admitted that the costs were paid as directed by the Court.

(4) I am, therefore, of the opinion that this appeal is not fit to succeed, and I would dismiss it with costs.

B/M.K.S. Appeal dismissed.

A. I. R. 1952 PATNA 458

DAS AND RAMASWAMI JJ.

Ram Sarup Sinha, Appellant v. Inderdeo Narayan Sinha, Respondent.

A.F.A.D. No. 33 of 1952, D/- 29-7-1952.

(a) Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947, prior to its amendment by Act 5 of 1951), Ss. 18 and 22 — Application for eviction of tenant on certain grounds — Order of eviction on one ground rejecting rest — Appeal by tenant only — Finality of adverse findings (Civil P.C. (1908), S. 11).

Where a landlord seeks eviction of his tenant on one of the three grounds mentioned in his application and the Rent Controller passes an order of eviction accepting one of the grounds and rejecting the rest, it is not obligatory on the landlord to prefer an appeal against the adverse findings as S. 18(1) allows an appeal to any person aggrieved by an

order and not a finding of the Rent Controller. If the tenant appeals against the order of eviction and the landlord does not appeal against the adverse findings, they do not become final as between the parties and the Commissioner can decide the appeal on grounds rejected by the Controller. The terms of S. 18(3) or S. 22 cannot preclude the Commissioner from re-opening the issues decided against the landlord: 39 Cal. W.N. 567; AIR 1951 SC 115, Ref. (Paras 5, 6 & 7)

Anno: C.P.C. S. 11 N. 110, 111.

(b) Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 18(2) — 'Decide the appeal' — Meaning of — Order of eviction based on particular ground — Commissioner in appeal setting aside order and remanding case for decision on another ground rejected by Controller — Order is not without jurisdiction — (Civil P.C. (1908), S. 9).

The words of S. 18(2) must be construed in their ordinary grammatical sense, in consonance with the reason and commonsense. So construed, it is impossible to infer from the words of S. 18(2) that an order of remand is not one of the ways of deciding the appeal and that the Commissioner should be restricted to two kinds of orders, namely, allowing the appeal or dismissing the appeal. (Para 10)

Where in an appeal against an order of eviction based on particular ground the Commissioner sets aside the order and directs the Controller to decide the issue of personal necessity afresh which he had held to be barred on the ground of res judicata, the order cannot be said to be in violation of the terms of S. 18(2), or one passed without jurisdiction. Even assuming that the Commissioner passed an order which was not quite legal, either because he went wrong on the plea of res judicata or because he misconstrued S. 18(2) it does not by any means follow that his order was without jurisdiction. The reason is that the existence of jurisdiction is very different from the exercise of jurisdiction: AIR 1949 Pat. 139 (FB) Ref. AIR 1948 Mad. 235 Dist. (Paras 9, 10)

Anno: C.P.C. S. 9 N. 4.

Dr. Qazi Nazrul Hassan and M. Siddique, for Appellant; K. K. Varma and K. P. Varma, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('51) 1951 SCR 145: (AIR 1951 SC 115) 7
('35) 39 Cal WN 567 5
('48) AIR 1948 Mad 235: (1947-2 Mad LJ 482) 11
('48) 26 Pat 748: (AIR 1949 Pat 139 FB) 9

DAS J.: This second appeal by the plaintiff raises the question whether an order of the Commissioner, dated the 2nd of November 1950, in an appeal preferred under Section 18 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, was without jurisdiction.

(2) The question has arisen on the following facts. The respondent is the owner landlord of a double-storied house bearing holding No. 124, Circle No. 4, standing on the Sinha Library Road in the town of Patna. The appellant occupied three rooms on the ground-floor of the house. On the 17th of July 1948, the respondent applied to the Controller, under sub-section (3) of Section 11 of the aforesaid Act, for an order of eviction against the appellant on the ground that he required the rooms in question reasonably and in good faith for his own occupation. For convenience this ground has been described as the ground of personal necessity. This application was dismissed by the Controller on the 23rd of December 1948. There was an appeal under Section 18 of the Act, and the Additional Commissioner of Patna Division upheld the order of the Controller on the 13th of May 1949, and rejected the appeal. On the 31st of October 1949, the respondent again applied to the Controller for an order of eviction against the appellant on three grounds, (a) non-payment of rent, (b) breach of a condition of the tenancy, and (c) personal necessity in accordance with the provisions of sub-section (3) referred to above. By his order dated the 16th of May 1949, the Controller allowed the application on the ground that there was a breach of a condition of the tenancy, which gave the landlord the right to ask for eviction of the tenant. The learned Controller negatived the plea of non-payment of rent. On the plea of personal necessity, the learned Controller held that his previous decision created the bar of 'res judicata'.

There was then an appeal to the Commissioner by the present appellant against the order of eviction passed by the controller. This appeal was disposed of by the learned Commissioner by his order dated the 2nd of November 1950. The learned Commissioner upheld the contention of the appellant that there was no breach of the condition of the tenancy, which would give the landlord the right to ask for an eviction of the tenant. He, however, held that the learned Controller was wrong in his view that his previous decision on the plea of personal necessity created the bar of res judicata, and he expressed the view that personal necessity might change from time to time and would depend on the circumstances existing at the time. The operative portion of the order of the learned Commissioner was expressed in the following terms:

"I would, therefore, remand the case for further enquiry and decision by the Controller on the point of personal necessity."

We are told that the Controller then decided the case afresh, passed an order of eviction against which the appellant appealed unsuccessfully.

(3) The present appellant then brought a suit for a declaration that the order of the Commissioner was without jurisdiction. The suit was dismissed by the learned Munsif. An appeal against the decision of the learned Munsif was dismissed by the learned Subordinate Judge.

(4) As I have already stated, the principal question for decision is if the order of the Commissioner dated the 2nd of November 1950 was without jurisdiction. In order to appreciate the points urged on behalf of the appellant in support of the contention that the order of the Commissioner was without jurisdiction, it is necessary to read some sections of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, Section 11 deals with the eviction of tenants. It mentions the grounds on which a tenant in possession of any building is liable to be evicted. Sub-section (3) (a) states:

"A landlord may apply to the Controller for an order directing the tenant to put the land-

lord in possession of a building if he requires it reasonably and in good faith for his own occupation or for the occupation of any person for whose benefit the building is held by him;"

Section 18 provides for an appeal against the order of the Controller, Section 18 reads:

"18. (1) Any person aggrieved by an order passed by the Controller may, within fifteen days from the date of receipt of such order by him, prefer an appeal in writing to the Commissioner of the Division.

(2) On such appeal being preferred, the Commissioner shall send for the records of the case from the Controller and after examining such record and, if necessary, after making such further inquiry as he thinks fit either personally or through the Controller shall decide the appeal.

(3) The decision of the Commissioner and subject only to such decision, an order of the Controller shall be final, and shall not be liable to be questioned in any Court of law whether in a suit or other proceedings by way of Appeal or revision."

I may state here that Section 18 was further amended in March 1951 by Bihar Act V of 1951. I am reading the section as it stood on the day on which the learned Commissioner disposed of the appeal filed by the present appellant. Section 22 of the Act states that Controller shall summarily reject any application which raises substantially the same issues as have been heard and finally decided in a former proceeding under the Act between the same parties or between the parties under whom they or any of them claim. Section 23 lays down that no suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done in pursuance of any order made or deemed to have been made under the Act.

(5) Learned Counsel for the appellant has placed great reliance on sub-sections (2) and (3) of Section 18 of the Act. The first point he has urged in support of his contention that the order of the Commissioner was without jurisdiction is the following. He has pointed out that the Controller found against the respondent on the pleas of non-payment of rent and personal necessity, though he passed an order of eviction on the third ground of a breach of a condition of the tenancy; and the present respondent did not prefer any appeal against the findings of the Controller on the two pleas of non-payment of rent and personal necessity. The point urged by learned Counsel is that the findings of the Controller on those points became final by reason of the provisions of sub-section (3) of Section 18 and Section 22 and it was not open to the Commissioner to go behind those findings. Learned Counsel has referred to certain decisions where, dealing with the Code of Civil Procedure, it was pointed out that, though the provisions of that Code gave a right of appeal only from a decree as defined in the Code, it was justifiable, and even necessary, to read in the provisions of the Code an implication in favour of suitable exceptions; & a party in whose favour a decree was passed might, nevertheless, have a right of appeal against a finding adverse to him 'Hara Chandra v. Bhola Nath', 39 Cal W N 567. In my opinion, an answer to the argument of learned Counsel for the appellant is furnished by the words of Section 18 itself. Sub-section (1) of section 18 allows an appeal to any person aggrieved by an order passed by the Controller. I emphasise the word "order" in the sub-section. The Section does not speak of an appeal against a finding; it speaks of an appeal against an order. Again sub-section (3) states that an order of the Controller shall be final subject to the decision of the Commissioner. Sub-section (3) does not state that an adverse finding of the Controller shall be final as between the parties. As to section 22 which enacts the principle of res judicata, the point to remember is that the issue in the two proceedings must be substantially the same; in cases based on recurring causes of action, such as personal necessity the change in circumstances may change the issue.

(6) In the case before us, the order of the Controller was wholly in favour of the respondent. The respondent had asked for an order of eviction of any one of the three grounds. The Controller accepted one of the grounds and gave the order of eviction which the respondent asked for. In these circumstances, it is impossible to accept the contention that it was obligatory on the respondent to prefer an appeal to the Commissioner against certain adverse findings, or that if he did not prefer an appeal against certain adverse findings, they became final as between the parties, or that those findings precluded the Commissioner from deciding the appeal in the way he thought fit. The first point urged on behalf of the appellant must, therefore, be overruled.

(7) Learned Counsel for the appellant has submitted that the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, is a self-contained Act, and it would be wrong to import the provisions of other Acts, such as the Transfer of Property Act or the provisions of the Code of Civil Procedure, into the said Act. Learned Counsel has placed reliance on certain observations made in 'Brij Raj Krishna v. S. K. Shaw', 1951 S C R 145. If the principle underlying some of the provisions of the Code of Civil Procedure could be invoked in aid of the respondent, it was open to the respondent to support the order of eviction on a ground decided against him. But leaving aside the provisions of the Code of Civil Procedure, I think that the words of sub-section (1) and sub-section (3) of Section 18 of the Act negative the contention of learned Counsel for the appellant, and Section 22 did not preclude the Commissioner from re-opening the issue of personal necessity.

(8) Next, learned Counsel has contended that the only jurisdiction which the Commissioner possessed was to decide the appeal; he had no jurisdiction to pass an order of remand. It is pointed out that under sub-section (2) of Section 18 of the Act the Commissioner had merely the power to decide the appeal. It is contended that the power to decide the appeal meant two powers only; (a) the power to allow the appeal, and (b) power to dismiss the appeal. It is further contended, on the words of sub-section (2), that the final decision must be that of the Commissioner and he had no power to ask the Controller to give a fresh decision.

(9) In my opinion, the argument of learned Counsel for the appellant is based on a misconception as to the distinction between the existence of jurisdiction and the exercise of

jurisdiction. Learned Counsel for the appellant cannot dispute, nor has he disputed, that the Commissioner had jurisdiction to hear the appeal which the appellant had filed against the order of eviction passed by the Controller. The contention of learned Counsel for the appellant is that the Commissioner had jurisdiction to hear the appeal, but the order which he passed was a wrong order, as it was not in consonance with the provisions of sub-section (2) of Section 18 of the Act. The distinction between existence of jurisdiction and exercise of jurisdiction was very clearly brought out in a Full Bench case of this Court, 'Ramranbijaya Frasad Singh v. Ramkamal Upadhya', 26 Pat 748 (FB), in which the leading judgment was given by my learned brother. It was pointed out there that a different question arose when it was suggested that a court in the exercise of the jurisdiction which it possessed had not acted according to the mode prescribed by the statute. It was stated that if such a question was raised, it related obviously not to the existence of jurisdiction but to the exercise of it in an irregular or illegal manner. Assuming, therefore, that the learned Commissioner passed an order which was not quite legal, either because he went wrong on the plea of res judicata or because he misconstrued sub-section (2) of section 18, it does not by any means follow that his order was without jurisdiction.

(10) There is another way of looking at the question. It is true that sub-section (2) does not in express terms give the power of remand. Learned Counsel for the appellant has drawn our attention to Section 107, Code of Civil Procedure, which expressly gives the appellate Court a power to remand a case. Learned Counsel has also referred us to various rules in Order 41 of the Code of Civil Procedure. His contention is that, in the absence of express provisions, sub-section (2) of Section 18 of the Act must be construed as excluding the power of remand. The words of sub-section (2) must, I think, be construed in their ordinary grammatical sense, in consonance with reason and commonsense. Sub-section (2) states that the Commissioner shall, after examining the record and, if necessary, after making such further enquiry as he thinks fit, either personally or through the Controller, decide the appeal. The important words are "decide the appeal". It cannot be said that in the case before us the Commissioner failed to decide the appeal; in effect he set aside the order of eviction and sent the case back to the Controller for a fresh decision on the plea of personal necessity. I do not understand why it should be inferred from the words of sub-section (2) of section 18 that an order of remand is not one of the ways of deciding an appeal and why the Commissioner should be restricted to two kinds of orders only, namely, only allowing the appeal or dismissing the appeal. There was some argument before us that the commissioner could not delegate his power to the Controller and the final decision had to be made by the Commissioner. I do not see how any question of delegation at all arises in this case. The Commissioner had decided the appeal and he had not delegated the power to decide the appeal to anybody; nor had he failed to give his own decision in the appeal. All that he had done was to decide the appeal in a particular way, namely, by setting aside the order of eviction and sending the case back for a fresh decision by the Controller. In my opinion, the order of the Commissioner was not in violation of the terms of sub-section (2) of Section 18 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947.

(11) Learned Counsel for the appellant placed reliance on a decision of the Madras High Court in 'N. K. Segu Abdul Khadir v. A. K. Murthy', AIR 1948 Mad 235. The facts of that case were entirely different. There the learned Chief Judge of the Court of Small Causes, who was the appellate authority under the Madras Buildings (Lease and Rent Control) Act, dismissed an appeal and then set aside the order he had previously passed on the ground that there was sufficient cause for non-appearance of the appellant. In those circumstances it was pointed out that where the rules of procedure made under the Act had been followed and service which those rules required was effected, the appellate authority had no jurisdiction to set aside his order because he was later impressed and accepted that the respondent did not know of the date or of the fact of the hearing of the appeal. It was pointed out that the material provisions of the Code of Civil Procedure had not been made applicable to the proceedings under the Control Act; and, in the absence of incorporation of the provisions of the Code of Civil Procedure in the rules of procedure for the tribunals under the Control Act, there was no justification for the application of the principles of those provisions. In the case before us, the learned Commissioner did not incorporate or import into the Control Act the provisions of the Code of Civil Procedure; he merely decided the appeal in the way he thought fit.

(12) For the reasons given above, it is clear to me that the contention of learned Counsel for the appellant that the order of the Commissioner dated the 2nd November 1950, was without jurisdiction is not tenable. The Courts below were right in dismissing the suit which the appellant had brought. Accordingly, the appeal fails and is dismissed with costs.

(13) RAMASWAMI, J.: I agree.

B/K.S. Appeal dismissed.

A. I. R. 1952 PATNA 461

SARJOO PROSAD J.

Deo Narain Singh and others, Appellants-Petitioners v. Siabar Singh and others, Respondents-Opposite Party.

A. F. A. D. No. 333 and Civil Revn. No. 197 of 1951, D/- 12-5-1952.

(a) Arbitration Act (1940), S. 39 (2) — Appellate Court affirming decree of trial Court passed in terms of award after overruling objections as to validity of reference and award — No second appeal lies. (Para 2)

Anno: Arb. Act, S. 39, N. 1.

(b) Civil P. C. (1908), O. 32, R. 7 — Reference to arbitration by guardian or pleader on behalf of minor — Leave of Court — Absence of — Effect — Arbitration Act (1940), Ss. 21 and 24.

Order 32, Rule 7, Civil P. C., is as much applicable to the case of a guardian-ad-litem entering into a compromise or into an agreement for reference to arbitration, as in the case of a natural guardian, appearing on behalf of the minors. (Para 3)

Hence, where in a suit for declaration and possession of a piece of land the next friend of the minor plaintiff who had a common case with other plaintiffs and the guardian-ad-litem of the minor defendant who had also a common case with other defendants agree to join in the reference to arbitration without the leave of the Court expressly obtained under O. 32, R. 7, the reference itself is illegal and therefore the whole proceedings which follow thereafter including the award would also be illegal. (Para 3)

It is essential in such a case that all parties should join in the reference. S. 24, Arbitration Act, which is an exception to S. 21 can have no application because it is impossible for the Court to refer the matter in dispute between the parties to the reference to arbitration only and continue to proceed with the suit so far as minors are concerned. (Para 3)

A pleader of a minor party who is empowered to refer the matter in dispute to arbitration on behalf of his client is equally bound by the provisions of O. 32, R. 7 as his position is no better than that of an agent acting for his principal. Hence, the mere circumstance that the reference was made at the instance of pleaders of the minor parties would not make it valid in the absence of leave of Court. (Para 3)

Anno: C. P. C., O. 32 R. 7 N. 15; Arb. Act, S. 21 N. 12.

(c) Arbitration Act (1940), S. 14 (1) — Failure to sign award by some of arbitrators — Effect of, on validity of award.

It is true that an award need not be signed by all the arbitrators if some of them refused to sign it. What is, however, essential is to find out whether or not all the arbitrators have deliberated together and then come to a certain decision, and if after due deliberation a decision has been arrived at with which some of the arbitrators have disagreed and refused to sign the award, it will not materially affect the award where the parties are to be governed by the decision of the majority. (Para 4)

Anno: Arb. Act, S. 14 N. 1.

(d) Arbitration Act (1940), Ss. 16 and 17 — Award — Absence of objection by parties — Duty of Court to decide competency of reference and validity of award on face of it.

The mere fact that an objection is not filed by any of the parties to the award does not altogether absolve the Court from its responsibility of deciding whether there was a competent reference and whether the award was a valid award on the face of it. These are matters which really go to the root of the award itself and irrespective of any objection by the parties, these matters have to be decided by the Court before a decree can be passed on the basis of the award. Section 16 (1) (c) of the Arbitration Act itself provides for such a case, namely, where an objection to the legality of the award is apparent on the face of it then the Court may either remit the award or may supersede it and proceed to decide the suit on merit. (Para 4)

Anno: Arb. Act, S. 16 N. 5.

Dasu Sinha, for Appellants-Petitioners; Tribeni Narain Sinha, for Respondents-Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras
('30) AIR 1930 PC 158: (57 Cal 1311) 3
('39) 18 Pat 271: (AIR 1939 Pat 278) 3

JUDGMENT: The second appeal and the civil revision arise out of the same judgment of the court of appeal below. A preliminary objection has been raised that the second appeal is not maintainable.

(2) The facts giving rise to the appeal and the application are that a suit for declaration of title and recovery of possession in respect of a small area of land in khata No. 248 forming part of plot No. 2846 was instituted by the plaintiffs-petitioners. The suit was filed in May, 1948. During the pendency of the suit on the 19th May, 1949, an application was filed for reference to arbitration purporting to be on behalf of the parties to the suit. The court on the basis of that petition made an order of reference. In the agreement for reference, it appears that five arbitrators were named to decide the dispute between the parties. On the 5th of September 1949, a document was filed on behalf of the arbitrators signed by three of them which was said to be an award given by the majority of the arbitrators concerned. The court, after having allowed time to the parties to file objections, if any, made the award a rule of the court and directed a decree to be passed on the basis of the award. It was against this decree that an appeal was filed to the court below on the ground that the reference was incompetent and the award was on the face of it illegal, and the court below overruling these objections affirmed the decree based upon the award. On these facts, it is quite clear that although an appeal may have been competent before the court of appeal below, a second appeal to this Court could not lie against the decision of the learned Subordinate Judge. The preliminary objection, therefore, must prevail and the appeal is dismissed as being incompetent.

(3) The question, however, remains whether the application against the order of the learned Subordinate Judge should be entertained. There appear to be two vital objections to the award which, in my opinion, must prevail. It is firstly contended that the reference to arbitration was without any sanction being accorded to the guardians of the minors to enter into the agreement. It is pointed out that plaintiffs 3 and 4 were minors to the suit and so was defendant No. 3 also a minor. These minors were represented in the suit by their natural guardians. The natural guardians entered into the compromise but there is nothing in the order-sheet to indicate that these natural guardians sought the leave of the court to enter into the compromise on behalf of the minors, or that any such leave was accorded to those guardians. It has been repeatedly held that Order 32, Rule 7, Civil P. C., is as much applicable to the case of a guardian-ad-litem entering into a compromise or into an agreement for reference to arbitration as in the case of a natural guardian appearing on behalf of the minors. In either case compliance with the provisions of Order 32, Rule 7 is essential, and that not having been done, the reference cannot be said to be a valid reference on behalf of the minors concerned.

In 'Kedar Nath v. Basant Lal', 18 Pat 271. this Court pointed out that where the next friend or guardian-ad-litem of a minor party

agrees to join in a reference to arbitration, the leave of the court to do so on behalf of the minor must first be obtained by the next friend or guardian-ad-litem, and the leave must be expressly recorded in the proceedings in compliance with the provisions of Order 32, Rule 7 of the Civil Procedure Code; and the omission to obtain leave renders an award or any decree based upon it voidable at the instance of the minor. It is to be remembered that the suit was for declaration of title and recovery of possession in respect of a certain piece of land in which the minors as well as the other plaintiffs had a common case and so had the minor defendant a common case with the other defendants. That being so, the award based upon such a reference was not a valid award and could not be given effect to. Section 21 of the Arbitration Act provides that where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference. It is clear on the language of this section that all the parties interested in the suit should agree to refer the matter in dispute otherwise the reference cannot be operative so as to dispose of the suit itself. The only exception to this is provided in Section 24 of the Act wherein it is laid down that where some only of the parties to a suit apply to have the matters in difference between them referred to arbitration, the court may, if it thinks fit, refer such matters to arbitration, but the suit shall continue so far as it relates to the parties who have not joined in the said application.

In the present case Section 24 could obviously have no application because it was impossible for the court to refer the matter in dispute between the parties to the reference to arbitration only and continue to proceed with the suit so far as the minors are concerned. Having regard to the nature of the suit itself, it was essential that all the parties to the suit should have joined in the reference, and that leave ought to have been obtained by the natural guardians on behalf of the minors before a valid reference could be made. The learned Subordinate Judge appears to have thought that because the reference in the present case was at the instance of the pleaders for the parties, therefore Order 32, Rule 7 of the Code probably had no application. In this connection he relied upon a decision of the Judicial Committee of the Privy Council in 'Sourendra Nath v. Tarubala Dasi', AIR 1930 P C 158. He seems to be of the opinion that it is within the power of the pleaders, who represented the parties, whether the power was express or implied, to refer the dispute to arbitration on behalf of their clients. In the present case, it has not been shown in the first instance whether the pleaders had the power to refer the matter in dispute to arbitration on behalf of the parties, and secondly in any case even these pleaders were bound by the provisions of Order 32, Rule 7; their position was no better than that of an agent representing their principals, and consequently in the case of minors it was necessary that leave of the court should have been obtained before any reference could be made. The reference itself being illegal, the whole proceeding which followed thereafter must be held to be illegal.

(4) The second objection arises on account of the fact that prima facie the award which has been adopted by the court below is signed by only three of the arbitrators. It is true that the award need not be signed by all the arbitrators if some of them refused to sign it. What is, however, essential is to find out whether or not all the arbitrators have deliberated together and then come to a certain decision, and if after due deliberation a decision has been arrived at with which some of the arbitrators have disagreed, it will not materially affect the award where the parties are to be governed by the decision of the majority. The award undoubtedly recites that all the arbitrators conferred together in the case, heard the parties and took evidence and arrived at a certain decision, though subsequently two of the arbitrators refused to sign it. But the learned Munsif made no endeavour to examine any one of the arbitrators in proof of this recital in the document. In the absence, therefore, of any definite material to show that all the arbitrators had sat and deliberated together before coming to their conclusion, the award which purports to be signed only by three of the arbitrators could not have been accepted by the court. These two objections, therefore, in my opinion, must prevail. The order of the court below adopting the award as a rule of the court and passing a decree on the basis of the award is without jurisdiction and must be set aside. The mere fact that an objection was not filed by any of the parties to the award does not altogether absolve the court from its responsibility of deciding whether there was a competent reference and whether the award was a valid award on the face of it. There are matters which really go to the root of the award itself and irrespective of any objection by the parties, these matters had to be decided by the court before a decree could be passed on the basis of the award. Section 16 (1) (c) of the Arbitration Act itself provides for such a case, namely, where an objection to the legality of the award is apparent on the face of it then the court may either remit the award or may supersede it and proceed to decide the suit on merit. In the present case, as I have shown above, the reference to the arbitration was an incompetent and invalid reference and could not bind the minors or for the matter of that the other adult parties to the suit.

(5) For these reasons, this application must be allowed and the order of the court below adopting the award must be set aside. The suit should now be heard and decided on merits by the learned Munsif according to law. The petitioners will be entitled to their costs; hearing fee one gold mohur.

B/K.S. Appeal dismissed & revision allowed.

A. I. R. 1952 PATNA 463

IMAM AND SINHA JJ.

Harikrishna Sinha, Petitioner v. The Patna University and another, Opposite Party.

S.C. Appeal No. 16 of 1952, D/- 28-3-1952.

(a) Constitution of India, Art. 133(1)(c) and 226 — Grant of writ — Discretion of Court — Refusal to exercise discretion — Leave to appeal to Supreme Court.

The granting of a writ under Art. 226 is a matter of discretion with the Court, but

every discretionary power is exercised judicially and it cannot be held that no leave to appeal to the Supreme Court can be granted where the Court has declined to exercise its discretionary power. Each case has to be considered upon its merits. (Para 5)

Anno: C.P.C. Appendix III, Constitution of India Art. 133 N. 5; Art. 226 N. 1.

(b) Patna University Act (25 of 1951), Ss. 2 (p) and 15 — Laboratory assistant — Claim to be put on voters' list for Class III Representative members Clause (i).

A laboratory assistant may be a person imparting instruction and, if so, may be regarded as a "teacher" under the definition. But there is a clear distinction between being a "teacher" within the definition and being a "teacher" who is a member of the "teaching staff" of a college or University department. Therefore a laboratory assistant who is not a member of the teaching staff of a college cannot claim to be entitled to be put on the list of voters for the Class III Representative members clause (i) under the Act. (Para 5)

P. R. Das, S. K. Sen, and K. B. N. Sinha, for Petitioner; Govt. Pleader with Ramananda Sinha, for Opposite Party.

IMAM J.: This is an application under Article 133 of the Constitution for leave to appeal to the Supreme Court against a decision of this Court dismissing the applicant's application for writ of mandamus under Article 226 of the Constitution. The applicant is employed as a laboratory assistant at the Bihar National College, Patna. Previous to the Bihar Act XXV of 1951, the applicant was on the electoral roll of the Patna University maintained under the Patna University Act, 1917. He was on this roll as a voter for the teachers specified in Class III. With the commencement of the Act XXV of 1951, a Senate, a Syndicate and an Academic Council have to come into existence. For this purpose, an election of the Senate had to take place and the Chancellor of the Patna University under the aforesaid Act, fixed the 20th of March 1952 for election of the Class III representative members clause (i) under the Act for the Senate.

The electoral roll which was prepared for this election did not contain the petitioner's name as a voter for the Class III Representative members clause (i). The petitioner along with other laboratory assistants submitted a memorial to the Chancellor of the Patna University somewhere about the 16th of February 1952, protesting against the exclusion of the laboratory assistants from the list of voters for the aforesaid Class III representatives. The material before me does not clearly indicate as to what was the final order of the Chancellor. I am informed that, in fact, he has passed no order. The petitioner being aggrieved filed an application in this Court for a writ in the nature of mandamus under Article 226 of the Constitution, on the 25th of March 1952, which was summarily rejected by a Bench of this Court on the 26th of March 1952.

(2) This matter has been argued at some length by the learned Counsel for the petitioner as well as by the Government Pleader. The main contention of Mr. Das has been that the petitioner has the statutory right to be on the list of voters for Class III Representative members clause (i) having regard to the provisions of the Bihar Act XXV of 1951. He contended that this right was a valuable right, one of the most valuable rights that any individual can have in a democracy. The petitioner had been unreasonably and without justification excluded from the list of voters with reference to the aforesaid Class III representatives and, thus, had been deprived, by an illegal order, of his right to vote. Reference was made to the definition of the word 'teachers' in the aforesaid Act, and it is better to set out that definition.

Under section 2 (p), the word 'teachers' has been defined to include Principals, University professors, professors, readers, lecturers and other persons imparting instruction in departments or institutes established and maintained by the University or in any of its colleges but do not include research scholars or research Fellows. Section 15 of the aforesaid Act provides that the Senate shall consist of certain persons; Class I refers to ex-officio members; Class II to life members; Class III refers to Representatives members and Class IV to nominated members. It is with Class III that we are concerned in the present matter. Clause (i) under this head-Class III reads as follows:

> "Thirty five teachers, other than Deans, Principals, and Heads of the University departments, to be elected from and by the teaching staffs of colleges and University departments in such manner as may be prescribed by the Statutes, so that the teaching staff of every college and the teaching staff of every University department shall be represented on the Senate under this sub-head in such number and at such intervals as may be prescribed by the Statutes."

Clause (ii) refers to fifteen graduates. The other clauses under this Class need not be stated, that is to say clauses (iii), (iv) and (v).

(3) It was contended by Mr. Das, therefore, that having regard to the definition of "teachers" and what is contained in Section 15, regarding Class III, Representative members Clause (i) the petitioner, who was a laboratory assistant, was undoubtedly a teacher and, therefore, was entitled to vote in the election to the Senate for the Class III Representative members, namely, 35 teachers. Mr. Das referred to the fact, which was not in dispute, that the petitioner was on the list of voters for Class III representatives, namely teachers, under the old Act, i.e., the Patna University Act, 1917. He referred to certain sections of the new Act, namely, the Bihar Act XXV of 1951, which made it clear that statutes, ordinances, regulations, and rules made under the Patna University Act, 1917 which were in force immediately before the commencement of the new Act, shall continue to be in force, so far as they are not inconsistent with the new Act, subject to such modifications and adaptations, if any, as may be made therein by the Vice-Chancellor and approved by the Chancellor.

Section 58 of the Bihar Act 25 of 1951 provides that the enactments specified in the Schedule to the Act, in their application to the colleges transferred to, and the departments established, and maintained by, the University under the Act were thereby repealed, provided that all appointments made, orders issued, degrees conferred, privileges granted or other things done under any of the said enactments

and in force immediately before the commencement of the Act shall, so far as they were not inconsistent with the Act, will be deemed to have been respectively made, issued, conferred, granted or done under the Act.

The Government Pleader, on the other hand, has contended that under Section 55 (2) the Vice Chancellor of the Patna University was to carry on the duties of the University for a period of three months from the commencement of the Bihar Act 25 of 1951; and that under Section 9 (4), the Chancellor of the Patna University could, by order in writing, annul any proceeding of the University which was not in conformity with the Act, the Statutes, the Ordinances and the Regulations. The petitioner could and, in fact, did move the Chancellor against his exclusion from the list of voters with reference to Class III representatives. There was, therefore, another remedy open to the petitioner than that of a writ under Article 226 of the Constitution. He further contended that under Section 45 of the Bihar Act XXV of 1951, if any question arose whether any person had been duly elected as a member of the Senate, the Syndicate or the Academic Council, the matter should be referred to the Chancellor, whose decision thereon shall be final.

His contention in this respect was really to this effect that, if the thirty five teachers, as the Class III representatives under Section 15 of the Act, were elected, the petitioner could still have the matter referred to the Chancellor raising the question whether such persons had been duly elected when the voters' list was incomplete, because those who were entitled to be on this list were not on the list. The Government Pleader also contended that since the application for a writ under Article 226 of the Constitution had been rejected by a Division Bench of this Court and the granting of such a Writ being entirely a matter of discretion, this Court should not grant leave to appeal, because it could not be said, where discretion had been exercised, that it is a fit case for appeal to the Supreme Court. Lastly, the Government Pleader urged that the present application should be dismissed on the ground of convenience, namely, that if leave to appeal to the Supreme Court was granted with the consequent injunction restraining the election to the Senate, the entire functioning of the University would come to an end.

(4) So far as the last contention of the Government Pleader is concerned, I am not attracted by it, for, it seems to me that whatever may be the inconvenience caused by the delay in holding the elections that consequence must follow, if any right, which the petitioner has under the law to vote in the elections, he has been deprived of.

(5) No doubt, the granting of a Writ under Article 226 of the Constitution is a matter of discretion with the Court, but I take it that every discretionary power is exercised judicially and I am not prepared to hold that no leave to appeal to the Supreme Court can be granted where the Court has declined to exercise its discretionary power. Each case has to be considered upon its merits and, I think, instances are not wanting where leave to appeal to the Supreme Court has been granted by this Court where question of issuing a writ under Article 226 of the Constitution has been considered and this court has been of the opinion that the case was a fit one for appeal to that Court. I have not the advantage of knowing what were the reasons which persuaded their Lordships of the Division Bench to reject the petitioner's application under Article 226 of the Constitution.

Therefore, in the present matter, it will be necessary to set out some reasons as to whether this is a case which, in my opinion, is a fit one for granting leave to appeal to the Supreme Court. Under the old Act, namely, the Patna University Act, 1917, a rule had been framed, viz, rule 102, which provided that the names of only those laboratory assistants that take part in actual teaching in a college and are also graduates shall be entered in the electoral roll of college teachers. In other words, not every laboratory assistant was put on such a roll but only the laboratory assistants who took part in actual teaching in a college, and were graduates. A fresh electoral roll had to be prepared for the election to the Senate under the new Act, Bihar Act, XXV of 1951.

I have given at the commencement of this judgment the definition of the word "teachers" in this Act, and a laboratory assistant may be a person imparting instruction and, if so, may be regarded as a "teacher" under the definition. Under Section 15 of the Bihar Act XXV of 1951, Class III Representative Members clause (i) have to be elected from and by the teaching staff of colleges and University departments. To my mind, an important question arises in this case as to whether a laboratory assistant, though coming perhaps under the definition of the word "teacher" is a member of or part of the teaching staff of a college or University Departments. The petitioner's application under Article 133 of the Constitution, no doubt, states that amongst his other duties he has the duty of imparting instruction and, therefore, he is a teacher within the meaning of Bihar Act, XXV of 1951. There is no assertion in that petition that he is a member of or part of the teaching staff of the college where he is employed.

In a supplementary affidavit filed in the course of the hearing of the present application, it has been asserted that the petitioner is on the teaching staff of the college. One Kalika Prasad, an assistant of the Patna University, has sworn an affidavit to the effect that there was a committee appointed by the Vice-Chancellor to draft Statutes, Ordinances and Regulations under Bihar Act XXV of 1951; that the committee met on the 9th of January 1952 and considered various matters including the question of inclusion of the laboratory assistants in the register of teachers; and it was resolved by the Committee that the laboratory assistants could not be included in the register of teachers and must be transferred to the register of registered graduates. The affidavit goes on to give the reasons as to what influenced the Committee in its decision. The main assertion is in paragrah 5 of the affidavit which runs as follows:

> "That the routines of the Colleges would show that they (laboratory assistants) are not shown taking classes and are not on the teaching staff of the colleges or (university?) department."

Paragraph 7 goes on to state that the laboratory assistants do not take part in the election to choose representatives of the teaching staff

of the college to the Governing Body of the colleges. Paragraph 8 states that the laboratory assistants are not taking any class. Although there is no definition of the words "teaching staff" in the Act (Bihar Act XXV of 1951), yet in the light of what prevailed before that Act, namely, rule 102, as quoted in the petitioner's application, the names of only those laboratory assistants who took part in actual teaching in a college and who were graduates were to be entered in the electoral roll of college-teachers.

It seems to me, therefore, that there is a clear distinction between being a "teacher" within the definition of that word under Bihar Act XXV of 1951 and being a "teacher" who is a member of the "teaching staff" of a college or University department. I see no reason to distrust the affidavit filed on behalf of the Patna University by one of its assistants, particularly when that affidavit has as its annexure a copy of the minutes of the Committee to which reference has been made in the affidavit itself. It would, therefore, appear that the petitioner is not a member of the teaching staff of the Bihar National College, Patna and as such could not claim to be entitled to be put on the list of voters for the Class III Representative members clause (i) under the Bihar Act XXV of 1951.

As to whether the Vice Chancellor was justified while having the electoral roll prepared in excluding the laboratory assistants from the register of teachers and transferring them to the register of registered graduates, was a matter, in my opinion, purely within the domestic affairs of the University. This is not a case where the petitioner has altogether been excluded from the electoral roll of the University.

(6) I do not think it is necessary for me to go into the question raised by the Government Pleader with reference to Section 9 (4) and Section 45 of the Act, for the reasons which I have already set out.

(7) Having regard to all the circumstances, I do not think this is a fit case for leave to appeal to the Supreme Court. The application is accordingly dismissed.

(8) SINHA J.: I agree.

B/V.R.B. Application dismissed.

A. I. R. 1952 PATNA 466

DAS AND RAMASWAMI JJ.

Shreenath Singh and another, Appellants v. The East Indian Rly. Administration, Respondent.

A.F.O.O. Nos. 329 and 330 of 1951, D/- 2-4-1952.

† (a) Railways Act (1890) Ss. 82A and 82J — Rules under S. 82J — Railway Accidents (Compensation) Rules (1950) — Rules are not inconsistent with S. 82A, Railways Act.

The liability to pay compensation under S. 82A has no necessary relation to the liability to pay damages in an action in tort, and there are no reasons why the principles relating to damages in an action in tort should be imported into section 82A. The rules made under S. 82J clearly work out the object of S. 82A and are in no way inconsistent with the meaning of S. 82A, nor do they go beyond the object of that Section. (Para 4)

Anno: Railways Act S. 82A N. 1.

(b) Railway Accidents (Compensation) Rules (1950) R. 6(2) and Sch., Part II — Person injured in railway accident — Injuries causing permanent partial disablement affecting his earning capacity — Injuries sustained not those specified in Part II of Schedule — R. 6(2) held applied to case. (Para 5)

Nandlal Untwalia and Kamleshwar Pd. Sinha, for Appellants; Govt. Advocate, P. K. Bose and Nandlal Ray, for Respondent.

DAS J.: These are two appeals under Section 82F(2) of the Indian Railways Act from an order of the Claims Commissioner dated the 18th of August 1951, and the principal point for consideration is the amount of compensation to which the appellants are entitled by reason of the provisions of section 82A and the rules made under section 82J of the Indian Railways Act. In Miscellaneous Appeal No. 329 of 1950, the appellant, who was the claimant before the Claims Commissioner, is Sri Sreenath Singh, an advocate of this Court. The appellant in Miscellaneous Appeal No. 330 of 1951, who was the claimant before the learned Claims Commissioner, is Sri T. R. Bhatia. Both these gentlemen were travelling by the 7 Up Toofan Express on the 13th of August 1950. This train met with an accident near Karamnasa, and as a result of the accident, the appellants sustained severe personal injuries and lost their personal effects. Both of them were first removed to Mogalsarai by a relief train, then to the hospital at Benares & ultimately to the Patna General Hospital. At the Patna General Hospital, they were indoor patients for some months; and their case before the Claims Commissioner was that they were still suffering from the effects of the personal injuries sustained by them in the accident.

(2) The questions raised in the two appeals are principally questions of law bearing on the amount of compensation payable to the appellants. Therefore, it is unnecessary to give details of the injuries sustained by the appellants. It is, however, necessary to indicate how the Claims Commissioner proceeded to consider and decide the claims preferred by the two appellants. Section 82A (I am reading only the relevant portion) lays down that, when in the course of working a railway an accident occurs, whether or not there has been any wrongful act, neglect or default on the part of the Railway Administration such as would entitle a person who has been injured or has suffered loss to maintain an action and recover damages in respect thereof, the Railway Administration shall, notwithstanding any other provision of law to the contrary, be liable to pay compensation to the extent set out in sub-section (2) and to that extent only for loss occasioned by the death of a passenger dying as a result of such accident, and for personal injury and loss, destruction or deterioration of goods owned by the passenger and accompanying the passenger in his compartment or on the train, sustained as a result of such accident. Sub-section (2) states that the liability of a railway administration shall in no case exceed ten thousand rupees in respect of any one person.

Section 82A was inserted by Section 2 of the Indian Railways (Amendment) Act, III of 1942. In 1949, further amendments were made by the

Indian Railways (Amendment) Act, LVI of 1949. Sections 82B to 82J were added. These sections related to the appointment of Claims Commissioners, application for compensation, procedure and powers of Claims Commissioners, interim orders for compensation, liability to pay compensation etc. to be decided by the Claims Commissioners, and appeals from their orders etc. Section 82H saved the right of any person to recover compensation payable under the Workmen's Compensation Act, 1923 or any other law for the time being in force or under any contract or scheme providing for payment of compensation etc. Section 82J is important, and I propose to read it in full:

"(1) The Central Government may, by notification in the official Gazette, make rules to carry out the objects of Sections 82A to 82H inclusive.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for—

(i) the qualifications and conditions of service of Claims Commissioners:

(ii) the nature of the injury for which and the rates at which compensation shall be payable;

(iii) the rates at which compensation shall be payable for death or total disablement;

(iv) the manner in which claims for compensation may be inquired into and determined by the Claims Commissioner;

(v) the matters in respect of which any person may be chosen to assist the Claims Commissioner under Section 82D, and the functions exercisable by such person;

(vi) generally for the effective exercise of any powers conferred on the Claims Commissioner.

(3) All rules made under this section shall be laid before the Dominion Legislature as soon as may be after they are made."

The Rules made in exercise of the powers conferred by Section 82J are known as the Railway Accidents (Compensation) Rules, 1950. These were published in the Gazette of India, Part II-section 3, dated the 1st July, 1950. It is necessary to read Rule 6 of the said Rules and I am reading it so far as it is relevant for our purpose:

"(1) The amount of compensation payable in respect of death or for injuries causing partial disablement or total disablement shall be at the rates set out in the schedule.

(2) In case of a partial disablement arising out of an injury not specified in Part II of the Schedule, such percentage of the compensation payable in the case of a total disablement as is proportionate to the loss of earning capacity permanently caused by the injury, shall be payable:

Provided that where more than one injury is caused by the same accident, compensation shall be payable in respect of each injury but so that the aggregate amount of compensation does not exceed the amount which would have been payable if a total disablement had resulted from such injuries."

The learned Claims Commissioner applied sub-rule 2 of Rule 6 to the claims of these two appellants, inasmuch as the injuries which the appellants sustained were not injuries specified in Part II of the Schedule appended to the Rules. On the basis of medical certificates submitted by the Surgeon, Dr. V. N. Singh, F.R.C.S. of the Patna General Hospital who treated the two appellants, the learned Claims Commissioner found that both the appellants had suffered partial disablement as a result of the injuries sustained and such disablement had caused a permanent loss of earning capacity fifty per cent in the case of Sri Sreenath Singh and thirty per cent in the case of Sri T. R. Bhatia.

On the basis of their monthly income at the time of the accident as per Part I of the Schedule, he allowed compensation of Rs. 4,250/- to Sri Sreenath Singh on account of personal injury, and Rs. 3,000/- to Sri T. R. Bhatia. With regard to the loss of personal effects, he allowed further sums to both the appellants, the details whereof are unnecessary for our purposes except in the case of Sri Sreenath Singh where, it has been contended, there has been an error of calculation to the extent of Rs. 72 only. To that aspect of the case I shall return later.

(3) The contention of learned Counsel for the appellants is that his clients are entitled to the maximum compensation laid down in sub-section (2) of Section 82A of the Indian Railways Act. In support of this contention, he has urged the following points. Firstly, he has argued that the rules made under Section 82J (particularly Rule 6), so far as they are inconsistent with the meaning, and go beyond the scope, of Section 82A, must give way to the provisions of that section. Secondly, he has contended that the rules are incomplete and do not cover the cases of the two appellants; therefore, the general rules relating to damages in an action in tort should be applied, subject to the maximum fixed by sub-section (2) of Section 82A.

These have been the two principal arguments of learned Counsel for the appellants. He has also submitted that the certificate of Dr. V. N. Singh, on which the learned Claims Commissioner relied, should not have been preferred to another certificate which the same Surgeon had given in respect of the injuries of Sri Srinath Singh in support of the claim of the appellant. I propose now to consider the arguments in the order in which I have stated them.

(4) Speaking for myself, I have found it rather difficult to appreciate the argument of learned Counsel for the appellants that the Railway Accidents (Compensation) Rules, 1950 are in any way inconsistent with the meaning or go beyond the scope of the provisions in Section 82A of the Indian Railways Act. Those Rules were made in exercise of the powers conferred by Section 82J of the Indian Railways Act. Learned Counsel for the appellants stated before us that he did not contend that any of the Sections 82A to 82J were ultra vires the Legislature which passed them. He agreed that Section 82J was good and valid. He referred to sub-section (1) of Section 82J which gave the Central Government a general power to make rules to carry out the objects of Sections 82A to 82H (inclusive).

Without prejudice to the generality of the power given by sub-section (1), sub-section (2) stated that the rules might, in particular, provide for among other things, the nature of the injury for which and the rates at which compensation shall be payable. Rule 6 is obviously a rule made under that power. It is difficult to see how Rule 6 can be said to be inconsistent with or to go beyond the scope or object of

Section 82A. Learned Counsel, however, argued that Section 82A had a particular meaning, and if his contention as to meaning of Section 82A were accepted, then Rule 6, sub-rule (2), would be inconsistent with that meaning.

The meaning which learned Counsel for the appellants sought to give to Section 82A was this; Section 82A according to him, imposed a statutory liability on the Railway Administration to pay compensation for, (a) death, (b) personal injury, and (c) loss, destruction or deterioration of animals and goods etc. The liability was limited to a maximum of Rs. 10,000. But, within the maximum limit no principles were laid down as to how the amount of compensation would be determined; therefore, the contention of learned Counsel was that the principles which governed the determination of damages in an action in tort should be applied, and the measure of damages must represent, (a) solatium or satisfaction for the pain, infirmity etc. as also (b) compensation for medical expenses, loss of business, earning capacity etc.

Put briefly, the argument of learned Counsel for the appellants is that we must first read into Section 82A the principles governing damages in an action in tort & then hold that the rules made under Section 82J, so far as they are inconsistent with the said principles, are invalid and inoperative. Put this way, the fallacy of the argument becomes at once apparent. There is nothing in Section 82A which requires us to read or engraft into that section the principles relating to damages in an action in tort. On the contrary, there are words in the section which give different indication. The section clearly indicates that the liability imposed by it is independent of any wrongful act, neglect or default on the part of the Railway Administration such as would entitle a person, who has been injured or has suffered loss, to maintain an action and recover damages in respect thereof.

The word damages is used in connection with a wrongful act, neglect or default, but the liability under the section is compensation (as distinct from damages). Section 82H saves the right of any injured person to claim compensation under any other law for the time being in force. It is obvious, therefore, that the liability to pay compensation under Section 82A has no necessary relation to the liability to pay damages in an action in tort and there are no reasons why the principles relating to damages in an action in tort should be imported into Section 82A. The rules made under Section 82J clearly work out the object of Section 82A and are in no way inconsistent with the meaning of Section 82A, nor do they go beyond the object of that section.

It is unnecessary to consider in this case how the amount of compensation would have been determined, if there were no rules. It is pointed out that the Railway Accidents (Compensation) Rules, 1950, came into existence some seven years after the enactment of Section 82A. The question before us is whether the said Rules are in any way inconsistent with Section 82A, and I do not propose to answer the hypothetical question as to how the compensation would be determined in the absence of any rules. The argument of learned Counsel that the rules are inconsistent with the meaning of Section 82A must, in my opinion, be overruled.

(5) The next argument is that the rules are incomplete and do not cover the case of the two appellants. Here again, I think that the argument is unsound. The learned Claims Commissioner, on a comparison of the provisions of the Railway Accidents (Compensation) Rules, 1950 and the Workmen's Compensation Act, 1923 came to the conclusion that Rule 6, sub-rules (1) and (2), together with the Schedule attached to the Rules, provided for compensation for permanent total disablement and permanent partial disablement only; in other words, the Rules did not provide for temporary total disablement or temporary partial disablement. Learned Counsel for the appellants pointed out that the rules made under Section 82J did not have any provision corresponding to section 4, clause D of the Workmen's Compensation Act.

I do not think that it is necessary in these two appeals to determine (1) whether the view of the Claims Commissioner that Rule 6 provides for compensation for permanent total disablement and permanent partial disablement only is correct and (2) whether the rules have a lacuna of the kind suggested by learned Counsel for the appellants. With regard to both the appellants, the Surgeon, who treated their injuries, said that there was permanent partial disablement which affected their earning capacity. Rule 6(2) clearly applies to such a case, because the injuries which the appellants sustained were not injuries specified in Part II of the Schedule. In the case of Sri Sreenath Singh, the partial disability caused a loss of earning capacity permanently to the extent of fifty per cent. In the case of Sri T. R. Bhatia, there were two medical reports, one by Dr. V. N. Singh and the other by a Medical Board consisting of the Divisional Medical Officer, East Indian Railway and Dr. Imam, Civil Surgeon of Patna.

Dr. Singh's report was that the disability affected the earning capacity of Mr. Bhatia to the extent of fifty per cent; the Medical Board gave its estimate as fifteen per cent. The learned Claims Commissioner examined both estimates with reference to the nature of the injuries sustained and held that the correct proportion would be thirty per cent. I do not think that the learned Claims Commissioner was wrong in his estimate on the materials before him. In my opinion, the learned Claims Commissioner rightly applied sub-rule (2) of Rule 6 in the cases of the two appellants, and it is not necessary in this case to consider whether his view as to the general effect of Rule 6 is correct or not, or whether the Rules have a lacuna of the kind suggested by learned Counsel for the appellants.

(6) Learned Counsel drew our attention to another certificate of Dr. V. N. Singh dated the 30th October 1950, in which he noted, amongst other things, that Sri Sreenath Singh was completely disabled at that time and would take about three years to recover. It is contended that there was, in the case of Sri Sreenath Singh, total disablement for a temporary period, and if the Rules do not provide for payment of compensation for temporary total disablement, the general principles of determining damages for bodily harm in an action in tort should be followed. I am unable to accept this argument. The two certificates of Dr. V. N. Singh should be considered together, and the

latter certificate gave a correct estimate of the effect of the injuries on Sri Sreenath Singh: that effect was partial disablement causing a loss of earning capacity permanently. Sri Sreenath Singh was entitled to compensation on that basis, and the Claims Commissioner rightly allowed such compensation to him.

(7) Sri T. R. Bhatia was also entitled to compensation on the same basis. As to the method of calculation, learned Counsel has conceded that there has been no error, the calculation being made on the basis of monthly income as laid down in Part I of the Schedule.

(8) As to the loss of personal effects, there has been a mistake of calculation with regard to Rs. 72 only in the case of Sri Sreenath Singh. It appears that the learned Claims Commissioner allowed full value of certain articles which, together with the cash money lost by Sri Sreenath Singh, came to Rs. 1,050. Regarding other articles, the learned Claims Commissioner allowed one-third of the amount claimed as compensation. Sri Sreenath Singh claimed Rs. 1500 as compensation for the loss of personal effects. Deducting Rs. 1,050 from that amount, the balance was Rs. 450 only. One-third of Rs. 450 is Rs. 150. Therefore, Sri Sreenath Singh was entitled to Rs. 1050/- plus 150: Rs. 1200, on the findings of the learned Claims Commissioner. He appears to have been given Rs. 1,128 only for personal effects besides Rs. 4,250/- for personal injury, the total sum allowed to him being Rs. 5,378. Sri Sreenath Singh should get Rs. 5,450 instead of Rs. 5,378. Learned Counsel for the respondent has agreed that there was a mistake of calculation to the extent of Rs. 72 only and that should now be corrected.

(9) It is conceded that there was no mistake of calculation so far as Sri T. R. Bhatia was concerned.

(10) The result, therefore, is that the appeal of Sri Sreenath Singh (Miscellaneous Appeal No. 329 of 1951) is allowed to the limited extent indicated above. The appeal of Sri T. R. Bhatia (Miscellaneous Appeal No. 330 of 1951) is dismissed. In the circumstances of these cases we direct that the parties should bear their own costs of the hearing in this Court.

(11) RAMASWAMI J.: I agree.

B/V.R.B. Order accordingly.

A. I. R. 1952 PATNA 469

LAKSHMIKANTA JHA C. J. AND REUBEN J.

Thakur Prasad Singh and another, Appellants v. Raghubar Prasad Singh, Respondent.

A. F. O. D. No. 436 of 1946, D/- 21-4-1952.

(a) Civil P. C. (1908), O. 32 R. 7 — Regularity of compromise questioned — Presumption is Court performed its duty — Onus of proof — (Evidence Act (1872), S. 114).

When a minor is concerned as a party to a proceeding in Court and compromise is proposed, the guardian ad litem of the minor must obtain the permission of the Court before entering into the compromise. When the question of the regularity of the compromise arises subsequently the presumption under S. 114, Evidence Act, is that the Court performed its duty and the onus of proof falls on the party which asserts that permission was not given by the Court. (Para 7)

Anno: C. P. C., O. 32 R. 7 N. 5; Evi. Act, S. 114 N. 29.

(b) T. P. Act (1882), Ss. 58, 62 — Usufructuary mortgage — Rights of mortgagor after mortgage — Transferability of.

When the owner of property hypothecates that property by a usufructuary mortgage he does not cease to have any interest in the property until the mortgage-debt is satisfied in due course and he is in a position to sue for recovery of possession under S. 62. The ownership of property connotes a bundle of rights in respect of that property. In a transaction of mortgage the owner of that bundle of rights transfers some of those rights to the mortgagee. The remainder of that bundle of rights still remains with him and can be transferred. AIR 1946 All 400, Expl. (Para 11)

Anno: T. P. Act, S. 58 N. 4.

Mahabir Prasad, Rai Paras Nath and Umesh Chandra Prasad Sinha, for Appellants; Prem Lall, for Respondent.

REFERENCE..... Para.

('46) AIR 1946 All 400: (227 Ind Cas 541) 11

REUBEN, J.: This is an appeal by the plaintiffs from a decision of the Additional Subordinate Judge at Monghyr dismissing a suit for redemption of a mortgage.

(2) The plaintiffs-appellants are father and son and members of a joint Mitakshara family. The mortgage sought to be redeemed was created by a 'sadhawa patawa' bond executed by Bhagwat Prasad Singh deceased, father of the plaintiff No. 1 Thakur Prasad Singh, both as karta of the joint Mitakshara family consisting of himself and his son, and as guardian of his son. By this deed, the mortgagors hypothecated four items of proprietary interest (1) 3 annas and odd share in mauza Azizpur Piparia, touzi No. 838, (2) 16 annas khas patti in Azizpur Piparia, tauzi No. 840, (3) 8 annas out of 16 annas in respect of 4 annas patti in mauza Jagdishpur Saiyadpur, touzi No. 987, and (4) 8 annas out of 16 annas in respect of 4 annas patti in Jagdishpur, touzi No. 8994, to secure an amount of Rs. 17,000/- for the period 1st Asin 1336 to 30th Bhado 1351 Fasli. The property was to remain in the possession of the mortgagee Dalip Narain Singh, defendant No. 1 since deceased, who would be responsible for the payment of Government revenue and cess. The income of the property, after making a certain allowance for the cost of collection, was to be applied first to the payment of the interest payable under the 'sadhawa patawa' deed and the balance, if any, towards the satisfaction of the principal amount of the said mortgage-debt. There was to be a yearly rendering of accounts. If within the term of the mortgage the debt was not satisfied the sadhawa patawa was to continue till the date of payment of the entire mortgage dues.

(2a) There was a special provision regarding 180 bighas 15 kathas of bakasht land, 107 bighas of which lay within tauzi No. 840 and the balance 73 bighas 15 kathas within touzi No. 838. I reproduce the provision:

"We the executants have khud kasht land in the properties let out in 'sadhawa patawa'. Out of the said lands jamabandi (rent) has been fixed with regard to some land which has been recorded as nakdi kaimi land in

the name of minor son, Thakur Prasad Singh in the jamabandi list which has been signed by me and made over to Rai Bahadur the said creditor. B. Thakur Prasad shall keep, in possession and occupation the said land till the payment of the 'sadhawa patawa' money, the said Rai Bahadur shall continue to receive the rent thereof according to the list submitted by us, the executants year after year."

There was no accounting between the parties. Also, no payment was made by the mortgagors in respect of the 180 bighas 15 kathas. It appears that in 1931 the mortgagee filed a suit against the mortgagors in respect of arrear rent due for this land and obtained a decree in execution of which he put to sale and purchased the mortgaged property.

(3) The plaintiffs filed the suit on the basis that their interest was unaffected by the execution sales and that the mortgage dues were fully satisfied by the usufruct of the mortgaged property. They pleaded:

"The plaintiffs have come to know that defendant No. 1 instituted a rent suit in respect of the said land against the family of the plaintiffs and obtained a decree fraudulently and surreptitiously and thereafter executing the said decree by taking surreptitious steps purchased all the jot lands and the properties let out in sadhawa patawa for a meagre amount of Rs. 300. The plaintiffs beg to submit that the said decree was a money decree. The plaintiffs have come to know that defendant No. 1 had never obtained permission from the Court for purchasing at the auction-sale. As the said decree was in respect of the subject-matter of the sadhawa patawa deed, hence the purchase by defendant No. 1 at auction sale is by all means illegal and ineffective. The plaintiffs beg to submit that the defendants are up till now in possession and occupation of the properties let out in sadhawa patawa as sadhawa patawadar. The plaintiffs have by all means the right to redeem the rehan.

"They therefore prayed

1. for a decree for redemption with an order for rendition of accounts of the entire income of the property and
2. "if the Court be pleased to consider it necessary to set aside the purchase of defendant No. 1 at auction sale, then the said auction sale may be set aside."

(4) The learned Subordinate Judge rejected the story of fraud both in the rent suit and in the execution proceedings. He held that the claim in the rent suit did not arise under the mortgage. Further he expressed the view that even if it did arise under the mortgage & there was a contravention of Order XXXIV, Rule 14, such a sale is voidable and not void and therefore the sale must be taken to be valid in the present case as the time limited by Art. 12 of the Schedule to the Limitation Act for instituting a suit for setting aside such a sale has expired. He pointed out in addition that a suit for setting aside the sale on the ground of fraud or irregularity in the execution proceedings is barred by O. XXI. Rule 92, sub-rule (3), Civil P. C. On these findings he held that the plaintiffs had no right to redeem the mortgage and dismissed the suit.

(5) The correctness of the propositions of law enunciated by the Additional Subordinate Judge has not been challenged. The question of fraud in the execution of the decree and the effect of the provisions of O. XXXIV, Rule 14 on the validity of the execution sales therefore was not agitated before us. The learned Advocate-General who represented the appellants, confined his argument to the contention that in spite of the execution sales plaintiffs still retain their interest in the mortgaged property and are entitled to redeem the mortgage. This contention he based on three grounds:

1. The plaintiff No. 1 was a minor at the time of the compromise decree in the rent suit and it has not been proved that the Court permitted his guardian ad litem in the suit to enter into the compromise,

2. that the mortgage in this case being a purely usufructuary mortgage, the mortgagors were merely entitled to recover possession under S. 62, Transfer of Property Act, and had no interest in the property which could pass by the execution sale, and

3. that the interest of the plaintiffs in the 180 bighas 15 kathas of bakasht land was not affected by the sale in Execution Case No. 995 of 1933, and the land is still in possession of the plaintiffs.

(6) On the pleadings and on the evidence adduced in the case, I do not think the first ground is tenable. The plaint alleges in general language that the decree was "fraudulently and surreptitiously obtained". This was denied in the written statement, and in the evidence no reference was made to fraud or any irregularity in obtaining the decree. Plaintiff No. 1 who was examined as the first witness for the plaintiffs, confined his deposition in examination-in-chief to the execution proceedings, denying the service of the processes and knowledge of the sales. Questioned about the decree in question he merely denied knowledge of it but did not suggest fraud. This may be because he was a minor at the time the decree was obtained and therefore not likely to have any direct knowledge. This observation does not apply to Medni Prasad Singh (P. W. 4) who according to his evidence was in the service of Dalip Narayan at the time when the suit was instituted and the decree was obtained. He mentions the decree without suggesting that there was anything irregular or fraudulent in the manner in which it was obtained and then goes on to say that the decree was executed fraudulently. The same is the case with Ram Kishun Singh (P. W. 11) an old servant of the plaintiffs' family who after mentioning that he was the karpardaz of the family from the time of the father of plaintiff No. 1 and used to go to Dalip Narayan for demanding a rendering of accounts every year, continues; "No process of execution was served according to law." The other witnesses examined to prove fraud similarly confined their depositions to the execution proceedings (P. Ws. 2, 3 and 5 to 10).

(7) The circumstances I have set out explain why the first ground proceeded on the basis that the permission of the Court to enter into the compromise has not been proved. In my opinion this is the wrong approach to the question. Under the law, when a minor is concerned as a party to a proceeding in Court and compromise is proposed, it is the duty of the Court to look after the minor's interest. The Code, therefore, prescribes that the guardian

ad litem of a minor must obtain the permission of the Court before entering into the compromise. When the question of the regularity of the compromise arises subsequently the presumption under S. 114, Evidence Act, is that the Court performed its duty, the onus of proof falls on the party which asserts that permission was not given by the Court. There is nothing in the present case to transfer that onus to the defendants. A reference has been made to the fact that the rent suit was instituted in February for arrears of rent for 1336 to 1338 Fasli though the year 1338 Fasli had not yet ended. Exhibit L which is the Suit Register merely mentions the years to which the claims relate. It may be that the claim did not relate to the whole of the year 1338. In this connection, it is relevant to note that, whereas the claim was laid at Rs. 1654, the suit was compromised for Rs. 1524. Further plaintiff No. 1 admits in his evidence that no payment was made of rent due on account of the bakasht land. This suggests that there was a basis for the claim in the suit and that the compromise was not unreal. The mere fact that the claim was exaggerated is not enough to transfer the onus to the defendants.

(8) In support of his second ground the learned Advocate General stressed the difference between Ss. 60 and 62, Transfer of Property Act. Section 60 provides that at any time after the principal money has become due the mortgagor has a right on payment or tender of the mortgage-money to require the mortgagee, (a) to deliver to the mortgagor the mortgage deed, (b) where the mortgagee is in possession, to deliver possession thereof to the mortgagor, and (c) to retransfer the mortgaged property to him or to register an acknowledgment that the mortgagee's interest in the property has ceased. This right, the section defines, is the right to redeem. As against this S. 62 provides in the case of a usufructuary mortgage that the mortgagor has a right to recover possession of the property with all the relevant documents: (a) Where the mortgagee is authorised to pay himself the mortgage-money out of the usufruct, when such money is paid and (b) where the mortgagee is authorised to pay himself only a part of the mortgage-money, when the term prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders the mortgage-money or the balance thereof or deposits it as provided in the Act.

(9) A suit under this section is really a suit by the owner to recover possession of the property on his title, though from its analogy to a redemption suit and for want of a better term it is generally called a suit for redemption. The contention of the learned Advocate-General is that till the title reverts to the mortgagor by the mortgage dues being satisfied as aforesaid the mortgagor has no interest in the property and therefore by the execution sales in this case no interest passed to the decree-holder auction-purchaser.

(10) The answer to the contention is two fold. First of all, I do not think that the mortgage in question was a pure usufructuary mortgage. I have referred above to 180 bighas 15 kathas of bakasht land of which the mortgagors retained possession, agreeing in respect of it to pay to the mortgagee the rent shown as due on account of it in the landlord's jamabandi. This area lay within the tauzis 838 and 840 both of which were the subject-matter of the mortgage. These touzis were hypothecated "together with kamat khudkasht & bakasht land, etc." The mortgage, therefore, covered this area. The sadhawa patawa describes the land as khudkasht (a word used loosely for bakasht) & notes that it has been "recorded as nakdi kaimi in the name of Thakur Prasad". Evidently the mortgagors regarded the land as the bakasht land of the mortgagors and were giving a description of the entries in the jamabandi for fixing its identity and for fixing the payment which was to be made to the mortgagee on account of the retention of this land in the possession of the mortgagors. It is thus clear that under the mortgage the mortgagee was not entitled to possession of the entire mortgaged property.

(11) Secondly, I cannot agree that when the owner of property hypothecates that property by a usufructuary mortgage he ceases to have any interest in that property until the mortgage-debt is satisfied in due course and he is in a position to sue for recovery of possession under Section 62, Transfer of Property Act. — 'Ram Prasad v. Bishambhar Singh', A.I.R. 1946 All. 400 which has been relied upon is not authority for this proposition. The ownership of property connotes a bundle of rights in respect of that property. In a transaction of mortgage the owner of that bundle of rights transfers some of those rights to the mortgagee. The remainder of that bundle of rights still remains with him and can be transferred. So long as the usufructuary mortgage continues however the owner by reason of the mortgage is deprived of his right to immediate possession of that property. It is this right which he recovers when in course of time, the mortgage-debt is satisfied or when after the time prescribed for payment of the mortgage-money he makes the necessary deposit. This is the proposition enunciated by Braund, J. when he observes:

> "At the moment when the rents and profits of the mortgaged property sufficed to discharge the principal secured by the mortgage, the mortgage came to an end and the correlative right arose in the mortgagor to recover possession of the property".

(12) With reference to his third ground the learned Advocate-General points out that, whereas the area 180 bighas 15 kathas was the bakasht land of the plaintiff No. 1 and his father, it has been described in the sale certificate (Ext. K (1)) as "kaemi occupancy nakdi jot land". He contends that no such right existed in the judgment-debtors and so no interest passed by the sale. He further points out that as regards this property no evidence has been given that the auction-purchasers obtained delivery of possession through the Court, and that on their side there is evidence that the plaintiffs are in possession of it (P. Ws. 1, 3, 7, 8). In my opinion, the consideration of the points raised is not relevant to the decision of this suit. This area of land lies in touzi Nos. 838 and 840 and was held by the proprietors as their bakasht. The proprietary interest was mortgaged under the sadhawa patawa deed and under a lease back the mortgagors were permitted to continue in possession of this land. On the 31st March 1932 the proprietary interest of the mortgagors in tauzis 838 and 840 was sold and passed to the mortgagee. The mortgagors were however allowed to continue in possession of the land. Their interest in it was described by the mortgagor as "kaemi occu-

pancy nakdi" when he put up the property to sale in February 1934 (vide Ex. K (1)). This indicates that after the purchase of tauzis Nos. 838 and 840, the mortgagee treated the mortgagors as tenants holding the land under him as proprietor. The remaining proprietary interest of the mortgagors in the mortgaged property passed to the mortgagee when he purchased tauzis Nos. 987 and 8944. By this transfer the entire property mortgaged vested in the mortgagee and the mortgage was extinguished. After that the interest, if any, which the mortgagors still retain in respect of the area of 180 bighas 15 kathas would not entitle them to sue for redemption of the mortgage. It is therefore unnecessary to determine what interest the mortgagors retained in the property after the sale of the tauzis 838 and 840, whether that interest was affected by the sale on the 15th February 1934, and whether the plaintiffs are or are not in possession of the land.

(13) In passing our attention has been drawn to the fact that in support of the purchases of the mortgagors' interest in tauzis Nos. 987 and 8944 what is produced is not the sale certificate but only the writ of delivery of possession (Ext. G) and the entry in the Register of the Suits relating to the execution case in which the sale was held (Ext. L). The fact of the sale, however, was admitted in paragraph 4 of the plaint which I have cited above. There the plaintiffs spoke of having come to know that in execution of his decree defendant No. 1 "purchased all the said jote land and property let out in sadhawa patawa." This was also admitted at the trial for the Subordinate Judge observes in the judgment:

> "The plaintiffs do not deny the purchase of the properties in question by the defendant No. 1 in execution of his rent decrees against them. But they attack the purchase on the ground that it comes within the mischief of O. XXXIV, Rule 14."

(14) This makes it clear that only the legal effect and not the factum of the sales was denied. It was in these circumstances that the evidence adduced by the defendants to prove the sale was accepted by the Court. It is not possible at the appellate stage to put the defendants to strict proof of the purchase. A full description of the property is given in Ext. G. It tallies with the description in the sadhawa patawa deed. In these circumstances there is no doubt about the identity of the property sold.

(15) For the reasons set out above the appeal must fail. The result is that for a small amount due on account of the rent for the bakasht land the mortgagors have lost their valuable property. I would not penalise them further by saddling them with costs. I would therefore dismiss the appeal and direct that the parties bear their own costs of the appeal.

(16) LAKSHMIKANTA JHA C. J.: I agree.

B/V.S.B. Appeal dismissed.

A. I. R. 1952 PATNA 472

DAS J.

Gouri Shanker Singh and another, Appellants v. Ram Singhasan Singh and others, Respondents.

A. F. A. D. No. 1990 of 1948, D/- 8-5-1952.

Civil P. C. (1908), S. 11 — Scope — Identity of subject matter and causes of action — Essentials of res judicata.

Nothing in S. 11 of the Code has the effect of abrogating the general principles of res judicata which forbid the re-opening of matters once decided. (Para 5)

The principle of res judicata does not depend on whether the causes of action in the two suits are identical; causes of action in the two suits may be different, but the test is whether the matter directly and substantially in issue is the same in both suits and whether the parties are the same or the suit is between parties claiming under them and litigating under the same title. (Para 5)

Hence, the decision of a competent Court in a previous suit between A and B that B had no title to the plot in suit would operate as res judicata in a subsequent suit for partition brought by the successor in interest of B against A. AIR 1932 Cal 162 and AIR 1951 Pat 595, Ref. (Para 5)

Anno: C. P. C., S. 11 N. 2, 3, 5, 72, 73.

B. C. De and J. C. Sanyal, for Appellants; Lalnarayan Sinha, I. B. Singh, Dasu Sinha and T. N. Sinha, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('22) AIR 1922 PC 241: (48 Cal 460 PC) 6
('32) AIR 1932 Cal 162: (136 Ind Cas 604) 5
('51) 30 Pat 377: (AIR 1951 Pat 595) 5

JUDGMENT: This is a second appeal by the plaintiffs and arises out of a suit for partition. By the suit, the appellants, who are two brothers, claimed partition of their half share in Khewat No. 1/17 of village Adampur Tarari, Patti Kalan, Tauzi No. B. No. 1. The case of the appellants was that khewat 1/17 represented a separate and distinct 'takhta' of 6 dams, 13 cowries and odd interest in which the share of the appellants was 3 dams, 6 cowries and odd. The appellants claimed this share in the following way. It was alleged that there were two brothers called Modnarayan and Rampratap, and each of these two brothers had half share in the said 'takhta'. The proprietary interest of Rampratap was sold in a certificate sale held on the 18th of September, 1933 and was purchased by one Sk. Latif Hussain. The sale certificate showed that 6 dams, 9 cowries and odd share in village Adampur Tarari, Patti Kalan, relating to tauzi B. No. 1, separate account No. 36, was sold to Sk. Latif. Latif in his turn sold the purchased interest to the appellants by means of a sale deed dated the 7th of December, 1933. The appellants asked for mutation of their names in Register D and were recorded in respect of 4 dams, 11 cowries and odd share. In the record of rights finally published in 1914, Rampratap and one Mahabir were recorded as owners of the khewat, the khewat being khewat No. 1/17 of khewat, Part II, of revenue free lands. Rampratap's interest was shown as 3 dams, 6 cowries and odd, and Mahabir Mahto's interest as 3 dams, 6 cowries and odd.

In 1912, the interest of Mahabir was given in 'thica' to Rampratap for a term of five years, and in khewat Part III Rampratap was recorded as the 'thicadar' in possession, Mahabir Mahto being shown as the landlord under whom the thicadar held. I may here state that the patti in question, namely khewat No. 1/17, comprised an area of 5.51 acres and there were

three plots in the patti recorded in two holdings, holding No. 204 and holding No. 205; holding No. 204 was a holding of bakasht lands comprised in two plots, 1237 and 1238, 1237 having an area of 2.77 acres and 1238 an area of 2.64 acres. Holding No. 205 comprised of one plot only, plot No. 550, which was held by a raiyat on a small rent of Re. 1/- or so. On the strength of the entry made in Register D and the entries in the record of rights and on the basis of the purchase made by the appellants from Sk. Latif, the appellants founded their title and asked for partition on the plea that on the 30th of November, 1945, the respondents refused a demand for partition.

(2) Three sets of written statements were filed, one by defendant No. 1, the second by defendant No. 3 and the third by defendants 2, 4, 5 and 6. The case of these defendants, who are respdts. before me, was that Mahabir Mahto alone was the owner of the khewat in question, and on the 19th of August, 1926, Mahabir transferred his interest by means of a sale deed to the respondents. Subsequently, there was a private partition as a result of which one of the respondents got plot No. 1238 and one bigha out of plot No. 1237 and another respondent got the remaining area of plot No. 1237. It was stated that the other respondents had no concern with the lands. It was also alleged that Rampratap Singh, who was a thicadar under Mahabir Mahto, got certain wrong entries made during the survey proceedings. On the 21st of June, 1924, Rampratap executed a deed of ekrarnama by which he admitted the mistakes which had been made in recording the interest of the parties in the survey proceedings and also admitted that plot No. 1237, with an area of 2.77 acres, was wrongly recorded in his name though the plot belonged to and was in possession of Mahabir Mahto.

Subsequently, in 1932, there was a suit in the court of the Additional Munsif of Aurangabad in which the respondents were the plaintiffs and Rampratap Singh was a defendant. The suit related to the other plot, namely plot No. 1238, and it was held in the presence of and after contest by Rampratap, that the respondents were entitled to plot No. 1238. I may here mention that the judgment, exhibit C, shows that Rampratap was of unsound mind at the time and the suit was contested by a pleader guardian who represented Rampratap. It is worthy of note that both the deed of agreement and the decision in the title suit were before the purchase by Sk. Latif. The respondents claimed that they had been since a long time in exclusive possession by private arrangement as stated above. Put briefly, the case of the respondents was that the appellants neither had title nor possession of the property in question.

(3) The learned Subordinate Judge accepted the case of the respondents and held that the appellants had neither title nor possession. He further held that with regard to plot No. 1238, the suit was barred, on the principle of res judicata, by reason of the decision given in Title Suit No. 38 of 1932. The learned District Judge, who heard the appeal, affirmed the finding of the learned Subordinate Judge on the point of title and possession, though he expressed the view that the question of possession was not very material, because if the appellants had title, the possession of one cosharer would be deemed to be the possession of all. On the issue of res judicata, the learned District Judge did not agree with the learned Subordinate Judge, but he thought that the finding in Title Suit No. 38 of 1932 could be used as a piece of evidence and on that footing he held that the appellants had failed to prove their title with regard to plot No. 1238. With regard to plot No. 1237, the learned District Judge held that the admission of Rampratap made in the deed of ekrarnama in 1924 was binding on the appellants.

(4) Mr. B. C. De appearing for the appellants has contended that the finding of the courts below on the question of title is vitiated by reason of the wrong construction which they put on certain documents of title. The two documents, which can be called documents of title for the appellants, are the sale certificate in favour of Sk. Latif and the sale deed executed by Sk. Latif in favour of the appellants. The learned District Judge has pointed out that these two documents do not in express terms refer to Khewat No. 1/17. They specify the interest sold as 6 dams, 9 cowries and odd share in village Adampur Tarari Patti Kalan, Touzi B No. 1, separate account No. 36, Lakheraj No. 759. The learned District Judge thought that the appellants had failed to connect the interest sold by the aforesaid two documents with the interest recorded in the khewat. It is contended before me that the learned District Judge was wrong in this view. Mr. B. C. De has taken me through the entries in the khewat, both part II and Part III. He has also referred me to the entries made in Register D.

So far as the entries in the khewat are concerned, there seems to be some ambiguity. In khewat Part II relating to khewat No. 1/17, both Rampratap and Mahabir are recorded as owners to the extent of half each, the entire interest being 6 dams, 13 cowries and odd. The area of the lands under the khewat is shown as 5.51 acres. In Khewat Part III, however, Rampratap is recorded as the thicadar in respect of the entire area of 5.51 acres and Mahabir Mahto is shown as the landlord under whom the thicadar holds. The period of the thica is shown as 1320 to 1324 Fasli. In the khatian relating to the land, holding No. 204, which is the holding for the two plots 1237 and 1238, Rampratap is again shown as the thicadar in possession.

So far as Register D is concerned, the appellants are recorded in respect of 4 dams, 11 cowries and odd share. Learned Counsel for the appellants has explained this entry in the following way. It is pointed out that Rampratap was recorded in respect of three khewats, Khewat No. 1/10, khewat No. 1/12 and khewat No. 1/17. The total interest of Rampratap in these khewats was 7 dams and odd. Out of this share of 7 dams and odd, 3 dams and odd were purchased by one Ramautar Rai from whom defendant No. 3 purchased the said interest; therefore, defendant No. 3, who also applied for mutation, was recorded in respect of 3 dams, and odd, and the appellants, who had purchased 6 dams and odd interest from Sk. Latif, were recorded in respect of the remaining share of 4 dams and odd.

(5) The learned District Judge rightly pointed out, however, that the entries made in Register D or in the khewats did not create any title in favour of the appellants. Moreover, the entries in the khewats were ambiguous and Rampratap had himself admitted in the ekrar-

nama of 1924 that some of the entries were not correctly made. The question of title in this case has to be considered with reference to the two documents of title which the appellants produced, namely, the sale certificate of Sk. Latif (Exhibit 6) and the sale deed executed by Sk. Latif (Exhibit 1). Assuming that these two documents relate to the interest which Rampratap had in village Adampur Tarari Patti Kalan, the difficulty in the way of the appellants arises out of the admissions made by Rampratap himself in the ekrarnama of 1924 and the decision given in Title Suit No. 38 of 1932. Rampratap had clearly admitted that he had no title to nor possession of plot 1237, and the entry in the record of rights with regard to that plot was wrong. In Title Suit No. 38 of 1932 it was decided in the presence of Rampratap that plot No. 1238 did not belong to him, after the expiry of the thica.

There has been some argument before me whether the decision in Title Suit No. 38 of 1932 operates as res judicata. The learned District Judge found that the decision did not operate as res judicata, because he held that the causes of action in the two suits were different. I do not think that the principle of res judicata depends on whether the causes of action in the two suits are identical; causes of action in the two suits may be different, but the test is whether the matter directly and substantially in issue is the same in both suits and whether the parties are the same or the suit is between parties claiming under them and litigating under the same title. Mr. B. C. De appearing for the appellants met the plea of res judicata on a ground different from that of the learned District Judge. Mr. B. C. De contended that the principle of res judicata as embodied in section 11, Civil Procedure Code, is that the decision in the former suit will operate as res judicata if the court which gave the decision in the former suit was competent to decide the subsequent suit. It is contended that the Munsif who decided the former suit was not competent to decide the subsequent suit; therefore there is no bar of res judicata. This was the argument of Mr. B. C. De.

Mr. B. C. De, however, conceded that if the view taken in — 'Priyanath Chakraverty v. Kalicharan Chakravarty', A.I.R. 1932 Cal. 162 be correct, then the decision in the former suit, so far as plot No. 1238 is concerned, will operate as res judicata in the subsequent suit; because the Munsif who decided the former suit would be competent to try the subsequent suit with regard to plot No. 1238 having regard to its value, as pointed out by the learned Subordinate Judge. The decision in — 'Priyanath Chakravarty's case', appears to have been approved by a Division Bench of this court in — 'Gokaran Prasad v. Chhotey Narayan', 30 Pat. 377 in which Lakshmi Kant Jha C. J. quoted the decision as laying down:

> "Where a decision had been given by a competent court in a previous suit regarding part of the claim in the subsequent suit, and where both the suits are between the same parties and the causes of action relating to part of the claim are the same, that much part of the claim should be excluded from the subsequent suit being barred by the principle of res judicata."

I think that the expression "causes of action" used in this connection means that the matter in dispute is substantially the same, and the parties are the same or litigating under the same title. In the former suit, Rampratap claimed that he had title to plot No. 1238; in the present suit also the successors-in-interest of Rampratap are claiming that they have title to plot No. 1238. The decision given in 1932 was that Rampratap had no title. Assuming, however, as Mr. De contends that section 11, Civil Procedure Code, does not in terms apply to such a case, Reuben, J. pointed out in — 'Gokaran Prasad's case', that nothing in section 11 of the Code of Civil Procedure has the effect of abrogating the general principles of res judicata which forbid the re-opening of matters once decided; therefore, the appellants cannot now re-agitate the same matter and claim plot No. 1238.

(6) The position therefore comes to this; before Sk. Latif had purchased the interest of Rampratap in 1938, Rampratap had himself admitted that he had no interest in plot No. 1237 and it had been decided by a court of competent jurisdiction that Rampratap had no interest in plot No. 1238. I fail to see how after the aforesaid admission and decision the appellants can claim any title on the strength of their purchase from Sk. Latif. I am saying this irrespective of the entries in Register D and the khewats. The learned District Judge also has taken the same view, though with regard to the decision in Title Suit No. 38 of 1932 he thought that the decision did not operate as res judicata. He used the finding of the learned Munsif in the former suit as a piece of evidence. There is high authority in support of the view of the learned District Judge. In — 'Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy', AIR 1922 P C 241, it was observed:

> "Their Lordships do not consider that this will be found an actual plea of res judicata, for the defendants, having succeeded on the other plea, had no occasion to go further as to the finding against them: but it is the finding of a court which was dealing with facts nearer to their ken than the facts are to the Board now, and it certainly creates a paramount duty on the appellants to displace the finding, a duty which they have not been able to perform."

(7) Some comment has been made before me with regard to two points. It has been pointed out that the sale deed by which the respondents acquired their interest from Mahabir Mahto was not produced. Secondly, it is pointed out that the learned District Judge did not give proper effect to Exhibit 9, a deed of partition of the year 1904. One may feel a little surprised that the respondents did not produce their own sale deed, but the primary duty of proving their title lay on the appellants and I do not think that in the circumstances of this case, the non-production of their sale deed by the respondents can improve the position of the appellants in any way. As to the partition deed of 1904, all that it shows is that several co-sharers including Rampratap and Modnarayan partitioned their property and Rampratap and Modnarayan got four pies share out of one anna, which would be equivalent to 6 dams and odd, as recorded in Khewat No. 1/17. But the partition deed of 1904 does not and cannot supersede the admission made by Rampratap in 1924 and the decision given by a court of competent jurisdiction in 1932.

(8) In my opinion, the courts below correctly found that the appellants had no title to the

property which they claimed, and I do not think that the finding is vitiated by reason of any misconstruction of documents of title. On the question of possession, I think that the view of the learned Subordinate Judge was more correct, namely, that the rule that possession of one co-sharer is the possession of all co-sharers will not apply in the present case. With regard to the two plots, 1237 and 1238, there was undoubtedly an ouster of Rampratap in the sense that he was consciously, and to his knowledge, excluded. With regard to the raiyati plot No. 550 also, neither Rampratap nor the appellants were ever in possession by collection of rent, except when Rampratap sued as a 'thicadar'.

(9) I do not propose, however, to go into the finding of possession in any great detail, because I am satisfied that the courts below rightly found that the appellants had failed to prove their title to the property in respect of which they claimed partition.

(10) My conclusion is that the appeal is without merit and must be dismissed with costs.

B/K.S. Appeal dismissed.

A. I. R. 1952 PATNA 475

DAS AND RAMASWAMI JJ.

Banarsi Prasad, Petitioner v. Awadh Bihari Dass and another, Opposite Party.

Civil Revn. No. 194 of 1950, D/- 16-7-1952.

Civil P. C. ((1908), S. 11 — Suit for possession and mesne profits from date of suit to date of delivery — Decree silent as to mesne profits — Subsequent suit for mesne profits is not barred.

Where a decree for possession is silent as regards the mesne profits which had accrued between the date of the institution of the suit and the date of delivery of possession even though it had been claimed in the suit and an issue regarding it had been framed but no finding given, a second suit would lie for recovering such mesne profits and would not be barred by the provisions of S. 11. AIR 1931 Pat 1, Foll. (Para 3)
Anno: Civil P. C., S. 11 N. 72, 101.

Chandi Prasad, for Petitioner; K. Deyal, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras
('99) 21 All 425: (1899 All WN 153 FB) 4
('20) 44 Bom 954: (AIR 1920 Bom 39) 4
('38) ILR (1938) Bom 655: (AIR 1938 Bom 231 FB) 4
('30) 57 Cal 381: (AIR 1929 Cal 566) 4
('18) 41 Mad 188: (AIR 1918 Mad 484 FB) 3
('31) 12 Pat LT 127: (AIR 1931 Pat 1) 3, 5

RAMASWAMI J.: The question to be determined in this case is whether the suit brought by the plaintiffs claiming damages for use and occupation of a house from the defendant is barred by the principle of 'res judicata'.

(2) The plaintiffs claimed that they had purchased plot No. 509, khata No. 152, by virtue of a registered kebala and thereafter the defendant obtained lease of the house on a monthly rental of Rs. 10. As the defendant did not pay any rent the plaintiffs instituted a suit in 1945 in which they claimed arrears of rent and also asked that the defendant should be ejected. There was also a claim for future mesne profits. The Munsif who heard the suit decreed it in part holding that the plaintiffs had title and they should get a decree for ejecting the defendant from the house. He however disallowed the claim for arrears of rent. There was a direction that the defendant should vacate the house within three months from the decree failing which the plaintiffs should recover possession through Court. There was no mention in the judgment or decree about the claim for future mesne profits which the plaintiffs had made. In spite of the decree the defendant did not vacate the house but on 1st May, 1949, (1948?) the plaintiffs obtained dakhal dehani. The plaintiffs have now filed a suit against the defendant claiming a sum of Rs. 190 as damages for use and occupation for the period from 16th July, 1947, to 30th April, 1948. The defendant contested the claim mainly on the ground that it was barred by 'res judicata'. The learned Munsif disallowed the objection and granted the plaintiffs compensation at the rate of Rs. 10 per month for the period in question.

(3) In support of this rule learned counsel for the petitioner addressed the argument that the Munsif has committed an error of law in allowing the claim of the plaintiffs and that on a correct interpretation of Explanation V of section 11 of the Code of Civil Procedure the learned Munsif ought to have held that the claim was barred on principle of 'res judicata'. Learned counsel also referred to O. 20, R. 12 of the Code of Civil Procedure which provides that where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree (a) for the possession of the property; (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit; (c) directing an inquiry as to rent or mesne profits from the institution of the suit until the delivery of possession to the decree-holder.....It was contended on behalf of the petitioner that the word "may" in O. 20, R. 12, should be construed in an imperative sense and there was no discretion in the Court at all and if the party made out a case and established it on merits the Court was bound to award a decree for mesne profits from the date of the institution of the suit up to the date when possession of the property was delivered to the decree-holder.

The argument of the learned counsel is in substance the argument which commended itself to Das, J. in — 'Harnandan Rai v. Baliram Prasad', 12 Pat LT 127. But the two other learned Judges, Fazl Ali J. and Wort J. disagreed with the opinion of Das, J. holding that where a decree for possession is silent as regards the mesne profits which had accrued between the date of the institution of the suit and the date of delivery of possession, and which had been claimed in the suit, a second suit would lie for recovering such mesne profits and would not be barred by the provisions of section 11 of the Civil Procedure Code. It was pointed out by Fazl Ali, J. in his judgment that the whole question as to whether a second suit for mesne profits is barred or not would have to be decided with reference to Explanation V of S. 11 of the Code. The judgment of Fazl Ali, J. was based on the decision of the Full Bench in — 'Doraisami Aiyar v. Subramania Aiyar', 41 Mad 188 (FB) in which Wallis, C. J. adopted the following interpretation of the words "relief claimed" as used in Explanation V, S. 11:

"The word 'relief' in the explanation means relief arising out of a cause of action which had accrued at the date of suit and on which the suit was brought, and did not include re-

lief such as mesne profits accruing after the date of suit as to which no cause of action had then arisen, but which the Court was nevertheless expressly empowered to grant. The explanation having been reproduced in exactly the same words, the presumption is that it was intended to have precisely the same effect. I do not find any sufficient indication to rebut this presumption in the fact that sections 211 and 212 of the old Code were amalgamated to form Order XX, R. 12. The change introduced by the new rule is that the award of mesne profits in all cases is to be by preliminary decree, and that when ascertained they are to be embodied in a final decree, whereas under sections 211 and 212 they were to be ascertained in execution. This change does not appear to me to affect the construction of Explanation V to S. 11, nor do I think it is affected by the omission in S. 47 of the new Code of the proviso to the corresponding section 244 of the old Code."

Fazl Ali J. adopted the interpretation of the words "relief claimed" made in the Madras case and accordingly held that a suit for mesne profits will not be barred even if such mesne profits may have been claimed but not expressly granted in the first suit. Wort, J. expressed himself in agreement with the judgment of Fazl Ali, J. and held that the plaintiffs in that case were entitled to recover mesne profits from the date of the institution of the suit up to the date when possession was delivered. In accordance with this view of the law we are bound to hold in this case that the claim of the plaintiffs for damages for use and occupation for the period from 16th July, 1947, to 30th April, 1948, is not barred.

(4) It is necessary to add that there is a catena of decisions of other High Courts to the same effect. See for instance, — 'Bipulbehari v. Nikhil Chandra', 57 Cal 381; — 'Ramdayal v. Madan Mohan Lal', 21 All 425 (FB) and — 'Gangadhar Gopalrao v. Shripad Annarao', ILR (1938) Bom 655 (FB) in which a previous decision — 'Atmaram Bhaskar v. Parashram Ballal', 44 Bom 954, was expressly overruled by the Full Bench.

(5) Learned counsel for the petitioner attempted to distinguish the present case on the ground that a specific issue had been framed in the previous suit whether the plaintiffs were entitled to get a decree for arrears of rent and for future mesne profits. In dealing with this issue the Munsif held that the plaintiffs were not entitled to a decree for arrears of rent. But there is no finding whether the plaintiffs are entitled to future mesne profits or not. Both the judgment and decree are absolutely silent on this point.

It was pointed out on behalf of the petitioner that in — 'Harnandan Rai v. Baliram Prasad', 12 Pat L T 127, the Court did not award future mesne profits observing that the parties had not joined issue on the point and so the question was left open. In my opinion, the distinction pointed out is not material. The circumstance that the judgment is silent as to future mesne profits or that the Court had expressly left it open would not make any difference in the application of the principle of 'res judicata'. I think that the present case falls clearly within the ambit of the principle laid down in '12 Pat L T 127', by the authority of which we are bound.

(6) For these reasons I hold that this application fails and must be dismissed with costs. Hearing fee two gold mohars.

(7) DAS, J.: I agree.

B/R.G.D. Revision dismissed.

A. I. R. 1952 PATNA 476

RAI J.

Bariar Singh, Appellant v. Durga Gir and others, Respondents.

A. F. A. D. No. 258 of 1948, D/- 29-7-1952.

(a) Civil P. C. (1908), S. 96 — Suit for redemption — Alternative claim for damages — Alternative claim granted in trial Court — Appeal by plaintiff.

In a suit for redemption, even if the plaintiff has prayed for an alternative relief for damages and has been granted one, he is not estopped from filing appeal for getting a decree for redemption. AIR 1946 Pat 231, Foll. (Para 7)

Anno: C. P. C., S. 96 N. 6.

(b) T. P. Act (1882), S. 60 — Mortgage — Redemption — Mortgage of holding — Mortgaged property sold for default of mortgagee for rent and other charges — Property purchased by rehandars themselves — Subsequent sale by rehandars — Transferee making no enquiry as to title of transferor — Transferee cannot resist claim for redemption by mortgagor.

Where certain holding is sold for default of rent and other charges by the usufructuary mortgagees and was in fact purchased by rehandars themselves, a subsequent purchaser from rehandars, to whom the original rehan bond was handed over and who could therefore see who was liable to pay the rent for the default of which the holding had been sold, but who has made no enquiry as to the title of the transferor to the property in suit, cannot resist the claim of the mortgagor, for redemption of the holding. (Para 8)

Anno: T. P. Act, S. 60 N. 23 Pt. (8).

A. B. Saran, Tarkeshwar Nath and Jhaneshwar Singh, for Appellant; G. P. Das, R. P. Sinha and K. B. N. Singh and S. K. Sarkar, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('46) 25 Pat 1: (AIR 1946 Pat 231) 7
('51) 30 Pat 391: (AIR 1951 Pat 566) 6
('52) AIR 1952 Pat 286 6

JUDGMENT: This appeal by the plaintiff is directed against the judgment and decree passed by the Additional District Judge of Shahabad reversing those of the third Additional Subordinate Judge of the same place.

(2) The facts relevant for the decision of this appeal may shortly be stated as follows. The plaintiff filed the suit for redemption in respect of 3.93 acres of land situated in village Doma Dehri Tauzi No. 3309 of the Shahabad Collectorate. His case was that he and the defendants third party are the raiyats of this holding. On the 23rd of May 1932 an area of 3 bighas 15 kathas and 17 dhurs out of the entire holding of 3.93 acres was given in usufructuary mortgage by the plaintiff and defendant No. 7 to Ramnandan Gir, father of defendants 2 to 4, and Durga Gir, defendant No. 1. Defendant No. 5 is nephew of defendant No. 1. The properties given in rehan continued to remain in possession of the family of defendants 1 to 5. According

to the terms of the rehan bond the rent and other charges in respect of the holding were payable by the rehandars.

Sometime in 1934 the plaintiff came to know that on account of default of the mortgagees the holding had been advertised for sale at the instance of the landlord. The plaintiff was also in need of some more money to defray other expenses. He, therefore, approached defendant No. 1 with whom an agreement was reached, according to which the plff. executed a handnote for Rs. 225/- in favour of defendant No. 5 at the direction of defendant No. 1 who agreed to discharge the entire decretal dues for which the holding had been advertised for sale. For satisfaction of the interest due on the handnote and for satisfaction of a portion of the principal amount the plaintiff gave the remaining area of the holding in rehan to defendant No. 1. In pursuance of the above agreement an application was filed in the certificate proceedings by defendant No. 1 for permission to deposit the entire money, but due to the fraud of the defendants 1st party the holding was sold and purchased in the name of defendant No. 5.

The case of the plaintiff further was that in order to put obstacles in his way defendants 1 to 5 brought into existence a collusive sale deed dated the 5th of May 1943 in favour of defendant No. 6 in respect of the entire area. According to the case of the plaintiff he went to tender the rehan money to the mortgagees but as they did not accept it he was compelled to bring the present suit. In the suit the plaintiff claimed a relief for redemption of the entire area, or in the alternative for damages to the tune of Rs. 4200 from defendants 1 to 6.

(3) The suit was contested by defendants first and second party. According to the case of the constesting defendants, it was the mortgagors who are liable to pay the rent etc., of the holding which was sold by auction due to the default of the mortgagors themselves. They denied the alleged agreement by which the defendants first party are said to have undertaken to pay the decretal amount and save the holding from being sold. They further pleaded that defendant No. 5 was separate from defendants 1 to 4 and that defendant No. 6 was not a farzidar for the rehandars. Defendant No. 6 claimed to be a bona fide purchaser for value of the holding in question. They further pleaded that the suit was fit to be dismissed.

(4) The trial court dismissed the suit. It held that defendants 1 to 5 were members of a joint Hindu family and that the purchase by defendant No. 5 was in fact a purchase by the rehandars themselves. The trial court did not accept the case of agreement set up by the plaintiff by which the mortgagee had agreed to discharge the entire decretal dues and save the holding from being sold. He also held that defendant No. 6 was not a farzidar for the mortgagees. On these findings the suit was dismissed.

(5) The plaintiff thereafter went in appeal. The appellate court also confirmed the finding of the trial court to the effect that defendants 1 to 5 were members of a joint Hindu family and the purchase in the name of defendant No. 5 at the auction sale was really a purchase by the mortgagees themselves. The lower appellate court believed the case of agreement set up by the plaintiff by which defendant No. 1 had undertaken to save the holding by discharging the certificate dues. It also held that the mortgagees had committed fraud in purchasing the holding in the name of defendant No. 5 who was a member of their joint family. The lower appellate court held that defendant No. 6 was not a farzidar of the mortgagees. It, however, held that as there had been a contributory negligence on the part of the plaintiff by not making an enquiry whether the certificate debt had been discharged by the mortgagees or not, he was entitled to merely damages as against the defendants first party. In that view of the matter, the lower appellate court passed a decree for damages in favour of the plaintiff. The plaintiff has thereafter come up in second appeal to this Court.

(6) The learned Counsel for the plaintiff-appellant contended that on the finding that the certificate sale was brought about by the fraud of the mortgagees who themselves purchased the properties given in rehan in the name of defendant No. 5, who was one of the members of their joint family, the court of appeal below should have held that the equity of redemption owned by the plaintiff had not been extinguished. In support of his contention he relied upon the decisions in the cases of — 'Ram Rup v. Jang Bahadur' 30 Pat 391 and — 'Deo Saran Singh v. Barhu Singh', AIR 1952 Pat 286. The learned counsel for the plaintiff-appellant further submitted that the term for payment of rent etc. as incorporated in the usufructuary mortgage bond in suit was similar to that of the mortgage bond which was under consideration in the case of — 'Deo Saran Singh', abovementioned. Learned Counsel for the appellant further submitted that even if defendant No. 6 be held not to be the farzidar for the mortgagees, he will be deemed to have purchased nothing more than the right of the usufructuary mortgagees, and as such the plaintiff was entitled to get a decree for redemption.

(7) Learned Counsel for the defendant No. 6, on the other hand, contended that his client having been found not to be the farzidar of the mortgagees, the only decree that could have been passed in favour of the plaintiff, namely, a decree for damages against the original mortgagees has been passed by the court of appeal below. According to him, the plaintiff having prayed for an alternative relief and having been granted one, he is estopped from filing the present appeal. In my opinion, there is no substance in this contention. As held in the case of — 'Amir Mahton v. Sheopujan Missir', 25 Pat 1, even if the alternative relief was granted to the plaintiff, he is not debarred from filing this appeal for possession of the properties in suit after redemption.

(8) It was next contended by the learned Counsel that on the finding of the courts below to the effect that defendant No. 6 is not the farzidar of the mortgagees, his possession cannot be disturbed. I am afraid, I am not inclined to accept this argument. As I have held above, defendant No. 6 will be deemed to have purchased the right of the usufructuary mortgagee only, and he cannot be heard to say that he is not bound to give up possession to the plaintiff who is prepared to redeem the mortgage. From the evidence of D. W. 5 brother of defendant No. 6 who has not been examined, it is clear that at the time of sale the original rehan bond was handed over to him. It was the duty of defendant No. 6 to

have looked into the bond and to have seen who was liable to pay the rent for the default of which the holding had been sold. D. W. 5 also admitted in his deposition that he had made no enquiry as to the title of defendant No. 5 to the lands in suit. That being the position, defendant No. 6 cannot, on any ground, resist the claim of the plaintiff for redemption of the properties in suit. In my opinion, the relief for redemption should have been granted to the plaintiff.

(9) The result is that the judgments and decrees passed by the courts below are set aside, the suit for redemption is decreed and this appeal is allowed with costs throughout. The costs of both the courts below will be payable by defendants 1 to 5 and the costs of this court will be payable by defendant No. 6. The plaintiff is held entitled to get possession of the properties in suit after deposit of Rs. 1525/- to the credit of the heirs of defendant No. 6 in the trial court within three months from today.

B/V.B.B. Appeal allowed.

A. I. R. 1952 PATNA 478

DAS AND RAMASWAMI JJ.

Sir Kameshwar Singh, Petitioner v. Ram Prasad Sharma and others, Opposite Party.

Civil Revns. Nos. 110 and 111 of 1951, D/- 25-7-1952.

Civil P. C. (1908), Ss. 151, 152 and 115 — Parties having full knowledge of decree — Setting aside of decree on ground of being erroneous or inequitable.

The Court cannot override the express provisions of law by a resort to inherent powers under S. 151, nor can the Court ignore the specific provisions for dealing with a case by a resort to inherent jurisdiction either under S. 151 or S. 152. Where the finding of the Judge is that the opposite parties had full notice and knowledge of the suit which resulted in the preliminary decree as also of the proceeding which resulted in the final decree for mesne profits, it is not open to his successor to decide the case as though he were the Court of appeal. Neither S. 151 nor S. 152 gave the jurisdiction to set aside the decree on a finding that the decree was erroneous and inequitable. The Judge was in error and acted in excess of his jurisdiction in setting aside the decree passed by his predecessor. Case Law Rel. on. (Paras 4, 6)

Anno: C. P. C., S. 151 N. 2, 4; S. 152 N. 3; S. 115 N. 10.

B. C. De and S. P. Srivastava, for Petitioner; Dr. Sir Sultan Ahmad, A. N. Lal and R. D. Prasad Singh, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras
('30) AIR 1930 Cal 387: (126 Ind Cas 779) 4
('20) 43 Mad 94: (AIR 1920 Mad 640 FB) 4
('22) 1 Pat 277: (AIR 1922 Pat 479) 4
('46) AIR 1946 Pat 165: (222 Ind Cas 353) 4

DAS J.: These two applications in revision arise out of an order of the learned Subordinate Judge of Monghyr, dated the 6th of January, 1951, in two miscellaneous cases, namely, Miscellaneous Case No. 41 and Miscellaneous Case No. 42 of 1950, before the learned Subordinate Judge.

(2) The relevant facts are the following: The petitioner before us is the Maharajadhiraj of Darbhanga. The petitioner was the proprietor of a village called Rasulpur Makdum in the district of Monghyr. There is an adjoining diara village called Pundarak in the district of Patna, of which the State of Bihar, opposite party No. 3 before us, is the proprietor. The opposite parties classed together as the first party were lessees of Diara Pundarak, and the opposite parties classed together as the 3rd party were tenants of the Khas Mahal in respect of the lands in question. In 1928 there was a dispute about 125 bighas of land as to whether they lay in the petitioner's village Rasulpur or in village Pundarak. The dispute resulted in a proceeding under section 145, Code of Criminal Procedure. That proceeding terminated against the present petitioner. Soon after there was another dispute regarding a block of 675 bighas of land. There was a proceeding under section 144, Code of Criminal Procedure, which was decided against the petitioner.

In 1934 the petitioner brought a suit for about 800 bighas of land, being Title Suit No. 24 of 1934 in the court of the Subordinate Judge of Monghyr. The suit was primarily one for a declaration of title and recovery of possession: there was also a claim for mesne profits, the nature and details whereof have given rise to some controversy. I shall later deal with that aspect of the matter. The present opposite parties were defendants in the suit, the lessees and tenants being defendants 2nd and 3rd parties and the defendant 1st party was the then Secretary of State for India in Council through the Collector of Monghyr. The suit, it appears, was contested by the Secretary of State alone. On the 28th of May, 1940, there was a compromise and the suit was decreed on compromise against the Secretary of State for India and ex parte against the other defendants. Paragraph 3 of the compromise petition stated:

> "If any part of the land in dispute is ascertained by the surveyor to be within the Raj boundary, Government will pay to the Maharajadhiraj whatever they have realised as profits of this particular land for the past 10 years and up to relinquishment of possession by Government in favour of the Maharajadhiraj."

The Government, however, did not relinquish possession in pursuance of the compromise petition. The result was that the present petitioner executed the decree and got possession delivered by a pleader commissioner on the 20th of April 1943. Thereafter, the present petitioner filed an application claiming mesne profits from the 28th May, 1930 to the 20th of April 1943, and one Mr. Maheshwar Prasad was appointed pleader commissioner for the ascertainment of mesne profits claimed by the petitioner. He submitted his report on the 21st of May, 1946, and in his report awarded mesne profits to the extent of Rs. 6,365/- and odd annas against the Secretary of State and Rs. 1,19,742/- and odd annas against defendants 2nd and 3rd parties, that is, 1st and 2nd opposite parties before us. The defendants did not appear to challenge the findings of the pleader commissioner, & on the 14th of February, 1947, the learned Subordinate Judge accepted the report of the pleader commissioner and passed a final order for mesne profits. Then on the 29th of May, 1950, more than three years after, some of the present opposite parties filed an application for setting aside the ex parte preliminary and final decrees under the provisions

of Order IX, Rule 13, Code of Civil Procedure. On the 2nd of September, 1950, they also filed two applications, purporting to be applications under sections 151 and 152, Code of Civil Procedure, for what they called an amendment of the decrees; in effect they said that the decree for mesne profits was illegal, incorrect and without jurisdiction and should be set aside.

The learned Subordinate Judge dealt together by one judgment the application under O. IX, Rule 13, and the applications under sections 151 and 152, Code of Civil Procedure. By his order dated the 6th January, 1951, he dismissed the application under Order IX, Rule 13, Code of Civil Procedure, holding that the opposite parties before us had full knowledge of the suit and also of the proceeding for the ascertainment of mesne profits. He further found that the application under Order IX, Rule 13, Code of Civil Procedure, was barred by time. He then proceeded to deal with the applications under sections 151 and 152, Code of Civil Procedure, and held that the decree for mesne profits passed by his predecessor in office was erroneous and inequitable. On that finding he came to the conclusion that it was open to him to correct the mistake of his predecessor in the interest of justice, and purporting to act in exercise of the inherent jurisdiction of the court, he vacated the decree for mesne profits.

(3) It is against this order of the learned Subordinate Judge that the two applications in revision are directed. Mr. B. C. De, appearing for the petitioner, has urged two substantial points: firstly, he has contended that the learned Subordinate Judge acted in excess of his jurisdiction in vacating the decree for mesne profits inasmuch as neither section 151 nor section 152, Code of Civil Procedure, gave the learned Subordinate Judge a jurisdiction to sit in appeal over the decision of his predecessor and set aside a decree passed by a court of competent jurisdiction except in accordance with law; secondly, he contended that the learned Subordinate Judge was wrong even on merits in thinking that the decree for mesne profits was erroneous or inequitable.

(4) In my opinion, the first contention of Mr. B. C. De is correct and must be upheld. There are many decisions which have laid down that the court cannot override the express provisions of law by a resort to inherent powers under section 151, Code of Civil Procedure, nor can the court ignore the specific provisions for dealing with a case by a resort to inherent jurisdiction either under section 151 or section 152, Code of Civil Procedure; see — 'Neelaveni v. Narayana Reddi', 43 Mad 94 (F.B.), — 'Ajodhya Mahton v. Mt. Phul Kuer', 1 Pat. 277, — 'Haridas Mukherjee v. Bijay Krishna Das', A.I.R. 1930 Cal. 387 and — 'Sheikh Yaruddin v. B. Das', A.I.R. 1946 Pat 165.

In the case before us the finding of the learned Subordinate Judge is that the opposite parties had full notice and knowledge of the suit which resulted in the preliminary decree as also of the proceeding which resulted in the final decree for mesne profits. If the decree was erroneous, the procedure for getting the decree vacated was by way of an appeal from the decree. If there was any error apparent on the face of the record, the proper procedure was to file an application for review within time. If a fraud was committed which vitiated the decree, it was open to the opposite parties to bring an action on that basis to set aside the decree. If fraud was committed on the court, the position might have been different and in an appropriate case the inherent jurisdiction of the court might be invoked. But there is no finding of fraud in this case; on the contrary, the finding is that the opposite parties knew of the suit and of the application for mesne profits, but they kept quiet and did not choose to contest the application.

That being the position, it seems to me surprising that there should be any occasion for invoking the inherent jurisdiction of the court or for saying that the ends of justice require that a person who was allowed a decree to be passed against him with full knowledge of the suit and proceeding taken against him should be allowed to agitate against the decree by a resort to the inherent jurisdiction of the court. There has been no abuse of the process of the court in this case which would require to be prevented or remedied by a resort to the inherent power of the court. I do not think that section 151 or section 152, Code of Civil Procedure, can be used in the way it has been used by the learned Subordinate Judge.

(5) Sir Sultan Ahmad, appearing on behalf of the contesting opposite parties, has very strongly contended before us that the preliminary decree was not in accordance with the judgment, and the court has an inherent jurisdiction to amend the decree to carry out its own meaning. It is contended that section 152, Code of Civil Procedure, is not confined merely to clerical or arithmetical mistakes, nor to errors arising from accidental slips or omission. He has placed before us the plaint and the judgment passed in Title Suit No. 24 of 1934. He has referred particularly to paragraphs 40, 41 and 45 of the plaint. It appears from those paragraphs that with regard to 115 bighas covered by the proceeding under Section 145, Code of Criminal Procedure, the petitioner distinctly claimed that he was dispossessed. With regard to remaining 675 bighas, the petitioner said that he was virtually dispossessed.

In paragraph 45 the petitioner averred that the order of the Collector of Patna in the Ballabandi proceeding and of the Subdivisional Officer of Barh in the section 144, Code of Criminal Procedure, proceeding had the effect of dispossessing the plaintiff from the lands in dispute. By relief No. 5 the petitioner asked for mesne profits from the date of the order in the section 145, Criminal Procedure Code, case to the date of the delivery of possession. Relief No. 6 was couched in the following terms:

> "That inasmuch as no mesne profits have yet accrued due with regard to the disputed lands other than those covered by the section 145, Cr. P. C. proceeding it is not claimed in this suit but an order may be passed in the decree that the plaintiff will be entitled to get mesne profits with regard to these lands from the date of dispossession up to the date of the recovery of possession."

It is contended on the basis of relief No. 6 that there was no claim for mesne profits with regard to 675 bighas of land. In the judgment by which the suit was decreed ex parte against the contesting opposite parties, the learned Subordinate Judge referred to the evidence which showed that the opposite parties other

than the Secretary of State for India had given up possession soon after the institution of the suit. No date of giving up such possession was however mentioned in the judgment. The judgment showed that costs were disallowed against defendants 2nd and 3rd parties; it did not mention anything about mesne profits except stating that the suit was decreed ex parte against defendants 2nd and 3rd parties. In the decree as drawn up all the reliefs claimed by the plaintiff were allowed 'ex parte' against defendants 2nd and 3rd parties. Relief No. 6, though it stated that no mesne profits had yet accrued due with regard to lands other than those covered by the section 145, Criminal Procedure Code proceeding, asked for an order to be passed in the decree that the plaintiff would be entitled to get mesne profits with regard to those lands as well from the date of dispossession up to the date of recovery of possession.

Mr. De has contended, not without some justification, that relief No. 6, properly construed, asked for a decree for future mesne profits with regard to 675 bighas of land as well. The matter did not, however, rest there. In accordance with the directions passed in the preliminary decree an application for ascertainment of mesne profits was made and a commissioner was appointed to ascertain the mesne profits. The finding of the learned Subordinate Judge is that the contesting opposite parties had knowledge of the application; yet they did not appear to contest the application and a final decree for mesne profits was passed against them in accordance with the report of the pleader commissioner. We have examined the judgment of the learned Subordinate Judge which resulted in the final decree for mesne profits. That final decree is in accordance with the judgment pronounced by the learned Subordinate Judge on the 14th of February, 1947. The utmost that can be said in favour of the contention of learned Counsel for the contesting opposite parties is that relief No. 6 was to some extent ambiguous, and the judgment which the learned Subordinate Judge passed in Title Suit No. 24 of 1934 on the 24th May, 1940, was itself not very clear with regard to relief No. 6. But no ambiguity exists with regard to the final decree for mesne profits. That decree is in accordance with the judgment, and clearly gives effect to it. In these circumstances, there is no question of correcting any error, accidental or otherwise, under the inherent power of the court.

(6) For the reasons given above, I am of the opinion that the learned Subordinate Judge was in error and acted in excess of his jurisdiction in setting aside the decrees passed by his predecessor. It was not open to the learned Subordinate Judge to decide the case as though he were the court of appeal. Neither section 151 nor section 152, Code of Civil Procedure, gave him the jurisdiction to set aside the decree on a finding that the decree was erroneous and inequitable. If there was any mistake or ambiguity in the preliminary decree, the contesting opposite parties were themselves responsible for it. They knew of the decrees, both preliminary and final, and kept quiet for so long, without taking any steps in accordance with law for the correction of such error or ambiguity.

(7) The result, therefore, is that I allow the applications with costs and set aside the order of the learned Subordinate Judge vacating the decrees passed against the contesting opposite parties. Hearing fee six gold mohurs.

(8) RAMASWAMI, J.: I agree.

Applications allowed.

B/D.H.

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1952

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PUISNE JUDGES :

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THE

ALL INDIA REPORTER

1952

Patiala & East Punjab States

Union High Court

A. I. R. (39) 1952 PEPSU 1 (C. N. 1)

(FULL BENCH)

TEJA SINGH C. J., KESHO RAM PASSEY AND CHOPRA, JJ.

Rulia Ram, Defendant v. Sadh Ram and others, Plaintiffs.

Civil Revision No. 9 of 1951, D/- 1-10-1951.

Civil P. C. (1908), O. 46, R. 1 — No Reasonable doubt — Competency of reference — Constitution of India Art. 228.

In a suit for pre-emption the plaintiff's objection to the plea of the defendant-vendee was that the Alienation of Land Act was void, inasmuch as it militated against the fundamental rights as enunciated in Art. 19 (1) (f) of the Constitution of India. The trial Sub-Judge held that the Act was void. The defendant vendee appealed to the Sub-Judge, 1st Class. Along with this the Deputy Commissioner applied to the said Sub-Judge, 1st Class under S. 29 (1) of the Pre-emption Act alleging that the decision of the trial Sub-Judge was contrary to the provisions of the Alienation of Land Act. The Sub-Judge, 1st Class was inclined to uphold the decision of the trial Sub-Judge, but since he thought that the point raised in the case, viz., whether the Patiala Alienation of Land Act was void was of great importance and involved a substantial question of law as to the interpretation of Clause (f) of Art. 19 of the Constitution of India, determination of which was necessary for the disposal of the appeal as well as the application of the Deputy Commissioner, he referred the case to the High Court.

'Held' that in this case if the Sub-Judge had decided the appeal or the application of the Deputy Commissioner no appeal would have been competent to the High Court and accordingly the said Sub-Judge was within his rights in making the reference to the High Court, but it could not be said that he had any reasonable doubt about the question of law. So strictly speaking, the reference was not covered by O. 46. In spite of this the reference was perfectly legal under Art. 228 of the Constitution. The Article does not say how the High Court is to be moved for the exercise of its powers but obviously it can be moved either by the parties or by the subordinate Court in which the case in question is pending. (Para 1)

Anno: C.P.C., O. 46, R. 1, N. 4, 7.

Dalip Chand, for Defendant (Rulia Ram), Puranchand, for Plaintiff (Sadh Ram), Chetan Dass, for Dy. Commissioner Fatehgarh.

ORDER.: One Ram Singh, a Jat of village Kukkar-Majra. sold 1 biswa of agricultural land to Rulia Ram Khatri of Ajnali for Rs. 11/-. Sadh Ram, brother of Ram Singh pre-empted the sale. Rulia Ram resisted the suit on the only ground that the sale being opposed to the provisions of Alienation of Land Act the suit was liable to be dismissed. The plaintiff's objection to the plea of the defendant-vendee was that the Punjab (sic) Alienation of Land Act was void, inasmuch as it militated against the fundamental rights as enunciated in Article 19 (1) (f) of the Constitution of India, and that the sale was perfectly valid and the plaintiff was entitled to pre-empt it because of his relationship with the vendor. The only issue framed in the case was: 'Whether the Patiala Alienation of Land Act is void and the suit is maintainable.' The trial Sub-Judge, found the issue in the plaintiff's favour and there being no other point of difference between the parties granted the plaintiff a decree on payment of Rs. 11/-. The vendee appealed to the Sub-Judge, 1st Class, Fatehgarh Sahib at Bassi. Along with this the Deputy Commissioner, Fatehgarh Sahib District applied to the said Sub-Judge, 1st Class under Section 29 (1) of the Pre-emption Act alleging that the decision of the trial Sub-Judge was contrary to the provisions of the Alienation of Land Act, and praying that the same be set aside. The Sub-Judge, 1st Class was inclined to uphold the decision of the trial Sub-Judge, but since he thought that the point raised in the case, viz., whether the Patiala Alienation of Land Act was void, was of great importance and involved a substantial question of law as to the interpretation of Clause (f) of Article 19 of the Constitution of India, determination of which was necessary for the disposal of the appeal as well as the application of the Deputy Commissioner, he has referred both the cases to the High Court, with the request that either the question of law mentioned above should be decided or the cases might be transferred to the Court and disposed of finally. Order 46 of the Civil Procedure Code deals with the power of a Subordinate Court to make a reference to the High Court. Rule 1 of the Order lays down that where before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, etc. Any question of law or usage having the force of law arises on which the Court trying the suit or appeal entertains a reasonable doubt the Court may either of its own motion or on the application of any of the parties draw up a statement of the facts of the case and the point on which doubt is entertained and refer

such statement with its own opinion on the point for the decision of the High Court. There is no doubt that in this case if the Sub-Judge had decided the appeal or the application of the Deputy Commissioner no appeal woud have been competent to the High Court and accordingly the said Sub-Judge was within his rights in making the reference to this Court, but in view of the observations made by him in the order of reference it cannot be said that he had any reasonable doubt about the question of law. So it may be said that, strictly speaking, the reference is not covered by Order 46. In spite of this my view is that the reference is perfectly legal. Article 228 of the Constitution says that if the High Court is satisfied that a case pending in a Court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case it shall withdraw the case and may either dispose of the case itself or determine the said question of law and return the case to the Court from which the case had been so withdrawn, etc. Both sides are agreed that the question of law which is the subject-matter of the issue framed in the case constitutes a substantial question as to the interpretation of one of the Articles of the Constitution the determination of which is necessary for the disposal of both the cases, and this Court is quite competent to withdraw the cases from the Court of the Sub-Judge and deal with them in the manner laid down in the Article. The Article does not say how the High Court is to be moved for the exercise of its powers but obviously it can be moved either by the parties or by the Subordinate Court in which the case in question is pending. It may also be mentioned that all the parties before us are agreed as regards the validity and the propriety of the reference by the Sub-Judge. Since the dispute between the parties is confined to the question incorporated in the issue and it would be absolutely useless for us to send back the case to the Court below after we have decided the issue I would accept the reference and withdraw both the cases from the Court of the Sub-Judge, 1st Class, Fatehgarh Sahib at Bassi to this Court for complete disposal.

D.H. *Reference accepted.*

A. I. R. (39) 1952 PEPSU 2 (C. N. 2)

TEJA SINGH, C. J., AND CHOPRA, J.

Bhajna, Petitioner v. Supdt., Central Jail, Patiala, Respondent.

Criminal Misc. No. 54 of 1951, D/- 18-10-1951.

(*a*) *Criminal P. C. (1898), S. 397 — Applicability to person convicted and sentenced on same day in more than one case.*

When applying the principle of S. 397 to a person who is convicted and sentenced to imprisonment by a Court in more than one case on the same day the imprisonment in the case decided first should be regarded as having commenced before that awarded in the case decided later. The question which case is decided first and which later, is one of fact. (*Para 5*)

Anno: Criminal P. C., S. 397, N. 2.

(*b*) (*Pepsu*) *Manual for the Superintendence and Management of Jails — Rule 455 (b) — Imprisonment in two cases — Appeal in one — Setting aside of imprisonment— Effect — Criminal P.C., (1898), S. 397.*

The Rule does not lay down the correct law. When a sentence awarded to a person in a case is set aside by a higher Court on appeal or revision, the effect is that it is washed away completely as if it was never awarded. So when a man is awarded imprisonment in two cases and the imprisonment in one is set aside the time which he spent in jail up to the date his imprisonment was set aside, must be credited to the imprisonment to which he was subjected in the second case. AIR (29) 1942 Bom 342, AIR (34) 1947 Sind 63, Rel. on; AIR (19) 1932 Sind 159 Dissent. (*Para 7*)

Anno: Criminal P.C., S. 397, N. 7.

(*c*) *Practice — Procedure — Accused — Benefit of favourable view.*

When a case can be looked at from two points of view, the accused is entitled to the benefit of the view which is more favourable to him. (*Para 10*)

Dalip Chand, for Petitioner; Advocate-General, for Respondent.

Case.s referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('42) AIR (29) 1942 Bom 342: (44 Cri L Jour 130) (Pr 8)

('32) AIR (19) 1932 Sind 159: (34 Cri L Jour 24) (Pr 10)

('47) AIR (34) 1947 Sind 63: (48 Cri L Jour 577) (Prs 9, 10)

TEJA SINGH, C. J.: This habeas corpus petition was referred to the Division Bench by my learned brother because he considered that the question of law involved therein was of general importance and required an authoritative pronouncement. The facts briefly stated are as follows:

(2) Bhajna, petitioner was tried by S. Charan Singh Tiwana, Magistrate 1st Class in two separate cases, one under section 325, I.P.C., and the other under section 323, I.P.C. He was convicted in both and was sentenced to 1½ years' rigorous imprisonment together with a fine of Rs. 50/- in the first case and one month's rigorous imprisonment in the second case. Both the cases were decided on 12-5-1951, but the Magistrate omitted to give direction in either case as to how the sentences were to run, that is to say, whether they were to run concurrently or one after the other. Bhajna appealed to the Court of the Sessions Judge in both the cases. His appeal in section 323 case was dismissed in entirety, but that in the other was accepted only to the extent that the term of imprisonment awarded to him was reduced to one year's rigorous imprisonment. The Sessions Judge disposed of both the appeals on 11-7-1951, but he too did not say anything as to how the sentences were to take effect. Against the order of the Sessions Judge in the appeal arising out of 325 case, Bhajna moved this Court on the revision side. On 16-8-1951, Bhajna as well as the complainant applied to the Court for permission to compromise the case. The Court accorded the permission and after the case had been compounded, Bhajna's petition was accepted and his conviction and sentence were set aside. No revision petition against the order of the Sessions Judge in 323, case was preferred to this Court and accordingly Bhajna's conviction and sentence in so far as that case is concerned, stood.

(3) The present petition was made on 20-8-1951. The position of the petitioner is that since his sentence under section 325, I.P.C., has been set aside by this Court, the period for which he has already undergone imprisonment after his conviction on 12-5-1951 and which is more than one month, should be counted towards the sentence awarded to him in 323 case, his further detention in jail was illegal and he was entitled to be released forthwith.

(4) The petition is opposed by the learned Advocate General who appeared on behalf of the Superintendent of the Jail. He contends that notwithstanding the omission of the trial Magistrate to give any direction as to how the sentences

awarded to the petitioner in the two cases were to take effect, they were to run one after the other. He further contends that according to the rules contained in the Manual for the Superintendence and Management of Jails, the Superintendent of Jail was competent to decide which of the two sentences was to commence first and since he decided that in the present case the sentence awarded to the petitioner in the section 325 case was to commence first and this sentence was set aside by the High Court on 16-8-1951, the sentence in the other case started to run from that date, and the petitioner could be released only after he had completed one month's imprisonment with effect from that date.

(5) As regards the first contention of the learned Advocate-General, I am inclined to agree with him. Section 397 of the Criminal Procedure Code lays down that when a person already undergoing a sentence of imprisonment, etc., is sentenced to imprisonment etc., such imprisonment shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence. When applying this principle to a person who is convicted and sentenced to imprisonment by a Court in more than one case on the same day, the imprisonment in the case decided first should be regarded as having commenced before that awarded in the case decided later, and the question which case is decided first and which later, is one of fact.

(6) As regards the second contention, the learned Advocate-General placed his reliance upon the first part of Clause (b) of Rule 455 which reads as follows:

"Where separate sentences have been passed in separate trials, the sentences being consecutive under section 397 of the Code of Criminal Procedure the operation of the second sentence will, in the event of the first sentence being set aside on appeal commence from the date of decision in that appeal.

"If, however, an appeal is also filed in the second case it will be competent to the Court hearing the second appeal to direct that credit shall be given for such period as is covered between the date of the second conviction and the date on which the first appeal was accepted.

"No credit can be given in the second case, however, for any period passed in jail under the first sentence prior to the date of the conviction in the second case by the Court of original jurisdiction."

(7) In my judgment, the rule does not lay down the correct law, and my reasons for coming to this conclusion are very simple. When a sentence awarded to a person in a case is set aside by a higher Court on appeal or revision, the effect is that it is washed away completely as if it was never awarded. So when a man is awarded imprisonment in two cases and the imprisonment in one is set aside, the result that must naturally follow is that the time which he spent in jail upto the date his imprisonment was set aside, must be credited to the imprisonment to which he was subjected in the second case.

(8) I am supported in this view by a Bench Decision of the Bombay High Court in 'Babibai v. Emperor', AIR (29) 1942 Bom 342. The facts of that case are analogous to those of the present one and in that case reliance was placed on behalf of the Emperor on Rule 392 of the Jail Manual, the words of which are similar to words of 455 of our Rule. It was held by Beaumont, C. J., with whom his learned colleague agreed. that when a conviction is set aside, the sentence imposed is not terminated from that date, it is destroyed, and rendered null and void from its inception and the part of the sentence served cannot be attributed to the conviction. The learned Judge further held that where a person is awarded two consecutive sentences for separate offences and while undergoing the first the same is set aside with the result that there is no sentence on that count; the sentence on the second count which is upheld must commence from the date of conviction and any part of the sentence already served must be attributed to the only sentence legally existing. Rule 392 of the Jail Manual was held to be invalid.

(9) The other case in point is 'Partumal Tourmal v. Emperor', AIR (34) 1947 Sind 63. The prisoner in that case was convicted by a Magistrate of two separate offences. In one judgment he was sentenced to six months' R.I., and in the other to two months' R.I. Both the judgments were passed on the same date. Subsequently, the judgment which awarded the sentence of six months' R.I., was set aside. While discussing the question as to whether two months' R.I., which the prisoner had suffered before the judgment by which he was awarded six months' R.I., was set aside, should be appropriated to the judgment in the other case, this is what the learned Judges observed:

"We think it should be appropriated to the judgment still in force; that judgment sentenced the accused to two months' R.I., which sentence he has already suffered and he is entitled, therefore, to be discharged from prison. If this period of two months' should be appropriated to the judgment which has been set aside, then it may be said that he has further to suffer rigorous imprisonment for two months or four months in all. There appears now no lawful basis for imprisonment for four months. We do not see how when a judgment has been set aside, the imprisonment already suffered can be, as it were, passed by or that the imprisonment which he has suffered under the judgment which has been set aside, should be counted as nothing against a judgment which is in force under which he has properly been sentenced and which sentence he has in effect actually undergone when the two judgments bear the same date."

(10) As against these two authorities, the learned Advocate-General drew our attention to 'Emperor v. Koural Shal', AIR (19) 1932 Sind 159, in which a different view was taken. In the opinion of the learned Judges, section 397 applies even when the sentence awarded in a case decided first in point of time is later on set aside. With all deference, I would follow the later view of the same Court in Partumal Tourmal v. Emperor'. AIR (34) 1947 Sind 63 supported as it is by the view of the Bombay High Court. It may be mentiontd that there is no evidence in this case to show that section 325 case was decided first and accordingly the sentence awarded to the petitioner in that case was the first sentence. This being the case, even if it be conceded for the sake of argument that Part (B) of Rule 455 embodied correct interpretation of the law, there is no warrant for holding that the sentence in Section 323 case commenced from the date the decision in the first case was set aside. It is admitted proposition of law that when a case can be looked at from two points of view, the accused is entitled to the benefit of the view which is more favourable to him. There being no evidence regarding the order in which the cases were decided, it is possible that Section 323 case was decided first and the other after that and if this was the case the sentence in the former case commenced from the date the cases were decided, and the whole of it was served out by the petitioner bfore his revision petition arising out of Section 325 case was decided by the High Court.

(11) For all these reasons I hold that further detention of the petitioner in jail was illegal. As he was released on bail by my learned brother I would order that his petition be accepted and his bail bond shall stand discharged.

(12) CHOPRA, J.: I agree.

D.H. *Petition allowed.*

A. I. R. (39) 1952 PEPSU 4 (C. N. 3)

TEJA SINGH, C. J., AND GURNAM SINGH, J.

Ladli Parshad, Appellant, v. J. C. Chandiok, Respondent.

First Appeal No. 35 of 2006, D/- 15-10-1951.

Civil P. C. (1908), S. 20 — Loan created by cheque — Suit for recovery of loan — Court within whose jurisdiction cheque is delivered if can entertain suit.

In a suit for recovery of loan, the cause of action does not constitute merely the giving of the loan but it consists of a bundle of facts including the agreement relating to the loan, the place where the plantiff delivered to the defendant the cheque for the amount of loan and the place where the loan was to be paid back. And if no cash was advanced by the plaintiff to the defendant but it was the cheque that constituted the loan, then the place where the defendant got the cheque from the plaintiff gives rise to a part of the cause of action and the plaintiff has a right to institute the suit in the civil Courts within whose territorial jurisdiction, the cheque was delivered to the defendant. 16 All 165 (FB); AIR (29) 1942 Bom 251 Rel. on. (*Para 4*)

Anno: C. P. C., S. 20, N. 15.

Lachmandas, for Appellant; Mokand Lal Puri Assisted by R. N. Nigam and R. B. Anant Ram, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

(1894) 16 All 165: (1894 All W N 65 FB) (Pr 4)

('42) AIR (29) 1942 Bom 251: (ILR (1942) Bom 620) (Pr 4)

TEJA SINGH, C. J.: This is a first appeal from the judgment and decree of the District Judge, Kapurthala, dismissing the plaintiff's suit for the recovery of Rs. 16,800, on the ground that the Court had no jurisdiction to entertain it.

(2) The plaintiff's allegation was that the defendant wrote to him on 5-4-1946 at Hamira asking him for a loan of rupees fifteen thousand. Later on the defendant himself came to Hamira on 14-4-1946 and borrowed from the plaintiff the said amount by means of a cheque on the Oriental Bank of Commerce Limited, Lahore. The plaintiff further alleged that at the time the cheque was given to the defendant the latter agreed to pay interest at the rate of Re. 1/-/- per cent. per mensem. The defendant contested the suit on various grounds — one of them being that the Court had no jurisdiction to hear the suit, because neither the defendant resided within the Court's territorial jurisdiction nor the cause of action wholly or in part arose within the said jurisdiction. The Court framed five issues, but of these only the first issue, which related to the jurisdiction, was decided.

(3) Two points have to be taken into consideration while deciding the question of jurisdiction, (1) whether the plaintiff gave the cheque for Rs. 15,000/-/- to the defendant at Hamira, and (ii) whether the giving of the cheque at Hamira brought the case within the purview of Clause (c) of S. 20, Civil P. C. (On the first point his Lordship held that the defendant obtained the cheque from the plaintiff at Hamira on 14-4-1946.)

(4) This brings us now to the second point. Section 20 Clause (c), Civil P.C., lays down that subject to the limitations, mentioned in the previous section, a suit can be instituted in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. In 'Murti v. Bhola Ram', 16 All 165, the cause of action was defined as consisting of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. The learned Judges emphasise that the cause of action does not comprise every piece of evidence which is necessary to prove such fact, but every fact which is necessary to be proved. The appellant's (respondent's ?) counsel contended that in the present case it was the giving of the loan that was the necessary fact that the plaintiff had to prove with a view to obtaining a decree against the defendant and the giving of the cheque was only a piece of evidence in support of the loan. In my opinion the contention is wholly devoid of force. In a suit of this kind the cause of action does not constitute merely the giving of the loan but it consists of a bundle of facts including the agreement relating to the loan, the place where the plaintiff delivered to the defendant the cheque for the amount of the loan and the place where the loan was to be paid back. A reference to the contents of the plaint would show that the delivery of the cheque by the plaintiff to the defendant at Hamira was a distinct fact alleged by the plaintiff. It was also alleged in the plaint that the defendant got the cheque from the plaintiff for purposes of the loan. Since these facts were denied by the defendant it became incumbent upon the plaintiff to establish them in order to succeed in the suit and consequently Hamira was the place where the plaintiff's cause of action arose in part. Our attention was drawn by the appellant's counsel to 'Jivat Lal v. Lalbhai Fulchand', AIR (29) 1942 Bom 251. The suit in that case was based upon a promissory note. While discussing where a cause of action in respect of a promissory note could arise this is what the learned Judge observed. The promissory note in a suit is a negotiable instrument. The cause of action on a negotiable instrument generally arises wherever any one of the facts, the proof of which is essential under the circumstances of the case, occurred. The place of the making of the promissory note is an essential part of the cause of action so as to give the Court of that place jurisdiction to try the suit on the note. The promissory note was executed at Ahmedabad and the Court at Ahmedabad would certainly have jurisdiction to try the suit on the note. It may sometimes happen that a promissory note is executed in one place but delivered to the promisee at another place and that moneys due thereunder are payable at a third place. In such a case part of the cause of action arises at any one of these places, and a suit may be filed at any one of these places at the plaintiff's option." The learned counsel for the appellant (respondent ?) made an effort to distinguish the above-mentioned case from the present case on the ground that the present case is not based on a cheque and it is a suit for the recovery of a loan. This is, no doubt, correct, but since no cash was advanced by the plaintiff to the defendant and it was the cheque that constituted the loan, in my judgment the place where the defendant got the cheque from the plaintiff did give rise to a part of the cause of action and the plaintiff had a right to institute the suit in the civil Courts of Kapurthala within whose territorial jurisdiction Hamira was situate.

(5) In the result I would allow the appeal, set aside the judgment and decree of the trial Court and remand the case for decision on merits under O. 41, R. 23. Court-fees paid on appeal shall be

refunded. Other costs will abide the event. The parties have been directed to cause their respective clients to appear before the trial Court on 5-11-1951.

(6) GURNAM SINGH, J.: I agree.

V.S.B. *Appeal allowed.*

A. I. R. (39) 1952 PEPSU 5 (C. N. 4)

TEJA SINGH, C. J., AND KESHO RAM PASSEY, J.

Lachhman Dass, Appellant v. Chuhra Mal, Respondent.

First Appeal No. 22 of 1950, D/- 28-3-1951.

(a) *Hindu Law — Widow — Alienation — Gratuitous gift in favour of nearest reversioner.*

The rights and powers of alienation of a Hindu widow over property that has come to her hands from her husband on his death are very much restricted and she can alienate it for necessity only. As she holds the estate as a widow's estate, she cannot make a gratuitous gift in favour of the nearest reversioner or reversioners even, unless the gift embraces her whole interest in the whole estate. (*Para 5*)

(b) *Hindu Law of Inheritance (Amendment) Act (1929), S. 1 (2) — Applicability — Act not in force in Patiala State either when the succession opened or when the suit was instituted — Provisions of Act held could not be invoked.* (*Para 5*)

Anno: Hindu Law of Inheritance (Amendment) Act, S. 1, N. 1.

L. Atma Ram, for Appellant; L. Puran Chand, for Respondent.

KESHO RAM PASSEY, J.: This appeal by Lachhman Dass defendant is directed against the judgment of the District Judge, Fatehgarh Sahib, dated 31-7-1950, decreeing Chuhra Mal plaintiff's suit for possession of two shops in Banur. The facts are these:

(2) Mt. Parmeshwari, widow of Sansari Mal, who had succeeded to her husband's estate and held it as a limited or widow's estate executed a Will on 29-5-1975 devising that estate to Chuhra Mal, who is Sansari Mal's sister's son. On 2-3-1980 she executed two deeds of gift, by one of which Ex. PA/ she gave two shops styled as property No. 1 in the plaint to her daughter Mt. Naina Devi and by the other Ex. PB/ Chuhra Mal was made the owner of 9 shops and 4 houses. Mt. Naina Devi died before 1985 survived by two minor daughters Sita Devi and Parkash Wati. On 28-12-1985, Muna Lal, husband of Mt. Naina Devi, in the capacity of being the father and guardian of the minor girls sold these two shops to Lachhman Das, defendant for Rs. 4,500/-/-. On 2-10-1993 Mt. Parmeshwari mortgaged with possession a shop which was described as property no. 2, to Amar Chand for Rs. 500/-/-. Mt. Parmeshwari died on 18-12-1995 and the present suit for possession of the three shops mentioned above was instituted by Chuhra Mal on 27-8-2003 in the Court of Sub-Judge, 1st Class, Patiala, but as subsequently it was discovered that the value of the subject-matter of the suit, exceeded the pecuniary jurisdiction of the Sub-Judge, the plaint was returned for being presented to the District Judge Fatehgarh Sahib which was done on 28-11-2005. The plaintiff has based his suit for possession on the strength of his preferential right to succeed to the property of Sansari Mal over that of Sita Devi and Parkash Wati, who are his daughter's daughters. The gift by Mt. Parmeshwari in favour of Mt. Naina Devi and the mortgage by the former in favour of Amar Chand have been attacked as invalid and unauthorized because they were by a widow who could not dispose of her husband's property except for necessity which there was none in this case. The property in dispute admittedly came to the hands of Mt. Parmeshwari from Sansari Mal.

(3) The suit was resisted by Lachhman Dass and Amar Chand on various grounds and from the parties' pleadings ten issues were drawn up. The learned District Judge has held that the impugned gift was void and that the mortgage was valid to the extent of Rs. 200/- only which amount had been proved by the mortgagee to have been paid to Mt. Parmeshwari for legal necessity. Only Lachhman Das has appealed and Mr. Atma Ram appearing for him has argued that the plaintiff has failed to prove himself to be the sister's son of Sansari Mal, that he is not a better heir of Sansari Mal than Mt. Sita Devi and Mt. Parkash Wati, and that the gift by Mt. Parmeshwari in favour of her daughter Mt. Naina Devi was tantamount to an acceleration of the latter's succession and was, therefore, unassailable by any remoter heir. To support the last argument it was stressed by the learned counsel that the gift executed by Mt. Parmeshwari on 2-3-80 in favour of Chuhra Mal was complete in all respects and since that had preceded the gift of property No. 1 to Mt. Naina Devi, the later gift only purported to pass on the property that had been left with Mt. Parmeshwari to the next heir Mt. Naina Devi. The judgment of the learned District Judge is not attacked on any other ground.

(4) (On the question whether the plaintiff was Sansari Mal's sister's son his Lordship considered the evidence and concluded:) We have, therefore, no hesitation in endorsing the conclusion of the learned trial Judge that the plaintiff has succeeded in proving himself to be the sister's son of the husband of Mt. Parmeshwari.

(5) The next question that falls for determination is whether the gift in favour of Mt. Naina Devi amounted to an acceleration of her succession. As has been mentioned above, two deeds of gift, one in favour of Mt. Naina Devi and the other in favour of the plaintiff were executed by Mt. Parmeshwari on 2-3-1980, but there is no evidence that the gift in favour of the latter preceded the one in favour of the former. There is not an iota of evidence on the record to suggest that the donor after making these two gifts had no property left to herself. On the other hand, Ex. PX/1 which was a deed of compromise between Mt. Parmeshwari and Chuhar Mal, makes mention of a piece of land in village Jalalpur having been retained by her for herself exclusively. This document establishes that she had not parted with her entire estate and in the face of that fact it cannot be argued with any force that she had effaced herself and transferred whatever property she held to her daughter. The gift-deeds, dated 2-3-1980 clearly show that Mt. Naina Devi was given two shops only, whereas the bulk of the property was gifted to Chuhar Mal. The rights and powers of alienation of a Hindu widow over property that has come to her hands from her husband on his death, are very much restricted and she can alienate it for necessity only. As she holds the estate as a widow's estate, she cannot make a gratuitous gift in favour of the nearest reversioner or reversioners even, unless the gift embraces her whole interest in the whole estate. We, therefore, hold that the gift in favour of Mt. Naina Devi was invalid and it cannot affect the plaintiff's right of inheritance. If the gift to Mt. Naina Devi is ignored as, for reasons given above, it must be, then we would have to determine whether the plaintiff is the next heir to Sansari Mal's estate or his daughter's daughters Sita Devi and Parkash Wati. The succession opened on 18-12-1995 when Mt. Parmeshwari passed away and on that date the plaintiff and the above named two girls were the contesting claimants. Except possibly in Bombay and Madras, a daughter's daughter was not recognized as an

heir under Hindu Law and it was for the first time by Act No. II of 1929 (Hindu Law of Inheritance (Amendment) Act, 1929), that a change was made in the order of succession of certain heirs of a Hindu male dying intestate and a daughter's daughter was recognised as an heir and to have preference over a sister's son. The provisions of that Act were never enforced in the Patiala State and were not in force either when the succession opened or when the suit was instituted. They cannot, therefore, be invoked to sustain the daughter's daughter's claim of a preferential right of inheritance over that of the son if the sister of the last male owner.

(6) The gift in favour of Sita Devi and Prakash Wati's mother being invalid and they themselves being not better entitled to succeed to the property of Sansari Mal, the plaintiff's claim must, succeed. The appeal is dismissed with costs.

(7) TEJA SINGH, C. J.: I agree.

G.M.J. *Appeal dismissed.*

A. I. R. (39) 1952 PEPSU 6 (C. N. 5)

CHOPRA AND PASSEY, JJ.

Bagga Singh Appellant v. Lal Chand; Respondent.

Appeal No. 288 of 2006, D/- 20-6-1951.

Tansfer of Property Act (1882), S. 60 — Limitation Act (1908), S. 21 (2). — Acknowledgment by some of several mortgagees — Effect on limitation — Fresh contract — Contract Act (1872), S. 62 — Evidence Act (1872), S. 35.

Certain persons mortgaged 60 bighas of land for Rs. 3,500/- in Smt. 1930. In the settlement operations in 1960 the area was found to be 51 bighas and on the statements of the mortgagors and two of the mortgagees, the mortgage was shown in the mutation entry to be for Rs. 3,000/- in favour of six persons in two equal shares. In a suit for redemption in Smt. 2001 the mutation entry was relied on as a fresh contract or an acknowledgement to save the bar of limitation;

Held (1) that in the absence of evidence that the parties entered into a new contract in 1960, the mutation entry did not create any fresh mortgage. (*Para 3*)

(2) *As the acknowledgment of mortgage in the mutation entry was made by only two of the mortgagees it could not bind the remaining mortgagees and could not be used against them under S. 21 (2), Lim. Act.* (*Para 4*)

(3) *In the absence of any evidence, the two mortgagees could not be presumed to be authorised by the others to make an acknowledgment on iheir behalf or to have acted as their agent.* (*Para 4*)

(4) *As the integrity of the mortgage was not split up by any act of the mortgagees and as it was still joint and indivisible the mortgagors could not sue each mortgagee or each branch separately for redemption. The mere fact that each branch of the mortgagees' family was recorded as having a definite share did not entitle the mortgagors to get a part of the mortgage redeemed. AIR (21) 1934 Lah 293 and A I R (7) 1920 Lah 516, Rel. on; AIR (17) 1930 Bom 466 (FB) disting.* (*Para 5*)

Anno: Transfer of Property Act, S. 60, N. 41; Limitation Act S. 21, N. 6, 16; Contract Act. S. 62 N. 2; Evidence Act S. 35, N. 12.

Dalip Chand, for Appellant; Lachhman Dass, for Respondent.

Cases referred to:

Arranged in order of Courts, and in the Courts chrono.ogically. List of foreign cases referred to comes after the Indian Cases.)

('30) A I R (17) 1930 Bom 466: (54 Bom 625 FB) (Pr. 6)

('22) 67 Ind Cas 463: (A I R (7) 1920 Lah 516) (Pr 5)

('34) A I R (21) 1934 Lah 293: (151 Ind Cas 385) (Pr 5)

CHOPRA, J: This is a second appeal by the plaintiffs whose suit for redemption of a mortgage has been dismissed by the Courts below on the point of limitation. In the plaint it was alleged that the ancestors of the appellant had mortgaged 60 bighas of land with the ancestors of the respondent for Rs. 3,500/- and that in the year 1960 during the last Settlement the parties entered into an agreement that the money secured on 50 bighas 19 biswas out of that land would be Rs. 300/-. This was alleged to be fresh mortgage which the plaintiffs sought to redeem. The defendants joined issue on the point of limitation alleging that the land was mortgaged with them since 1930 and that the suit brought after more than 70 years was hopelessly barred by time. When the issues were struck the plaintiffs appear to have changed their position and to have relied upon the agreement of 1960 as an acknowledgment of the existence of the previous mortgage, which gave them a fresh start of limitation. A specific issue on the point calling upon them to prove a valid and binding acknowledgment was, therefore, framed. Both the Courts below have found that the acknowledgment was not on behalf of all the mortgagees and that it did not, therefore, bind any of them and give a fresh start of limitation. The suit and the appeal were consequently, dismissed and this is plaintiff's second appeal.

(2) The facts that have been found to be proved and are not disputed are these: In 1934 Gopi Sardara and Bhagta mortgaged with possession 60 bighas of land with the ancestors of the defendants for Rs. 3,500/-. A document evidencing it was executed in the account book of the mortgagees on Magh Badi 8, 1934. The land was described as the one or the thoroughfare leading to village Todarpur. Originally the land was mortgaged for Rs. 3,100/- in the year 1930 and on a further advance of Rs. 400/- the amount increased to Rs. 3,500/- in 1934. No writing to prove the prior mortgage of 1930 has been produced but the fact is not denied by the defendants. During the settlement in the year 1960 mutation No. 16 was entered and an enquiry regarding the mortgage was made by the revenue authorities. As a result of the persons interested in the entry, the mutation was sanctioned and 51 bighas and 19 biswas of land was entered as mortgaged with the defendants for Rs. 3,000/-. Hira, Ram Partap, and Bhagta sons of Gopi were shown as owners and motgagors of the land, while the mortgagees were Devi Dayal, Lal Chand and Dwarka Das sons of Kharita Ram in one half and Mt. Thakro, Gulab and Gaindi in the other half. The present suit for redemption was brought on 20-5-2001 by Bhagta and Malkiat Singh son of Ram Partap; Hira and Buja the other mortgagors had died issueless.

(3) The contention of Shri Dalip Chand, the learned counsel for the appellant, is that the parties entered into a new agreement in the year 1960 and a fresh mortgage was created by one of the plaintiffs himself and the father of the other. His argument is that while previously 60 bighas of land was mortgaged for Rs. 3,500/- there was a change in the area and the amount in 1960 and 51 bighas and 19 biswas of land was mortgaged for Rs. 3,000/. The suit, according to him, being one for redemption of this new mortgage was within time. This position, though taken by the appellant in the plaint, was subsequently given up when the issues were struck and, as is clear from the judgments of the Courts below, it was not re-

appeal. The point stressed there was that the existence of the mortgage of 1934 was acknowledged by the mortgagees in 1960 when mutation No. 16 was sanctioned and that it gave another start of limitation. The mutation was not relied upon as a new mortgage or contract between the parties. We, however, allowed the appellant's counsel to address us on the point and to satisfy us that the mutation created a new mortgage and gave a fresh cause of action. In that he has obviously failed. What actually happened in 1960 was that the Settlement Officers, who were to take measurements of all the agricultural land and prepare records relating thereto for the first time, entered mutation No. 16 with respect to the land in suit and made enquiries from the interested persons for the purpose. The mutation, as it is clear from its column No. 13, was entered and sanctioned on the basis of the mortgage of 1934. The mortgagors in their statements recorded by the Tahsildar admitted that the land was mortgaged by their ancestors 50 years ago, but they expressed their ignorance as regards the amount for which it was mortgaged. Statements of Devi Dayal and Dwarka Das, two of the motgagees, were also recorded in which they averred that the land was in their possession as mortgagees since 1930 and that the amount secured was Rs. 3,500/-. The deed of 1934 was produced and its only marginal witness, then alive, was also examined. The land mortgaged was found to measure 51 bighas and 19 biswas, and the two mortgagees expressed their willingness to reduce the mortgage money by Rs. 500/-. As result of the enquiries the mutation was sanctioned and the land was entered as mortgaged with Devi Dayal and others for Rs. 3,000/-. There is no evidence that the parties had entered into a new contract. The amount differed because two of the mortgagees accepted to take Rs. 500/- less, and the difference in the area was due to the actual measurement carried out during the settlement. In view of these facts it cannot be said that any new mortgage came into existence in the year 1960. The contention must, therefore, be repelled.

(4) It is next urged that the statements of the two mortgagees recorded in 1960 amounted to acknowledgment under Section 19 of the Limitation Act and they gave a fresh start of limitation. The difficulty in the way of the appellant, however, is that the acknowledgment was not made by all the mortgagees. The mortgagees, other than the two who had acknowledged,were not bound by the acknowledgment and as provided by Section 21 (2) of the Act, it could not be used against them. To get over this difficulty Shri Dalip Chand argues that Devi Dayal and Dwarka Das should be presumed to have an implied authority on behalf of others to acknowledge the mortgage, and that they should be taken to have acted as their agents. The contention is devoid of all force. There is not an iota of evidence to show that they acted as the agents of the other mortgagees or that they were authorised to make the acknowledgment on their behalf. No inference to that effect can be drawn from any of the facts brought on the record or the circumstances of the case. Two of the plaintiffs' own witnesses and all those examined by the defendants, deposed that the mortgagees had since long separated and were living separately. It cannot, therefore, even be said that either of the two mortgagees was a Karta of the family or that he acted as an agent or on an implied authority from others. The acknowledgment under the circumstances cannot give a fresh start of limitation in a suit for redemption against those who did not join it.

(5) The next question is whether the acknowledgment binds the makers thereof and can the appellants get their share in the property redeemed. My answer to this also must be in the negative. There was one single mortgage and the fact that each branch of the family of the mortgagees was recorded as having a definite share would not entitle the plaintiffs to sue each branch, or each mortgagee, separately for redemption. The integrity of the mortgage was not spit up by any act of the mortgagees and the morgage was still joint and indivisible. The plaintiff, therefore, were not entitled to get a part of the mortgage redeemed. In 'Nadar Shah v. Ishar Das', 67 Ind Cas 463, Martineau, J., on almost similar facts, observed that an acknowledgment of the right of redemption, in order to save limitation should be made by all the mortgagees and if it is not signed by all mortgagees, it does not hold good even with regard to the shares of those who signed it. Following this decision Jai Lal J. In 'Ahmad Shah v. Kartar Singh', AIR (21) 1934 Lah 293 held as follows:

> "An acknowledgment of liability to be redeemed made by one of several joint mortgagees is not sufficient to keep the right to redeem alive either as against the mortgagee who signed the acknowledgment or as against the rest."

(6) The facts of 'Motilal Jadav v. Samal Bechar', AIR (17) 1930 Bom 466 (FB), the only case referred to and relied upon by Shri Dalip Chand, were distinguishable. In that case on a partition in the family of the mortgagees 3 acres and 20 gunthas of the land was allotted to the branch of the family of defendant No. 1 and the remainder to the other branch of the family. The father of defendant No. 1 sub-mortgaged the land that had fallen to his share, to the plaintiff's father by a deed which acknowledged the existence of the original mortgage. The plaintiff's father subsequently acquired that right of redemption of the property comprised in the mortgage, and the plaintiff instituted a suit for redemption for the whole of the property. In the alternative he prayed for redemption of 3 acres and 20 gunthas on payment of the whole consideration. To save the bar of limitation, the plaintiff relied upon the acknowledgment made by the father of defendant No. 1. The Full Bench before whom the case was finally placed, arrived at the conclusion that although the acknowledgment was not in respect of the entire property yet because there had been separation of the mortgagee's family and defendant No. 1's property this was sufficient to save the bar of limitation in respect of that share. This case must be taken to have been decided on its particular facts. In the present case the family of the mortgagees no doubt had separated, but there was no evidence that the mortgagee rights in question had also been partitioned. Devi Dayal and Dwarka Das have not been shown to be in possession of any land separately from their brother Lal Chand or the other mortgagees. The revenue records, on the other hand, clearly show that all the mortgagees are still jointly possessing the whole of the land. The general rule is that a mortgage is one and indivisible and so it remains unless and until it is split up. There is no evidence or even a suggestion to that effect in this case.

(7) For all these reasons I do not see any ground to differ from the decision arrived at by the Courts below. The appeal is, consequently, dismissed with costs.

(8) **PASSEY, J: I agree.**

D.R.R. *Appeal dismissed.*

A. I. R. (39) 1952 PEPSU 8 (C. N. 6)

GURNAM SINGH AND CHOPRA, JJ.

Sarwan Singh, Appellant; v. Devinder Singh, Respondent.

Civil Misc. Appeals Nos. 82 and 83 of 1950, D/- 9-7-1951.

(a) *Pepsu Judicature Ordinance (X (10) of 2005) Ss. 92 (1), 116 — Pepsu (General Provisions) Ordinance (XVI (16) of 2005), S. 3 (1) Proviso — Application under Jind Law transferred to Sub-Judge's Court under Ordinance 10 — Appeal from order lies to District Judge and not to High Court.*

Ordinance 10 of 2005 did not give or create a right of action but only provided the procedure to be adopted, and the jurisdiction to be exercised, by the different Courts in the Pepsu Union. The question of forum for a particular action and the jurisdiction of a particular Court are matters of procedure and have nothing to do with the substantive rights of the parties to the action. A party aggrieved by an order passed after the promulgation of the new law would not have a right to insist that his appeal should be heard by the Court which was competent to hear it under the old law, even though that Court has been deprived of the jurisdiction to hear the appeal or has become extinct.

Thus an appeal from an order dismissing an application under a special local law of the Jind State, sanction to sell certain land for Rs. 2,500/- which was transferred to a Sub-Judge's Court for trial from the Court of the District Judge under S. 80 of the Ordinance 10 of 2005, lies to the District Judge and not to the High Court. The Court of the District Judge would, for the purposes of such cases, be a Court of the status of the High Court of the erstwhile Jind State.

The same result would follow from the Proviso to S. 3 (1) of the Ordinance XVI (16) of 2005, where the appeal is not pending on the appointed date but is filed long after it. The appeal is governed by the Law of the Union and not by the repealed law of the particular State. A I R (38) 1951 Pepsu 86 (2); A I R (37) 1950 Pepsu 43 Relied on.

Even if it be conceded that the right to file an appeal includes also the right to file it in a particular Court and the question of forum is, therefore, to be determined by the law that existed at the time the case was started and not by the law that exists at the time the order from which an appeal is sought to be preferred, is made, it cannot be disputed that the Legislation can take away that right or modify it by amending the law, and that S. 116 of the Ordinance X (10) of 2005 is such an express provision by which the Legislature has taken away the right to appeal to the High Court under the old law of the State A I R (38) 1951 Pepsu 39 Relied on. (*Paras 3, 4, 6*)

(b) *Interpretation of Statutes — Retrospective operation of Act — Right of Appeal — When affected.*

A right of appeal, which a suitor has in a pending action, is a vested right and the legislation cannot take it away retrospectively unless it does so by express words or necessary intendment. When a new enactment deals with a right of action, unless it is so expressed in the Act, an existing right of action is not taken away. But when it deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act. (*Para 3*)

Anno: C. P. C., Preamble N. 7.

Hanwant Bir Singh; for Appellant; Jagan Nath for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('50) 2 Pepsu L R 366: (A I R (38) 1951 Pepsu 86 (2)) (Pr 4)

('50) Civil Appeal No. 474 of 2005: (A I R (37) 1950 Pepsu 43) (Pr 5)

('50) Civil Appeal No. 493 of 2005: (A I R (38) 1951 Pepsu 39) (Pr 7)

CHOPRA, J: These two appeals arise out of the following facts: Devinder Singh respondent wanted to sell 4 bighas 5 biswas of his land to Sarwan Singh appellant for Rs. 2,550/-. As required by a special local law of the erstwhile Jind State, the respondent submitted an application for obtaining the necessary sanction to the District Judge, Sangrur on 15-4-1947. A Sub-Judge of the State could hear cases of which the value did not exceed Rs. 2,000/- and cases of higher value were heard by a District Judge. The application which was for sale of the land for Rs. 2,550/- was, therefore, originally presented to and was being heard by the District Judge, when the State joined the Patiala & East Punjab States Union. Shortly after the formation of the Union Ordinance No. X of 2005 was promulgated and published in the Pepsu Government Gazette on 10th Katik, 2005. By this Ordinance three classes of Sub-Judges, with various powers, were created and according to Section 80 of the Ordinance the said application became triable by a Sub-Judge II Class. The District Judge on coming into force of Ordinance X transferred the application on 26-7-2005 to the file of Sub-Judge II Class, Sangrur. The application was dismissed by the Sub-Judge on 9-12-2005 and an appeal against his order was presented by Sarwan Singh, the proposed vendee, in the Court of the District Judge, Sangrur as provided by Section 92 of the said Ordinance. The respondent took objection to the competency of the District Judge to hear the appeal on the ground that under the Jind Law, which was asserted to be applicable to the case, an appeal against an order or decree in cases where value of the subject-matter in dispute was more than Rs. 2,000/-, lay to the High Court. The learned District Judge found in favour of the preliminary objection and dismissed the appeal on that ground alone. Sarwan Singh has filed appeal No. 82 against this order of the District Judge; another appeal No. 83 he has presented against the order of the Sub-Judge with a prayer for extension of time.

(2) The question that crops up for decision is whether the case, in the matter of forum for appeal, would be governed by the repealed Jind Law or by the superseding Union Law embodied in the Ordinance X of 2005. The contention of Shri Jagan Nath, the learned counsel for the respondent is that since an appeal is only a continuation of the original action Jind Law under which the action was started, would decide the forum of appeal. Reliance is particularly placed on the proviso to Section 3 of Ordinance No. 1 of 2005, which laid down that all proceedings pending in the Courts of the Covenanting States on 5-5-2005 would be disposed of in accordance with the laws governing such proceedings in force in those States. It is argued that the right of appeal being a substantive right which gets vested in a party starting an action, it can only be taken away by an express provision of the repealing or amending legislation. The law of the Union, it is urged, has nowhere expressly taken away that right, on the other hand it provided that the pending proceedings would be governed by the law under which they were commenced. It is, therefore, maintained that the appeal from the order of the Sub-Judge lay to the High Court and not to the District Judge.

(3) It cannot be disputed that a right of appeal, which a suitor has in a pending action, is a vested right and the legislation cannot take it away retrospectively unless it does so by express words or necessary intendment. When a new enactment deals with a right of action, unless it is so expressed in the Act, an existing right of action is not taken away. But when it deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act. Keeping these well-recognised principles of interpretation of statutes in view, we have to examine the new enactment which came into force when the application was pending in the Court of the original jurisdiction. Ordinance X of 2005 aimed at consolidating and amending the laws relating to the Courts in the Patiala & East Punjab States Union. Part II of this Ordinance established and constituted a Judicial Committee as the final Court of appeal for the Union and Part III related to the establishment and constitution of the High Court. Section 49 in this Part describes the cases in which an appeal shall lie to the High Court and Subclause (iii) of Cause (b) of Sub-section (1) to this Section provides that an appeal to the High Court will lie from the decree or order of a Subordinate Judge only in cases where an appeal does not lie to the District Judge owing to the value of the subject-matter being beyond the appellate jurisdiction of that Court. Part III of the Ordinance deals with the Subordinate civil Courts, Section 80 which appears in Part III has created three classes of Sub-Judges exercising jurisdiction in civil matters; Sub-Judges of Class II with jurisdiction to try cases of value not exceeding Rs. 5,000/-/-. Section 92 (1) provides that an appeal from a decree or order of a Sub-Judge shall lie to the District Judge where the value of the original suit in which the decree or order was made did not exceed Rs. 5,000/- The Courts in the Union were created by this Ordinance and were to function and to try cases allotted to their jurisdiction. The powers that in certain cases were exercised by the District Judge according to the Jind Law, were given to a Sub-Judge, II Class under the Ordinance and the latter became competent to hear and decide the present application. It was for this reason that it was transferred by the District Judge to the file of Sub-Judge, II Class. An appeal against the order of the Sub-Judge lay to the District Judge under Section 49 of the Ordinance and for the matter of that it could not be filed in the High Court under Section 92. My own view is that this Ordinance did not give or create a right of action but only provided the procedure to be adopted, and the jurisdiction to be exercised, by the different Courts in the Union. The question of forum for a particular action and the jurisdiction of a particular Court are matters of procedure and have nothing to do with the substantive rights of the parties to the action. A right of action is something different from the choice of forum. There may be a vested right of action when the cause of action has accrued before the old Act has been altered; but there can be no vested interest or right in the choice of a particular forum. The analogy of a new Act not effecting a pending action would not, in my opinion, apply to the present case, because generally a new Act must have retrospective effect so far as the choice of forum is concerned. Proviso to Section 3 of Ordinance 1 of 2005, to which reference has been made, would not make any difference, because I do not think it was meant to interfere with the procedure to be adopted, and the jurisdiction to be exercised by the Courts created by the subsequent legislation (Ordinance X of 2005.) The Proviso, in my view only relates to the substantive rights of the parties to an action pending at the time of the formation of the Union and the substantive law by which they were to be governed. If a Court in which an action was rightly started before the formation of the Union, was deprived of the jurisdiction to continue to hear the action or became extinct, I do not think a party could, on the strength of this proviso, insist that the action should be heard and decided by that particular Court. A Court of the like status in the Union and having jurisdiction to hear the action would, under the circumstances, be the only Court competent to hear and decide it. The same would be the result in matters of appeal also. A party aggrieved of an order passed after the promulgation of the new law would not have a right to insist that his appeal should be heard by the Court which was competent to hear it under the old law, even though that Court has been deprived of the jurisdiction to hear the appeal or has become extinct. The District Judges created by the Ordinance X of 2005, were given the powers to hear appeals in certain cases in which an appeal under the Jind Law lay direct to the High Court. The Court of the District Judge would, for the purposes of these cases, be a Court of the status of the High Court of the erstwhile Jind State and be competent to hear appeals which could only be heard by that High Court. Section 92 of the Ordinance expressly took away the jurisdiction of the Union High Court to hear appeals in such cases, and the proviso to Section 3 of Ordinance No. 1 of 2005 cannot, in my opinion grant jurisdiction to the High Court to hear those appeals.

(4) The same result would follow if the matter is viewed from another angle. Ordinance No. 1 of 2005 was repealed by the Ordinance No. XVI of 2005 promulgated on 4-11-2005. It may be remembered that the application in question was decided by the Sub-Judge on 9-12-2005 and the appeal against the order of the Sub-Judge was filed in the Court of the District Judge, Sangrur on 13-1-2006. It is thus clear that the application was decided and the appeal was presented after Ordinance XVI had come into force. Section 3 of the later Ordinance which reiterated Section 3 of Ordinance No. 1 with certain amendments, reads as follows:

> "3. (1) As from the appointed day, all laws and rules regulations, bye-laws and notifications made thereunder, and all other provisions having the force of law, in Patiala State on the said day shall apply, 'mutatis mutandis', to the territories of the Union and all laws in force in the other Covenanting States immediately before that day shall cease to have effect.
>
> Provided that all suits, appeals, revisions, applications, reviews, executions and other proceedings or any of them, whether civil or criminal or revenue, pending in the Courts and before authorities of any Covenanting State shall, notwithstanding anything contained in this Ordinance, be disposed of in accordance with the laws governing such proceedings in force in any such Covenanting State immediately before the appointed day."

The appointed day in this section means 5th Bhadon, 2005. The proviso to the section makes definite mention of an appeal along with the suit or application and lays down that the law prevalent in the Covenanting States relating to each "Proceeding" before the appointed date, was to be applied so far as that proceeding was concerned provided that the proceeding was pending on that date. Appeal in the present case, as already observed, was not pending on the said date and was filed long after 5-5-2005. In view of the clear words of the proviso the law that governed the appeal in Sangrur State could be applied only if the appeal was filed before and was pending at the said date. The law, therefore, that would apply to

guide the filing of the appeal and to determine its forum, must be the one of the Union and not the repealed law of Sangrur State. In 'Bihari Lal v. Kishan Chand', 2 Pepsu L R 366, execution proceedings of a decree passed by a Kapurthala (another Covenanting State) Court were taken out after the formation of the Union, and the law of the erstwhile Kapurthala State was sought to be applied to the execution proceedings on the ground that the execution application was a continuation of that suit in which the decree was passed. On a similar interpretation of the proviso to Section 3 the learned Chief Justice who decided that case, arrived at the conclusion that even if the execution application was a continuation of the suit, the law of the Union would apply to its proceedings because it was instituted after the formation of the Union.

(5) 'Pt Mulkh Raj v. Balwant Singh', Civil Appeal No. 474 of 2005 decided by a Division Bench of this Court of which I was a member, was also a case in which a similar point was involved. A suit for the recovery of Rs. 5,400/- was pending in the Court of the District Judge, Kapurthala when this Union was formed. The case, according to the Kapurthala law, was only triable by the District Judge but on the promulgation of Ordinance X of 2005 it was transferred to the file of the Sub-Judge, First Class. The suit having been dismissed the plaintiff filed an appeal to the High Court because the claim was for an amount more than Rs. 5,000/-. The respondent, taking his stand on the Karpurthala law according to which an appeal from a decree of a Sub-Judge of any class lay to the District Judge, raised an objection that the High Court was not competent to hear the appeal. The preliminary objection was repelled and it was held that since no appeal was pending at the time of the formation of the Union, the Kapurthala law had no application and that the appeal was rightly filed in the High Court as provided by Ordinance X of 2005.

(6) Even if it be conceded that the right to file an appeal includes also the right to file it in a particular Court and the question of forum is, therefore, to be determined by the law that existed at the time the case was started and not by the law that exists at the time the order from which an appeal is sought to be preferred, is made, it cannot be disputed that the Legislation can take away that right or modify it by amending the law expressly or by making a provision from which such an intention must necessarily be inferred. A provision to that effect, in my opinion, is made by Section 116 of the very same Ordinance X of 2005 which reads as follows:

"116. Notwithstanding anything contained in this Ordinance, all suits, appeals, revisions, applications, reviews, executions and other proceedings, or any of them whether civil or criminal, pending in the Courts and before judicial authorities in any Covenanting State shall be continued and concluded respectively in Court or before judicial authorities of the like status in the Union; and the Courts or authorities in the Union shall have the same jurisdiction in respect of all such suits appeals, revisions, reviews, executions, applications and other proceedings, or any of them, as if the same had been duly commenced and continued in such Courts or before such authorities."

If a particular case which could be heard and decided by a District Judge was made cognizable by a Sub-Judge under the new Ordinance, the latter would be an authority of the "like status" for the purposes of that case and would be competent to proceed with it as if the same had been commenced before such authority. That is the only interpretation that I think can reasonably be placed on the language used in the Section.. I cannot agree with Shri Jagan Nath that for the purpose of every case a District Judge of the Union alone would be the judicial authority of the "like status" to a District Judge of the Covenanting State. That limited interpretation would surely be against the intention of the Legislation which is so very clear from the language of the section. The present application was, therefore rightly transferred to the file of the Sub-Judge II Class and he, by the provisions of this section, had the jurisdiction to hear and decide it as if it was duly commenced before him. The concluding words of the section "as if the same had been duly commenced and continued in such Court or before such authority", leave no doubt in my mind that all questions thereafter, including those of appeals and the forum thereof, should be determined by the provisions of the Ordinance. Obviously what these words mean is that notwithstanding the fact that he case was originally instituted in a different Court, for the purposes of jurisdiction it shall be deemed to have commenced in the corresponding Court of the Union. The Sub-Judge, II Class, in the present case had thus the jurisdiction to decide the application as if it had been commenced before him and the inevitable result that follows is that the appeal from his order would lie to the District Judge under Section 92 of the Ordinance and not to the High Court as provided by the repealed law of Jind State.

(7) That this was the intention of the Legislature in framing Section 116 has already been held by a Division Bench of this Court consisting of the Hon'ble the Chief Justice and myself in 'Civil Appeal No. 493 of 2005 'Ganpat Rai Hira Lal v. Aggarwal Chamber of Commerce Ltd., Narnaul', decided on 25-4-1950. The learned Chief Justice in that case observed that the section was an express provision bearing on the point or in any case it affected the ordinary rule of appeal by necessary intendment and held that the right of appeal in a case decided after the promulgation of the Ordinance, was to be decided by the provisions contained in the Ordinance and not by the law that existed at the time the case was commenced.

(8) For all these reasons I hold that the appeal from the order of the Sub-Judge lay to the District Judge and not to the High Court. Appeal No. 82 is consequently accepted, the order of the District Judge set aside and the case remanded to the District Judge, Sangrur, for its decision on merits. The parties have been directed through their counsel to appear in that Court on 23-7-1951. Appeal No. 83 in view of the decision in Appeal No. 82, has become infructuous and it, consequently, stands dismissed. As a contentious point of law was involved in the case, the parties are left to bear their own costs in the two appeals.

(9) GURNAM SINGH, J: I agree.

D.R.R. *Order accordingly.*

A. I. R. (39) 1952 PEPSU 10 (C. N. 7)

CHOPRA, J.

Bishan Singh, Appellant v. Chanan Singh, Respondent.

Second Appeal No. 334 of 2005, D/- 4-6-1951.

(a) Custom (Pepsu) — Applicability — Burden of proof — Persons not belonging to recognized agricultural tribes.

The initial presumption in case of persons who do not belong to recognised agricultural tribes would be that they are governed by their personal law and the burden of proving that they are regulated by custom lies heavily upon them. The mere fact that they are owners of some land which supplies an additional source of their livelihood would

not be enough to rebut the presumption. Only one instance of a daughter having been superseded by the collaterals of the last male-holder in the family would not be a conclusive evidence of the fact that in matters of succession the parties had adopted agricultural custom. The fact that Karewa was permissible in the family would not also be a very strong proof of the fact that in all social matters the parties had adopted custom. The fact that the parties reside in a village where custom generally prevails, would also not be a strong proof that they had abrogated their personal law in favour of custom, particularly so when they do not form an integral part of the village community. (*Paras 4, 5*)

(b) *Custom (Pepsu) — Alienation — Law applicable — Tarkhans of village Thuliwal, Tahsil Dhuri.*

The Tarkhans of village Thuliwal in Tehsil Dhuri are governed by their personal law in matters of alienation and not by general agricultural custom. (*Paras 1, 6*)

Dalip Chand, for Appellant; Gurbachan Singh, for Respondent.

JUDGMENT.: This main contentious point in second appeal of the defendant is whether the parties are Tarkhans of village Thuliwal in Tahsil Dhuri, are governed by their personal law in matters of alienation or by general agricultural custom.

(2) Sobha Singh sold 18 bighas and 6 biswas of land for Rs. 1,500/- to Bishan Singh appellant by registered deed, dated 15-12-93. Chanan Singh respondent brought the suit, giving rise to this appeal, challenging the sale on the usual ground that the land was ancestral and that the sale was for no valid necessity. Custom was alleged to be the law by which the parties were governed in matters of alienation. Prem Singh and Wariam Singh were real brothers and sons of Sehia Singh. Sobha Singh vendor is the son of Prem Singh while Chanan Singh plaintiff and Bishan Singh the vendee are the sons of Wariam Singh. The contest is, thus between two real brothers on an alienation by a cousin of theirs in favour of one of them. Sohna Singh was their common ancestor. The defendant joined issue with the plaintiff on all these points and the plaintiff was called upon to prove that custom was the governing rule amongst the parties and that the land was ancestral. The onus of proving necessity for the sale naturally lay on the vendee. The trial Sub-Judge found favour with the defendant on all the three points and dismissed the suit. The learned District Judge, however, differed from the finding of the trial Judge on all the issues, and the decision he arrived at was that the parties followed custom, the land was ancestral and that necessity to the tune of Rs. 540/- only had been proved. He, consequently decreed the suit and granted a declaration that the sale would not affect the plaintiff's reversionary rights after the death of the alienor. This is defendant's appeal.

(3) The points which according to the learned District Judge stood proved, and which formed the basis of his decision that custom was the rule governing the parties, are that Gurdas, a remote common ancestor of the parties settled in the village at the time of its foundation, that the parties owned and cultivated agricultural land which was the main source of their livelihood, that in social matters they followed custom and that they were Kamins living in a village where custom generally prevailed. Shri Dalip Chand has argued that the findings of the District Judge on some of these points are not supported by the facts on record and contends that the facts proved did not supply sufficient material to arrive at the conclusion that the parties had abrogated their personal law and adopted the general custom of the agriculturist as the rule governing them in matters of alienation. He has further stressed that the learned District Judge had lost sight of another crucial fact which according to him, should be the deciding factor on the point at issue. It is that there had been a good number of alienations in the family of the parties but none of them was ever challenged. The contention of the learned counsel for the respondent on the other hand is that all the points relied upon by the first appellate Court stood clearly established and that they irresistibly lead to a conclusion in favour of the plaintiff's case.

(4) It is not disputed that Tarkhans in village Thuliwal comprise of the family descending from one Gurdas. This Gurdas did not in fact settle in the village at the time of its foundation, as observed by the learned District Judge, but it is apparent from the Kafiat Dehi of the village, a copy of which has been brought on record by the plaintiff, that he was brought to this village by its proprietors sometimes after the village was founded. He was brought from Malerkotla to serve the proprietors as a carpenter and was given some land. The total land that the family descending from Gurdas owned during the last settlement was only an insignficant fraction of the village. The Tarkhans do not form a compact village community or supply any lambardar. The oral evidence adduced by the parties shows that they were carrying on their professional vocation. In addition to the income of the little land they possessed the parties depended for their livelihood on their professional earnings. It is also in evidence that they did not personally cultivate any land. Entries in the missal haqiat show that the whole of the land owned by the family of the parties was either mortgaged with Jats or was in their possession as tenants. A copy of the Jamabandi of 2001-2002 also makes it clear that the land was not cultivated by its owners. Even the land in dispute was not cultivated by the defendant himself ever since he got it. Tarkahans have not been declared as scheduled agriculturists in Tehsil Dhuri. The initial presumption in case of persons who do not belong to recognised agricultural tribes would be that they are governed by their personal law and the burden of proving that they are regulated by custom lies heavily upon them. The mere fact that they are owners of some land which supplies an additional source of their livelihood would not be enough to rebut the presumption. The plaintiff appearing as his own witness did not state that any member of his family ever cultivated any land himself. All that he stated was that income from land was a source of their livelihood. He, however, expressed his ignorance as to whether the parties carried on their professional occupation or as to who served the proprietors as carpenters. Arjan Singh and Harnam Singh plaintiff's witnesses admitted that the parties were serving the proprietors as carpenters and that the Tarkhan in the village could alienate their land even without necessity. The other two witnesses examined by the plaintiff were Mohammadans and they only deposed that the parties depended for their livelihood on agriculture.

(5) Only one instance of a daughter having been superseded by the collaterals of the last male-holder in this family has been relied upon to prove that the parties were governed by custom in matters of succession. No other instance of the kind has been referred to or proved and I am afraid, only one such instance would not be a conclusive evidence of the fact that in matters of succession the parties had adopted agricultural custom. The fact that Karewa was permissible in the family would not also be a very strong proof of the fact that in all social

matters the parties had adopted custom. No particular instance of a Karewa in the family has been referred to, but the fact does not appear to be seriously contested. Karewa now-a-days is not looked upon with much of disfavour even amongst the persons who are admittedly governed by Hindu Law. The fact that the parties reside in a village where custom generally prevails, would also not be a strong proof that they had abrogated their personal law in favour of custom, particularly so when they do not form an integral part of the village community.

(6) Another important factor which goes strongly against the allegations of the plaintiff, is that there have been a large number of alienations in this family before and after the last settlement, but none of them, except the one now in dispute has so far been challenged. The copy of the Missal Haqiat shows that the whole of the land of Prem Singh and Wariam Singh whose sons the parties are, had been mortgaged. One Hira Singh Tarkhan is said to have made a gift of his land in favour of Mt. Dharmo. The plaintiff himself admitted that Sobha Singh, the vendor in the present case had mortgaged some of his land to him, and that he (Sobha Singh) had absolutely no necessity to mortgage it. The plaintiff in his statement recorded in this Court referred to a sale of 18 bighas of land by one Bhag Singh in his favour. The original sale deed was produced by him and it was marked Ex. CA. The sale was for Rs. 800/-, Rs. 400/- out of this were paid before the Sub-Registrar and the rest was mentioned in the document to have been paid sometime earlier. The plaintiff has admitted that this Bhag Singh who was his first cousin, was spendthrift and had no valid necessity to alienate the land. Bhag Singh, according to him, was wasting away his property and this induced him (Plaintiff) to take the land himself. He further deposed that he had given half of his land to Bishan Singh defendant because of the latter's being a collateral, like him, of his vendor. This fact is denied by Bishan Singh and he stated that Chanan Singh had passed on about half of the land to him because he (Chanan Singh) stood in need of money. The two houses of Bhag Singh had also been purchased by Chanan Singh and one of these houses is alleged to have been transferred to Bishan Singh. Whatever may be the real position, it stands admitted that Bhag Singh sold away the whole of his property without any binding necessity. It has been found that the land in possession of the members of this family had descended from their common ancestor Sohna. This Bhag Singh was also a descendant of Sohna. The land that he alienated was, therefore, ancestral qua the parties to this case. The fact that none of the so many alienations in the family had been challenged, supports the argument of the learned counsel for the appellant that Chanan Singh, probably, was not confident of his right to impugn the alienations intended to be effected by Bhag Singh and that was why he acquired the property himself for consideration. These facts taken along with the evidence of the two witnesses of the plaintiff that the Tarkhans in the village could alienate their land without necessity and the admission of the plaintiff that Sobha and Bhag Singh, his first cousins, had alienated their ancestral lands for no necessity, strongly go to show that the parties had an unrestricted right in matters of alienation. The evidence in my opinion is not sufficient to prove that the power to alienate ancestral property amongst Tarkhans of Thuliwal is restricted as in the case of recognised agricultural tribes. The necessary consequence is that Hindu Law must be held to govern the matter. That law confers unrestricted right of alienation of the separated property by its owner whether it be ancestral or self-acquired. The plaintiff in that case would have no right to challenge the alienation in question.

(7) In view of my finding regarding the 'locus standi' of the plaintiff to impugn the sale in question the other issues need not be gone into. In the result the appeal of the plaintiff is accepted, decree of the District Judge set aside and that of the result the appeal of the plaintiff is accepted, all the facts and circumstances of the case the parties are, however, left to bear their own costs throughout.

V.B.B. *Appeal allowed.*

A. I. R. (39) 1952 PEPSU 12 (C. N. 8)

TEJA SINGH, C. J.

Sardara Singh, Petitioner v. Custodian Muslim Evacuee's Property and another, Respondents.

Civil Misc. No. 15 of 1951, D/- 21-6-1951.

(a) Administration of Evacuee Property Act (21 (XXI) of 1950), S. 12 — If 'ultra vires' — Constitution of India Art. 246, Sch. VII List II, Item 18 and List III, Item 41.

Some of the matters to which S. 12 Administration of Evacuee Property Act relates might come within the ambit of Item 18 of List II. But the precise item under which the matter dealt within S. 12 falls is Item No. 41 of List III which is a Concurrent List and laws in respect of which can be made by the Parliament as well as the State Legislature. There is no doubt that all immoveable property is included in the term land and it can, therefore, be urged that Item 18 of List II includes all the matters dealt with in Item 41 of List III, but since the former item is general, Item No. 41 of List III which is specific, must be preferred to it. It follows from this that notwithstanding Item No. 18 of List II, the Parliament had the power to pass a law 'inter alia' for the management of the property held by law to be evacuee property and since the management includes not only the power to make an allotment and grant a lease, but also to cancel or vary the terms of allotments and leases already effected, S. 12 was not 'ultra vires' of the Parliament. (Para 6)

(b) Administration of Evacuee Property Act 21 (XXI) of 1950), S. 12 — If contravenes Art. 14 Constitution of India.

S. 12 of the Act which empowers the Custodian to vary the terms of allotment and leases made by himself irrespective of the fact whether the other side agrees to it or not is not repugnant to Art. 14 of the Constitution and as such is not void. The power given to the Custodian is by virtue of the office that he holds and a law which vests a public officer or even a class of public Officers with powers not possessed by an ordinary citizen, cannot be regarded as denying to the citizen the equality before the law. According to S. 12, the Custodian has power to vary the terms of all allotments and leases granted or entered into after the 14th day of August 1947 irrespective of the fact whether the other party belongs to a particular class or community. So it cannot be said that any distinction has been made between persons who obtain allotment and leases of evacuee property. (Para 7)

(c) Administration of Evacuee Property Act (21 (XXI) of 1950) S. 56 — Rules under R. 14 (4) — Non-compliance with — Effect—Order of custodian cancelling allotment without notice, if can be quashed — Constitution of India, Art. 226.

When a Court of Law proceeds to decide a case against a party without giving him a notice and without hearing him, the order made is without jurisdiction, because giving of a notice is a condition precedent to the Court's power to decide the

case. (1927) 1 K. B. 491 and A I R (29) 1942 Mad 706, Ref. (Para 11)

Though a Custodian of evacuee property appointed under the Act cannot be described as a Court of law, his functions are 'quasi-judicial' and it is incumbent upon him to follow the provisions of law as well as the rules that have the force of law. Consequently, when he ignores a mandatory rule i.e., R. 14 (4) and cancels or varies an allotment without giving notice to the persons likely to be affected by his order, he acts without jurisdiction and his order must be quashed under Art. 226 of the Constitution. (Para 11)

(d) Civil P. C. (1908), S. 35 — Costs — Discretion to disallow costs to successful litigant, when exercised.

The Ordinary rule is that a successful litigant is entitled to his costs against his adversary but where some of the points urged by the petitioner's counsel, which resulted in considerable loss of public time, were frivolous and without any substance the Court directed the petitioner to bear his own costs. (Para 12)

Anno: C. P. C., S. 35, N. 7.

Ram Karan Dass, for Petitioner; Banwari Lal for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('42) A I R (29) 1942 Mad 706: (I L R (1943) Mad 402) (Pr 11)

(1927) 1927-1 K B 491: (96 L J K B 77) (Para 11)

ORDER: This is a petition under Section 60 of Ordinance No. 10 of 2005 and Article 226 of the Constitution of India for issue of writs of prohibition etc., to the Custodian of Muslim Evacuee Property and the Director of Rehabilitation (Urban) Patiala & East Punjab States Union. The allegations of the petitioner are that he is a refugee from Sheikhupura District, and that when he migrated to Patiala in the year 1949, the Custodian by his order dated 28-2-2006 allotted to him the vacant piece of land included in the area of the Idgah and known as Khola, for a period of three years. The rent was fixed at Rs. 20/- per mensem. The petitioner got possession of the Khola and set up therein a workshop for service and repairs of automobiles and tractors. Later on, the Custodian cancelled the petitioner's allotment in respect of a part of the Khola and allotted it to the Standard Vacuum Oil Company of New Delhi with a view to enabling them to set up a petrol pump and service station. The petitioner's case is that the order of the Custodian cancelling the petitioner's allotment in so far as it related to a part of the Khola, and allotting it to the said Company is illegal and without jurisdiction, first because no notice of the Custodian's intention to vary the terms of the original allotment was given to the petitioner, and secondly because the Custodian did not act on his own accord but was influenced by extraneous considerations. Accordingly, the petitioner prays that the Custodian's subsequent order be quashed, and that a writ be issued to him prohibiting him from evicting the petitioner from that part of the vacant site which he later on allotted to the Standard Vacuum Oil Company.

(2) The petition was opposed by both the respondents and it was urged on their behalf that the part of the Khola which was allotted to the Oil Company was in excess of the requirements of the petitioner and the allotment was made for public purposes. It was further urged on behalf of the respondents that the requirements of law regarding notice, etc., were duly complied with and the petitioner was given every opportunity to put forward his objections to the cancellation of his allotment.

(3) As I have already mentioned, the original allotment in favour of the petitioner was made by the Custodian and it was he who cancelled the allotment in respect of a part of the Khola and allotted that part to the Standard Vacuum Oil Co. The correspondence that has been produced before me was also between the petitioner and the Custodian, and the petitioner's counsel has not been able to show what part respondent No. 2, the Director of Rehabilitation (Urban) played in the affair and whether the petitioner is entitled to any kind of relief against him. I have, therefore, no hesitation in coming to the conclusion that he was dragged in Court without any reason.

(4) As regards the Custodian, the condition is quite different. It is not denied that the allotment of the entire Khola that he made in the petitioner's favour was for a period of three years. It is true that Section 12 of the Administration of Evacuee Property Act, 1950 (No. XXXI of 1950) gives the Custodian power to vary or cancel leases or allotments of evacuee property, but it is conceded by his counsel that the procedure for the exercise of this power is regulated by rules framed under Section 56 of the Act and it is laid down in Sub-rule (4) of Rule 14 of the Rules that before cancelling or varying the terms of a lease or before evicting any lessee the Custodian shall serve the person or the persons concerned with a notice to show cause against the order proposed to be made and shall afford him a reasonable opportunity of being heard. Shri Banwari Lal counsel for the Custodian has conceded that this rule was binding upon the Custodian and before he could cancel the petitioner's allotment even in part, it was incumbent upon him to give a notice to the petitioner and to give him an opportunity of being heard in support of his objections, if he had any.

(5) Before I proceed to decide whether the petitioner was given a notice in the terms of Rule 14, Sub-rule (4), I would like to dispose of the plea raised by the petitioner's counsel that Section 12 was 'ultra vires' of the Parliament. His argument was that when the Custodian grants a lease of a Muslim evacuee property or makes an allotment of it to another person, relationship of lessor and lessee or landlord and tenant, as the case may be comes into existence between him and the other person, and this relationship can be put an end to only under the appropriate enactments, such as the Transfer of Property Act or the Rent Restrictions Act, under which the case may fall. He further argued that the Parliament by enacting Section 12 of Act No. 31 of 1950 empowered the Custodian to ignore the provisions of all those laws and since the matter was included in Item No. 18 of List II of the Seventh Schedule of the Constitution of India, laws in respect of which could only be made by the State Legislature, under Clause (3) of Article 246 of the Constitution the Parliament exceeded the authority vested in it by the Constitution. Item 18 of List II reads as follows:

"Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land, land improvement and agricultural loans; colonization."

(6) Section 12 of the Act is no doubt very widely worded and it may sometime happen that while exercising the power to cancel or vary a previous lease or allotment, the Custodian will have to override the existing law affecting the relation of landlord and tenant, transfer and alienation of land etc., that is to say, some of the matters to which S. 12 relates might come within the

ambit of Item 18 of List II. But the precise item under which the matter dealt with in S. 12 falls in Item 41 of List III which is a Concurrent List and laws in respect of which can be made by the Parliament as well as the State Legislature. The said item relates to "custody, management and disposal of property (including agricultural land) declared by law to be evacuee property." There is no doubt that all immoveable property is included in the term land and it can, therefore, be urged that Item 18 of List II includes all the matters dealt with in Item 41 of List III, but since the former item is general, Item 41 of List III which is specific, must be preferred to it. It may be pointed out here that a mere perusal of the three lists would go to show that many of the items included therein overlap one another and when one item is wide and general and the other is narrow and specific, with a view to finding out which would apply to a particular matter, the narrow and specific item should be taken to exclude the other. This is in conformity with the well-recognised rule of construction of statutes that when there are two provisions of law, one general and the other specific, the latter excludes the operation of the former. It follows from this that notwithstanding Item 18 of List II, the Parliament had the power to pass a law 'inter alia' for the management of the property held by law to be evacuee property and since the management includes not only the power to make an allotment and grant a lease, but also to cancel or vary the terms of allotments and leases already effected, S. 12 was not 'ultra vires' of the Parliament.

(7) It was also urged by the learned counsel for the petitioner that Section 12 was void for the reason that it offended against Aricle 14 of the Constitution. In my opinion, there is no force in his contention either. The words of this Article are "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Counsel argued that when one person enters into a contract with another person, he cannot vary or alter it unilaterally, but Section 12 of the Evacuee Property Act empowers the Custodian to vary the terms of allotment and leases made by himself irrespective of the fact whether the other side agrees to it or not. It must, however, be remembered that the power given to the Custodian is by virtue of the office that he holds and I do not think that a law which vests a public officer or even a class of public officers with powers not possessed by an ordinary citizen, can be regarded as denying to the citizen the equality before the law. According to the vary nature of things if adminisration of the country is to be carried on and an ordered government is to function, persons holding public offices have to be given powers which are not possessed by ordinary citizens. According to S. 12, the Custodian has power to vary the terms of all allotments and leases granted or entered into after the 14th day of August 1947 irrespective of the fact whether the other party belongs to a particular class or community. So it cannot be said that any distinction has been made between persons who obtain allotment and leases of evacuee property. The conditions would have been quite different if the section had laid down that leases and allotments granted or entered into with one class of people should be treated as sacrosanct while those granted or entered into with others, should be liable to cancellation or variation, etc.

(8) What has now to be decided is whether the mandatory provisions of Rule 14 (4) in respect of notice were complied with. No particular form of notice is provided by the rules, but the words of Sub-rule (4) go to show that the following conditions have to be satisfied:

(1) that intimation should be given to the person concerned that it is proposed to cancel the term of his lease or allotments;
(2) that he should be informed that he has a right to put forward his objections to the proposed cancellation or variation of the terms; and
(3) that he should be given reasonable opportunity of having a say in support of his objections.

(9) What happened in the present case was as follows: On 15-12-1949 the Custodian addressed a letter to the petitioner (Ex. P. A.), in which he informed him that it had been found on inspection of the plot which had been allotted to the petitioner that a part of it measuring 232' x 132½" was not being put to any use by the petitioner and intimating to him that the above-mentioned part of the plot might be taken back from him for use by the Department for any other useful purpose, leaving behind the other measure 167' x 177' for his use. To this letter the petitioner sent a reply on 18th December, 1949. Ex. D. B. is the copy of that reply. The main points raised by the petitioner in the reply were that if the object, for which the allotment had been made to him, had to be fulfilled it was necessary that the part of the plot, which the Custodian described as lying without any use, had been left vacant so that it could be used for testing the vehicles which were brought to the workshop for repairs, etc., and that in view of the development of his workshop, which he was contemplating, even the plot which had been allotted to the petitioner would not be sufficient. On the strength of these facts he submitted that he was not in a position to spare any part of the Khola. No further action was taken by the Custodian on the receipt of the petitioner's reply and the matter remained where it was for about 7 months till 14-7-1950, when the Custodian addressed another letter to the petitioner saying that it was intended to give the whole of the Khola that had been allotted to the petitioner on a temporary lease to another person and in that case the petitioner would have to regard himself as the lessee of that person. The petitioner objected to this proposal and it appears that this was also dropped. On 20th July 1950 the petitioner received the following communication from the Custodian:

"You are hereby directed to relinquish you possession of 9,600 square feet land towards the railway gate immediately for the installation of Petrol Pump and Service Station to be run by the Standard Vacuum Oil Company, Queensway, New Delhi. I am asking the said company to commence their construction there as per Ferro-Plan submitted by them. This may be treated as most urgent."

A week later, i.e., on 29th July another order under the signatures of the Custodian was received by the petitioner. This order reads as below:

"You were directed vide my letter No. 3119, dated 20-7-50, marked immediate, to relinquish your possession of 9,600 sq. feet land towards the Railway Gate for the installation of Petrol Pump and service station to be run by the Standard Vacuum Oil Company of New Delhi but I am informed that you have not done so uptil now. Please see the undersigned in office on Monday morning (9-0 A.M.) without fail in this connection and treat it as most urgent."

The final order is contained in the Custodian's letter No. 757 dated 25-1-51. The operative part of the order was to the effect that a plot measuring 120' x 80'. leaving 90' from the Railway Gate site, out of the plot allotted to the petitioner having been found to be a surplus accommodation had

been allotted to the Standard Vacuum Oil Company of Queens-Road, New Delhi, as desired by the Under-Secretary-Rehabilitation vide his No. SR 4211, dated 14-7-50 and the possession of the plot had been handed over to Messrs Amir Chand and Sivsaran Das, representatives of the Company cited above. The concluding words of the order are:

"It is, therefore, ordered that the allotment of the above-mentioned portion viz., 120' x 80' out of the plot already allotted to you is hereby cancelled."

(10) It is conceded by the respondents' counsel that no formal notice as contemplated by Sub-rule 4 of Rule 14 was given to the petitioner before his allotment in respect of the area of 120' x 80' was cancelled and the same was allotted to the Oil Company. He, however, argued that the letter of 15-12-49 that the Custodian addressed to the petitioner satisfied all the requirements of a notice. In my judgment the contention is devoid of force, and my reason for coming to this conclusion is that though the letter contained an intimation that it was proposed to take the above-mentioned area out of the petitioner's possession he was never told that he had a right to object to the proposed order and further no opportunity was afforded to him of being heard. This means that the provisions of Sub-rule 4 of Rule 14 were not complied with. In addition, as I have already observed, the proposal was dropped and the whole thing came to an end for the time being. The same remarks apply to the Custodian's order conveyed in his letter of 14-7-50. As regards the subsequent orders and more particularly the final order of 25-1-51 it is not even alleged by the counsel for the respondents that they were preceded by any kind of notice, formal or informal, or that the petitioner was allowed an opportunity to put forward his objections to the proposed allotment of a part of the Khola to the Oil Company. My attention was drawn by the respondents' counsel to the last sentence of the Custodian's order of 29-7-50 directing the petitioner to see him in his office on Monday morning at 9-0 A.M., without fail. In the first place I cannot take this as tantamount to giving the petitioner a hearing to put forward his objections, because an opportunity of this kind had to be given before the allotment was varied or cancelled while it is clear from the preceding part of the letter as also from the previous letter of 20th July 1950 that a part of the petitioner's Khola had already been allotted to the Oil Company. Then the petitioner alleges, and this allegation is supported by an affidavit, that in compliance with his order he went to the Custodian's office on the appointed day and at the appointed time but he did not find him there. He further alleges that he again put in written objections to the cancellation of his allotment but they were never considered. The Custodian did not care to traverse the petitioner's allegation on this point nor did he put in a counter affidavit. This means that no hearing was given to the petitioner in fact.

(11) The other question that calls for determination is what is the effect of the Custodian's failure to give notice to the petitioner and to afford him an opportunity of hearing before cancelling his allotment. It is well established that when a Court of Law proceeds to decide a case against party without giving him a notice and without hearing him, the order made is without jurisdiction, because giving of a notice is a condition precedent to the Court's power to decide the case. I may refer in this connection the following observation made by Bankes, L. J. in 'King v. North (1927) 1 K B 491:

"The question which we have to consider in this case is what is the legal position of a person against whom an order for the payment of money has been made in a judicial proceeding where the person had no opportunity of being heard before the order was made? The rule of law applicable to such a case is thus stated in Broom's Legal Maxims, 9th Edn., page 78. "It has long been a received rule that no one is to be condemned, punished, or deprived of his property in any judicial proceeding unless he has had an opportunity of being heard." That is the general rule which we have to apply, and I should like to refer to two cases: (After this his Lordship referred to the cases)".

Reference may also be made to 'Valliappa Chettiar v. Arandi', A I R (29) 1942 Mad 706. In that case a petition had been made under Section 44B, Madras Hindu Religious Endowments Act, asking for an order directing the resumption of certain Devadayam inam lands granted to certain temples in a village. The petition was made by the trustees of the temples and the respondents were the persons who were in possession of lands as alienees. The respondents raised the contention that the section had no retrospective effect and this objection was allowed by the Revenue Divisional Officer and he held that the petition filed by the trustees was not maintainable. On this the trustees appealed to the Collector who without giving any notice to the respondents, directed the Revenue Divisional Officer to reopen the case and decide it on its merits. The respondents then made a petition to the High Court for issue of a writ of certiorari to quash the Collector's order. Learned Judges while accepting the petition made the following observation:

"The District Collector is there to administer the law and not to ignore it. His action in deciding the appeal made to him under S. 44B (2) (d) without notice to the respondents was most high-handed and he aggravates the situation by claiming a right to act in this manner."

I am aware that the Custodian cannot be described as a Court of Law, but, as I have held in another case, in matters of this kind his functions are 'quasi judicial' and it is incumbent upon him to follow the provisions of law as well as the rules that have the force of law. Consequently, I hold that when he ignores a mandatory rule and cancels or varies an allotment without giving notice to the persons likely to be affected by his order, he acts without jurisdiction and his order must be quashed for this reason alone.

(12) In the result I allow the petition in so far as it relates to the Custodian and set aside his orders of 20th July 1950, and 29th July 1950 and 25-1-1951. As I am told that the petitioner has been dispossessed of the part of the Khola was which the Custodian has allotted to the Oil Company, during the pendency of these proceedings, I further direct the Custodian to take back the possession of that plot from the Oil Company or from the persons who may be holding it on behalf of the Company, and to restore it to the petitioner. The Ordinary rule is that a successful litigant is entitled to his costs against his adversary but I do not propose to apply this rule in the present case, because some of the points urged by the petitioner's counsel, which resulted in considerable loss of public time, were frivolous and without any substance and I direct that the petitioner shall bear his own costs. For the reasons already mentioned the petition as against the Director of Rehabilitation shall stand dismissed with costs.

K. S. *Petition allowed.*

A. I. R. (39) 1952 PEPSU 16 (C. N. 9)

TEJA SINGH C. J.

Mulkh Raj, Petitioner v. Director of Rehabilitation and others, Respondents.

C. M. No. 98 of 1951, D/- 10-7-1951.

Constitution of India, Art. 227 — Power of High Court — When to be exercised — Order of Custodian held proper — Administration of Evacuee Property Act (1950), S. 10.

In so far as the Custodian and his subordinates have to decide questions relating to the respective rights of the parties that appear before them they are tribunals and the High Court has power of superintendence over them under Art. 227 of the Constitution. This power includes the power to interfere with their orders in appropriate cases. The power of superintendence is, however, not a power given to the Court to correct errors and the power should be exercised only in cases where the Courts have clearly done something which they were not intended to do and it must be used to keep the Courts within the bounds prescribed by law for such Court. 'Civil Misc. No. 1 of 1950', Relied on.

Thus where the custodian passed an order of allotment and for possession of certain evacuee property, but subsequently finding that the property was in possession of certain tenants of the evacuees who could not be ejected therefrom except in due process of law, the custodian set aside the order and restored the possession to the tenant.

Held that the custodian's latter order merely rectified the mistake made by his department, which it was open for him to do, and not being a wrong or erroneous order could not be interfered with under Art. 227. (*Para 2*)

Jagan Nath, for Petitioner — Dalip Chand, for Nos. 3 to 12 and Banwari Lal, for Nos. 1 and 2, for Respondents.

Case referred to:

('50) Civil Misc. No. 1 of 1950, (Pepsu) (Pr 2)

ORDER: This is a petition under Art. 227 of the Constitution of India for setting aside the order of the Director of Rehabilitation (Rural) and the Assistant Commissioner Rehabilitation, Patiala (respondents Nos. 1 and 2 respectively). The facts briefly stated are as follows: The petitioner was allotted certain land by order of the Director of Rehabilitation dated 10-12-1949 and it is alleged by him that later on he was also put in actual possession of the land. It appears that part of the land was in the actual possession of tenants and in spite of the fact that petitioner was alleged to have been given actual possession they continued to pester him and probably did not even admit his possession. On this the petitioner made a representation to the Assistant Commissioner Rehabilitation who by his order dated 17-6-1950 ordered possession of the tenants to be restored and fixed the batai at one half. Against this order the petitioner as well as the tenants made revision petitions to the Director of Rehabilitation. The petitioner's revision was dismissed but that of the tenants was allowed and the batai was reduced to one-third. The petitioner alleges that after the land had been allotted to him under the orders of the Director of Rehabilitation and actual possession of it had also been delivered to him neither the Assistant Commissioner Rehabilitation nor the Director of Rehabilitation had any jurisdiction to disturb his possession and to order that the possession of the tenants be restored. The petitioner further alleges that the Assistant Commissioner Rehabilitation and the Director of Rehabilitation being tribunals within the meaning of Article 227 their orders are liable to be set aside by this Court under the powers of superintendence. The tenants have also been made parties to this petition, they are respondents Nos. 3 to 12.

(2) It is admitted before me that the Assistant Commissioner Rehabilitation and the Director of Rehabilitation by virtue of the offices that they hold are respectively the Deputy Custodian and the Additional Custodian. It has been held by a Division Bench of this Court in 'Kartar Singh v. Custodian, Muslim Evacuees Property', Civil Misc. No. 1 of 1950, that in so far as the Custodian and his subordinates have to decide questions relating to the respective rights of the parties that appear before them they are tribunals and this Court has power of superintendence over them under Article 227 of the Constitution and this power includes the power to interfere with their orders in appropriate cases. The only question that has to be decided is whether this is a fit case in which that power should be exercised. As was held in the division Bench case mentioned above the power of superintendence is not a power given to the Court to correct errors and that the power should be exercised only in cases where the Courts have clearly done something which they were not intended to do and further that it must be used to keep the Courts within the bounds prescribed by law for such Court. In this case as I shall show hereafter the orders of the D. R. and the A. C. R. that are being challenged are not even erroneous. The contention that after the land had been allotted to the petitioner and possession had been ordered to be given the Director of Rehabilitation and his subordinates became functus officio is without any force, because the tenants' position was that since they had been cultivating the land for many years and were in actual possession of their holdings the Director of Rehabilitation had no power to oust them and when this fact was brought to the notice of the Assistant Commissioner Rehabilitation I cannot understand why it was not open to him to rectify the mistake that his department had made. I may also observe that there is no definite proof of the fact that possession was actually taken from the tenants and was given to the petitioner. No doubt it was mentioned in the Assistant Commissioner's order that the petitioner was in possession, but it cannot be believed that the tenants had willingly surrendered the possession in his favour. In any case, even if somebody acting under the orders of the Assistant Commissioner or the Director of Rehabilitation had gone to the spot and given actual possession to the petitioner, this act of his was illegal. It is true that according to the provisions of the Administration of Evacuee Property Act, 1950 and the various Ordinances that were promulgated by His Highness the Rajpramukh in this State from time to time, before Act 31 of 1950 came into force, the entire property including agricultural lands which once belonged to Muslim evacuees vest in the Custodian but it must be remembered that since the Muslim owners themselves, had they been here, could not eject the tenants except in due process of law, neither the Director of Rehabilitation nor the Assistant

Commissioner, Rehabilitation while acting as Deputy Custodian or Addl. Custodian, as the case may be, could interfere with the tenants' possession. In the view that I take I hold that the Director of Rehabilitation and his subordinates had no power to order that possession of that part of the land allotted to the petitioner which was in the actual possession of the old tenants should be delivered to the petitioner and consequently if the possession was delivered it amounted to an illegal act. It follows from this that when the Assistant Commissioner Rehabilitation ordered that the possession of the tenants should be restored he merely rectified a mistake that had been committed by his department and, therefore, his order cannot be described as wrong or erroneous.

(3) As a last resort the petitioner's counsel submitted that the Assistant Commissioner Rehabilitation had fixed the batai at one-half with the consent of the tenants and the Director of Rehabilitation was not justified in setting aside that order on the revision petition made to him by the tenants. Shri Dalip Chand who appears on behalf of the tenants denies that the tenants were ever agreeable to pay the batai. Since this is a matter which requires evidence, I do not think I would be justified in interfering with the Director of Rehabilitation's order in this petition.

(4) The result is that the petition fails and is dismissed with costs.

D.R.R. *Application dismissed.*

A. I. R. (39) 1952 PEPSU 17 (C. N. 10)

TEJA SINGH C. J. AND GURNAM SINGH J.

Ram Narain, Appellant v. Gokal Ram and others, Respondents.

Second Appeal No. 368 of 2006, D/- 4-7-1951.

Registration Act (1908), S. 17 (b)—Document waiving right of pre-emption — Registration.

The right of pre-emption is merely a personal right and not a right to or in immovable property and consequently the document whereby such a right is waived does not require registration, even if it be assumed that the value of the right is the value of the property. 136 Pun Re 1894, Foll.; 37 Pun Re 1888, Dissent.

(*Para 3*)

Anno: Registration Act, S. 17, N. 85.

D. S. Nehra, for Appellant; Kedar Nath, for Respondents.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('88) 37 Pun Re 1888 (Pr 2)
('94) 136 Pun Re 1894 (Pr 2)

TEJA SINGH C. J. : The short question involved in this appeal is whether the plaintiff had waived his right to pre-empt the sale in question. The defendant placed on record a document in which it was definitely stated that if the plaintiff was allowed certain land he would not exercise his right of pre-emption. The execution of the document was proved but the plaintiff objected that since it was not registered it could not be adduced in evidence. The argument advanced on his behalf was that the right to pre-empt is a right to or in immoveable property and since the value of the property in this case was above Rs. 100/- the document whereby the plaintiff gave up that right came under the purview of Section 17 (b) of the Registration Act and was compulsorily registerable. Both the Courts below have come to the conclusion that there was no force in this contention and have accordingly dismissed the suit. The plaintiff has now preferred a second appeal to this Court.

(2) Section 4 of the Pre-emption Act defines the right of pre-emption as the right of a person to acquire agricultural land or village immovable property or urban immovable property in preference to other persons. The question whether such a right can be regarded as a right to or in immovable property was first discussed by a Division Bench of the Punjab Chief Court in 'Mohammad Bakash v. Hayat Khan', (37 Pun Re 1888). That was also a case in which the plaintiff was alleged to have relinquished his right to pre-empt a sale by virtue of a document that he had executed. Mr. Justice Rattigan answered the question in the negative and held that a right of pre-emption is a right to or in immovable property. In coming to this conclusion he relied upon the definition of the right of pre-emption given in Section 9 of the Punjab Laws Act, 1872 which defined it as a right to acquire immovable property in preference to all other persons. The learned Judge observed that Section 9 created statutory right to become the purchaser of immovable property under certain conditions as to payment, etc. and remarked that such a right could not be put on a less higher footing than a right which a private purchaser acquires under a voluntary deed of sale to enforce that sale against a recalcitrant vendor on payment of the purchase money. In the view that he took he held that a document whereby a right of pre-emption was relinquished would come within the ambit of Section 17 (b) and Section 49 of the Registration Act. This decision was, however, expressly dissented from by another eminent Judge of the Chief Court Punjab (Mr. Justice Plowden) in 'Dhani Nath v. Budhu', 136 Pun Re 1894). The learned Judge made the following observations :

> "The fundamental question raised by the argument is whether the customary right of pre-emption dealt with under the Punjab Laws Act, 1872 is a right to or in immovable property within the meaning of this Section and it appears to me that it is not. A preferential right to acquire land, belonging to another person upon the occasion of a transfer by the latter does not appear to me to be either a right to or a right in that land. It is 'jus ad rem alienam acquirendam' and not 'jus in re aliena.'"

The learned Judge further observed that if the pre-emptor's right is regarded between him and the owner it is not a right to the land sold, and that if regarded between the pre-emptor and the person other than the vendor it lacks some of the usual attributes of a right to or interest in the property and that it could not be assigned. Referring to the previous case this is what he said :

> "The views expressed are not in accord with the decision of this Court in 37 Pun Re 1888, but we are not bound on that account to refer the question to a Full Bench. There is no current of decisions based upon that case so as to render a reference necessary."

[3] With all respect I agree with the view taken by Mr. Justice Plowden and hold that the right of pre-emption is merely a personal right and not a right to or in immovable property and consequently the document whereby such a right is waived does not require registration, even if it be assumed for the sake of argument that the value of the right is the value of the property a point upon which also there is a considerable room for doubt.

[4] It was urged before us by the appellant's counsel that the waiver by the plaintiff of his right was conditional upon his getting certain other land and since that condition was not fulfilled he could not be non-suited. This plea was not raised in the Court below and in my opinion it cannot be raised before us at this stage.

[5] The result is that the appeal fails and is dismissed with costs.

[6] **Gurnam Singh J.**—I agree.

G.M.J. *Appeal dismissed.*

A. I. R. (39) 1952 Pepsu 18 *[C. N. 11.]*

CHOPRA J.

Mst. Har Kaur — Appellant v. *Court of Wards, S. Kuldip Singh and another—Respondents.*

Second Appeal No. 383 of 2005, D/- 14 6-1951.

Limitation Act (1908), Art. 75—Instalment bond—Default clause — Option to sue in favour of creditor — Suit for recovery of instalments within time.

In an instalment bond with a condition of exigibility on one default the question as to when time begins to run really depends upon the construction of the document and the contract between the parties.

By an instalment bond the debtor expressly contracted to give the creditor an option to treat or not to treat the default as enabling him to sue for the whole amount. It was stipulated that the creditor might sue only for the instalment or instalments that fall due or, if he so liked, he might call upon the debtor to pay the whole of the amount that remained unpaid. It was expressly contracted by the debtor that the creditor, even in case of default, could sue for the instalment that had fallen due without taking benefit of the default :

Held that a suit by the creditor, under the circumstances, only for the instalments that were within time would not be barred under Art. 75, if he did not choose to take benefit of the default clause: A. I. R. (24) 1937 Lah. 1 ; 9 Patiala L. R. 324 and A. I. R. (36) 1949 Mad. 592, *Rel. on.* [Para 5]

Anno. Limitation Act, Art. 75, N. 8.

Daya Sarup Nehra —for Appellant; Daya Kishen Puri — for Respondents.

Cases referred to:—

('37) A.I.R. (24) 1937 Lah. 1 : (169 I. C. 929). [Pr. 6]

('49) A.I.R. (36) 1949 Mad. 592 : (1949-1 M.L.J. 112). [Pr. 6]

9 Patiala L. R. 324. [Pr. 6]

Judgment.— This is a second appeal by the defendant in a suit brought upon an instalment bond which provided for payment of the principal sum by certain instalments and gave an option to the obligee to realise the entire amount on default in payment of any instalment. The bond which was for the payment of Rs. 686 2-0 provided that the amount would be paid by instalments of Rs. 137-3-7 annually i. e. Rs. 68-9-9 per harvest commencing from Rabi 1997 and ending in kharif 2001. The bond was originally executed on 30 2-1997 and was completed on 1 3-1997 by adding the default clause which is the subject-matter of dispute in the case. The non-payment of an instalment, according to this clause, gave the creditor the choice to recover the entire amount then remaining due together with interest @ /12/-% per mensem or to institute a suit for each instalment as it fell due. The obligee, Court of Wards to the estate of S. Kuldip Singh, brought the present suit on 24-2-2003 with the allegation that Rs. 390 had been received from the debtor on different dates and that Rs. 96-2-0 principal and Rs. 81-4-9 by way of interest on the amount that remained unpaid, were due on the bond. The defendant Mt. Harsaran Kaur, widow of Tarlochan Singh the debtor, denied the execution of the bond and also payment of any instalments and pleaded the suit to be barred by time. The trial Sub-Judge found the execution of the bond to be proved but dismissed the suit as time barred. The learned District Judge, on appeal, before whom the execution of the bond was not challenged, granted the plaintiff a decree for Rs. 274-7 0, the amount of the last two instalments which he found to be within time. This is defendant's appeal and the only question agitated in it is regarding limitation.

[2] The plaintiff gave the following details of the alleged payment of Rs. 390 :

DATE OF PAYMENT	AMOUNT PAID
15-3-1997	Rs. 50
30-6-1998	,, 40
14-2-1999	,, 30
26-8 2000	,, 70
18-10-2000	,, 200

The defendant did not admit that any payment had been made to the plaintiff. Out of these, the plaintiff proved only the first and the last items of Rs. 50 and Rs. 200 respectively. After the payment of Rs. 50 on 15-3 1997 nothing is proved to have been paid till 18 10 2000 when eight instalments amounting to Rs. 548-14-0 had become due. Out of this only Rs. 50 had been paid, and Rs. 498 14-0 were due when the last item of Rs. 200 was paid. This makes it clear that a default was made in the payment of the very first instalment of Rabi 1997. Even if the intervening payments be taken into consideration—though they were never attempted to be proved—the result would be the same. The first instalment besides having not been paid in time was short by Rs. 18-9-9; the second instalment due in Kharif 1997 was not paid at all; and the next alleged payment was of Rs. 40 on 30 6-1998 when two more instalments had also become due. There cannot, thus, be any doubt that the debtor had become liable to pay the entire amount with interest in Rabi 1997 when the first instalment

fell due. If Art. 75, Limitation Act, applied and if the plaintiff failed to prove waiver of the option to take benefit of the default clause, the suit brought in 2003 was hopelessly barred by time.

[3] The contention of Mr. Puri, the learned counsel for the respondent, in the first instance, is that the bond clearly gave the obligee an option to take benefit of the default clause and to claim the entire amount that remained due on any default or to sue only for the unpaid instalment. He, therefore, urges that Art. 75 had no application and that the bond could be sued upon as one for simple instalment without a default clause, under Art. 74 and the suit for the last two instalments payable within three years would be within time. In the alternative, the counsel maintained that the creditor had waived his right to take benefit of the default clause and that on all the instalments having become due, he was entitled to sue for those which came within three years of the suit.

[4] Mr. Daya Sarup on the other hand stressed that Art. 75 did not make any distinction between cases where the bond provided that the amount shall become due and cases where the bond gave the option to the obligee to call in for the entire amount. His argument is that the question is not 'what the creditor may do,' but 'when the debtor is liable for,' and that when on default the debtor at once becomes liable to pay the whole sum, the amount becomes due to the creditor within the meaning of Art. 75, even though the bond gives the creditor an option in the matter.

[5] A number of authorities has been cited by the counsel for the parties in support of their respective contentions. But I do not think it is necessary for me to refer to them all in detail, because I am of the view that the matter is set at rest by the wordings of the default clause in the bond in question. In an instalment bond with a condition of exigibility on one default the question as to when time begins to run really depends upon the construction of the document and the contract between the parties. In the present case, the debtor expressly contracted to give the creditor an option to treat or not to treat the default as enabling him to sue for the whole amount. It was stipulated that the creditor might sue only for the instalment or instalments that fall due or, if he so liked, he might call upon the debtor to pay the whole of the amount that remained unpaid. The language employed makes it clear that what was conferred upon the obligee was an option which he may or may not exercise on default in payment of an instalment. It was expressly contracted by the debtor that the creditor, even in case of default, could sue for the instalment that had fallen due without taking benefit of the default. The debtor gave his consent in advance that the creditor could waive his right to enforce the default clause which was for his benefit. A suit by the creditor, under the circumstances, only for the instalments that were within time would not be barred under Art. 75, if he did not choose to take benefit of the default clause. The present suit was brought when all the instalments had become due and the plaintiff has been granted a decree only for the last two instalments that were within time.

[6] In *Fazal Ilahi* v. *Guddar Shah* A. I. R. (24) 1937 Lah. 1 the bond that was the basis of the suit recited that if the executant did not pay three consecutive instalments, the creditor would be entitled to realise the amount of the three instalments and interest thereon, or to realise the entire balance by means of a suit. Even the first instalment was not paid and 27 of the instalments had become barred by time when the suit was brought. The Division Bench decreeing the suit for the instalments that were within time held that:

"in view of the wordings of the bond Art. 74 and not Art. 75, Limitation Act, applied, and hence it was open to the creditor to sue at any time for all those instalments which had become payable within three years of the institution of the suit."

In a suit on a bond similarly worded, a Division Bench of the erstwhile Patiala High Court in *Lalu* v. *Budh Ganesh*, 9 Patiala L. R. 324 made the following observations:

"Where an instalment bond provided that in default of payment of any instalment, the whole amount shall become due at the option of the promisee, the obligee is not bound nor can he be forced to exercise his choice on the occurrence of the first default. If he does not choose to exercise his right to demand the whole amount at the first default, he can sue for the instalment that have fallen due within three years of the suit."

I am in respectful agreement with the view expressed in the two cases referred to above. A decision of a single bench of the Madras High Court in *S. K. S. Ayyathurai Mudaliar* v. *Ibramsa Rowther*, A.I.R. (36) 1949 Mad. 592 may also be quoted with advantage. In this case Mack J. compared the two articles providing limitation for suits on instalment bonds and arrived at the conclusion that the plaintiff has the option of enforcing the default clause in Art. 75, and if he does not do so, he must be deemed to have waived the benefit of the provision, and he then can fall back on his ordinary right of suit on the covenant to pay the instalments under Art. 74.

[7] In view of my above finding the alternate plea of waiver taken by Mr. Puri need not be gone into and the decision of the learned District Judge must be maintained. The appeal is, consequently, dismissed, but because of the question of law involved, the parties are left to bear their own costs. Announced.

V.S.B. *Appeal dismissed.*

A. I. R. (39) 1952 Pepsu 19 *[C. N 12.]*

GURNAM SINGH AND CHOPRA JJ.

Jangir Singh—Appellant v. *State.*

Cri. Appeal No. 87, Cri. Revn. Nos. 81 and 84 and M. Ref. No. 16 of 1951, D/- 3-5-1951.

(a) Evidence Act (1872), S. 24—Confession - Conviction if can be based on.

If a Court can come to a conclusion that the confession made by the accused is true, there is nothing in the way of the Court to convict the confessor on the basis of that statement. But when the investigation is not honest & the Court finds that effort was made to create false evidence against the accused, in such circumstances the Court is justified in looking for some sort of corroboration. [Para 2]

Anno. Evi. Act, S. 24, N. 8.

†(b) Evidence Act (1872), S. 24 — Confession alleged to be obtained under threat—Burden of proof.

Assuming the proposition that an accused, alleging that his confession was a result of threat & pressure of the police, must prove his allegations to be true, the burden of this proof on the accused is very light. This question of the onus is not free from difficulty. However, the words used in S. 24 are "appears to the Court." It is really not the strict proof which is required from the side of the accused to show that the confession was the result of inducement, threat or promise. If it appears to the Court that it was so it is sufficient for the purposes of holding that such confession is irrelevant. A I. R. (31) 1944 Mad. 117 (F. B.), *Disting.* [Para 4]

Anno. Evi. Act, S. 24, N. 5.

Jagan Nath — for Appellant; Lachman Dass — for Complainant; S. Narinder Singh, Advocate-General— for the State.

Cases referred to:—

('44) A. I. R. (31) 1944 Mad. 117: (45 Cr. L. J. 373 (F.B.)) [Pr 4]

(1893) 2 Q. B. 12 : (62 L. J. M. C. 93). [Pr 2]

Gurnam Singh J. — Jangir Singh appellant was convicted for the murder of Ginder Singh, a boy of 8 years of age, and was sentenced to transportation for life by the trial Court. He has come up in appeal against his conviction. There is also a reference before us by the learned Sessions Judge for the confirmation of his sentence. The State has also filed a revision petition for enhancement of the sentence. There is also a revision petition by Mehar Singh, uncle of the deceased, for enhancement. This judgment will dispose of the appeal as well as the revision petitions, along with the reference.

[2] This case was remanded by me and Hon'ble the Chief Justice as the case was not properly conducted and the Magistrate, who had recorded the confession of the appellant, was not examined. It was sent back for retrial after quashing the sentence of the accused. It is during the retrial that the accused has been convicted and the case has come up before us. [After narrating the facts and discussing evidence, his Lordship proceeded :] At the time of ordering retrial during the course of our judgment we had remarked: "we do not consider it desirable to express any opinion on these points, except this much that if a Court comes to the conclusion that a confessional statement made by an accused person before a Magistrate and duly recorded in accordance with the provisions of S. 164 is true, there is nothing wrong in law in its convicting him merely on the basis of that statement, though as a rule of caution corroboration of the statement should generally be insisted upon."

I still stick to this opinion expressed by us. If a Court can come to a conclusion that the confession made is true, there is nothing in the way of the Court to convict the confessor on the basis of that statement. But each case depends on its own circumstances. When the investigation is not honest and the Court finds that effort was made to create false evidence against the accused, in such circumstances the Court is justified in looking for same sort of corroboration. At this stage the remarks by Lord Cave in *The Queen* v. *Thompson*, (1893) 2 Q. B. D. 12 at p. 18 can be referred to with advantage:

"I would add that for my part I always suspect *these* confessions, which are supposed to be the off spring of penitence and remorse and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is an very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession; a desire which vanishes as soon as he appears in a Court of Justice."

I am in respectful agreement with this opinion expressed by Lord Cave. This opinion aptly fits in with the facts of the present case.

[3] Instead of finding any other corroborative evidence of the confession we find that there is lot of contradictory evidence present on this record. [After discussing evidence, his Lordship proceeded :]

[4] The learned Advocate General has also conceded that the prosecution case entirely depends upon this confession. He has further argued that the conviction of the appellant can be based on a retracted confession provided the Court believes it to be true. In such a case, according to him, no evidence to corroborate the confession is required. In this case while retracting the confession the accused had stated that the confession was made by him under threat and pressure of the police. The learned Advocate-General has argued that the accused has led no evidence to substantiate these allegations. He further urges that if the allegations of the accused are found to be palpably false the confession should be accepted and the conviction of the appellant upheld. The facts disclose that the appellant remained in custody of the police from 28th July to 31st July when he was produced before the Magistrate for recording the confession. From 30th July to 31st July he was kept by the police in the police station. It is evident from the above discussion that he was not prepared to make a confession up to 30th July, upto the time when he was produced before the Magistrate. If any pressure was exerted on him it must have been after 6 P.M. on 30th July, when remand of his person was obtained. In these circumstances, I cannot conceive of any evidence which the accused could produce to support his allegations. He was kept in the police-station where no other evidence could be available except that of the police officials. In the nature of things there could only be evidence of circumstances through which undue pressure could be inferred. I have already discussed those circumstances which lead me to think that the confession made by the appellant was not voluntary.

The learned Advocate General argued that it was for the accused to prove his allegations of threat and undue pressure. Assuming the proposition to be true, as urged by the learned counsel, in my opinion, the burden of this proof on the accused is very light. This question of the onus is not free from difficulty. However, the words used in S. 24, Evidence Act, are "appears to the Court." It is really not the strict proof which is required from the side of the accused to show that the confession was the result of inducement, threat or promise. If it appears to the Court that it was so it is sufficient for the purposes of holding that such confession is irrelevant. The learned Advocate General argued that the reasons given by the accused for making the confession are palpably false. To support this contention, he has cited *In re B. K. Raja Gopal*, A. I. R. (31) 1944 Mad. 117. I am unable to accept the contention of the learned counsel for the State that the reasons given by the appellant for making the confession are proved to be palpably false. In the Court of the Committing Magistrate the accused stated that the confession was the result of undue pressure and threat by the police. He repeated the same allegations in the previous trial before the learned Sessions Judge. He took up the same position in the present trial but added that he was also given beating by the police. The argument of the learned counsel is based on the fact that the Magistrate recording the confession did not find any injuries on his person. As far as undue pressure and the threat are concerned, they are not proved to be palpably false. On the other hand, there are circumstanses in the case to show that the police was resorting to such methods otherwise there was no necessity for the police to delay the recording of the confession. No doubt injuries were not found on his person. It is not always necessary that beating should always create impression of injuries on the person beaten. If a man is continuosly interrogated for several days and a few slaps are also given to him during interrogation along with the threats of future beating it can be called a beating by the police, although it may not cause visible injuries on such person. I, therefore, cannot hold in this case that the reasons given by the appellant have been proved to be palpably false. I am in respectful agreement with the authority cited by the learned counsel for the State. In that particular case, the facts were different from the present case before us. In that case before recording the confession of the accused they were sent up to the Judicial Lock-up and the confession was recorded on the following day. There was also evidence of the approver to corroborate the confession of the accused. Also the Court came to the positive conclusion that the reasons given by the appellant which induce him to make the confession were found to be palpably false. In my opinion, therefore, the authority cited by the learned counsel for the State has no application to the facts of the present case.

[5] The learned counsel appearing for the State has frankly conceded that in case there was even a slight doubt about voluntary nature of the confession, it required corroboration. We have found circumstances from the evidence of the prosecution which go to show that there do exist such suspicions. We are, therefore, clearly of the opinion that in this case as a measure of caution, corroboration of the confessional statement is necessary. [It was held that there was no corroboration and the accused was acquitted.]

[6] **Chopra J.**—I agree.

V.S.B. *Accused acquitted.*

A. I. R. (39) 1952 Pepsu 21 *[C. N. 13.]*

TEJA SINGH C. J. AND PASSEY J.

Khub Ram—Appellant v. *Lachhman Ram—Respondent.*

Letters Patent Appeal No. 24 of 2006, D/- 2-5-1951.

Patiala Judicature Farman, (Smt. 1999), Cl. 44 — Rules framed under — Rules and Orders of High Court, R. 6—Appeal to Division Bench—Time taken for grant of certificate by single Judge—Exclusion—Limitation Act (1908), Ss. 5, 29.

Rule 6 of the Rules & Orders of the High Court does not contemplate an exemption for the period taken for obtaining a certificate from the single Judge that it is a fit case for an appeal to the Division Bench. No extension of time can be granted under S. 5, Limitation Act, as the Patiala Judicature Farman and the rules framed thereunder provide a special law on the subject and therefore, the provisions of the Limitation Act cannot affect or alter the period of limitation specially prescribed by that law, under S. 29 of that Act. Moreover, when the provision of law is clear, the Court cannot grant relief merely on the ground of hardship. [Paras 2, 3]

Gurbachan Singh — for Appellant ; Kishori Lal—for Respondent.

Passey J.—This appeal on a certificate under cl. 44 of the Patiala Judicature Farman, 1999 is met with a preliminary objection by the respondent's counsel that it is time-barred. The judgment by Kartar Singh Sandhu J. was pronounced on 23 3 2006 and an application for a copy was made on 4-4-2006 and the same was delivered on 13-4-2006. On 23 6 2006 a copy of the decree was applied for and obtained on the same date. The application for the necessary certificate was submitted on 11-4-2006 and it was granted on 22 6-2006. The appeal was filed on 4-7-2006. According to R. 6 as given in Vol. 2 Appendix A, Part B of the Rules and Orders of the High Court an appeal to a Division Bench must be accompanied by copies of the judgment, decree or order appeal from and of the order granting the certificate and it must be filed within sixty days from the date of the judgment, decree or order. Rule 6 further provides that in computing the period of sixty days the time spent in obtaining the copies of the judgment, decree or order and of the certificate shall be deducted. In the case before us, even if the time spent in obtaining the copies of the judg-

ment, decree and the certificate are deducted the appeal is still beyond time.

(2) Shri Gurbachan Singh contends that the time occupied in obtaining the certificate should also be allowed, but such an exemption is not contemplated by R. 6 mentioned above. It is stressed that the enforcement of the rule in its terms would result in grave hardship in certain cases, but in view of the express provision of the law on the subject we are unable to help him.

(3) It was next argued that it was a fit case for extension of time under S. 5, Limitation Act, but that section has no applicability as it has not been made applicable to such appeals by the rules framed under the Judicature Farman, 1999. The said Farman and the rules framed thereunder provide a special law on the subject and therefore, the provisions of the Limitation Act cannot affect or alter the period of limitation specially prescribed by that special law. S. 29, Limitation Act itself says that nothing contained in the Limitation Act shall affect or alter any period of limitation specially prescribed for any appeal or application by any special or local law. Even if there was sufficient cause for the delay, this time-barred appeal cannot be entertained. Dismissed. No costs.

(4) TEJA SINGH, C. J.: I agree with my learned brother in holding that the appeal is barred by time. I also agree with my learned brother that S. 5, Limitation Act does not apply and inspite of the fact that more than two months were taken by the learned single Judge to grant a certificate that the case was a fit one for appeal to a Division Bench it is not within our power to extend the time. There is no doubt that this is a hard case inasmuch as the total time allowed for appeal is sixty days while the time spent in obtaining the requisite certificate amounted to more than two months, but when the provision of law is clear, we cannot grant relief merely on the ground of hardship. I would, therefore, suggest that steps should be taken to amend the rules to meet cases of this kind.

D.R.R. *Appeal dismissed.*

A. I. R. (39) 1952 PEPSU 22 (C. N. 14)

CHOPRA J.

Karora Singh and others, Appellants v. Babu Ram Respondent.

Ex. Second Appeal No. 10 of 1950, D/- 24-10-1951.

(a) Civil P. C. (1908), O. 38 Rr. 5, 9 — Suit dismissed for default again restored — Fresh bond under O. 38 R. 5 — Necessity.

Where an order dismissing the suit for default is set aside on an application for that purpose, the suit is revived as it was on the day when it was dismissed. The proceedings taken in the suit up to that date must also be deemed to have been revived and to have remained in force when the dismissal is set aside. An interlocutory order that had been made in the suit before it was dismissed for default should continue to have the same force when the suit is revived. No fresh order for attachment of the property before judgment of the judgment-debtor is required after the dismissal has been set aside. On the restoration of the suit the security bond given by the defendant under O. 38 R. 5 is also restored and the decree-holder would be entitled to enforce the security bond. *(Para 3)*

Anno: C. P. C., O. 38 R. 9. N. 1.

(b) Civil P. C. (1908), O. 38 R. 5 — Decree against assets in hands of widow of original defendant — Liability of surety.

Where the sureties took upon themselves to pay the decretal amount in place of original judgment-debtor if the suit against him was decreed, the mere fact that he died during the pendency of the suit would not be of any importance and would not absolve the sureties of their liability so long as the decree was against his assets in the hands of his widow. 25 W R 250 (Cal) Disting. *(Para 4)*

Ram Niwas, for Appellants — Dalip Chand, for Respondent.

Case referred to:
('74) 25 W R 250 (Cal) (Pr 4)

JUDGMENT: The facts giving rise to this second appeal in an execution case are these:

(2) Babu Ram and others respondents brought a money suit against Jaimal Singh and applied for attachment of his property under O. 38 R. 5 C.P.C. On a notice having been issued to Jaimal Singh, Karora Singh and Amar Singh stood sureties on his behalf for payment of the amount in case the suit was decreed. The defendant died during the pendency of the suit and Mst. Attro, his widow, was brought on the record as his legal representative. On 30-5-2005 a decree for Rs. 2800/- was passed against the assets of Jaimal Singh deceased in the hands of Mst. Attro. Execution was then taken out by the respondent against Karora Singh and Amar Singh, the sureties. They objected that: (i) they were sureties only to produce Jaimal Singh in Court and not to pay the decretal amount; and (ii) since the suit had been dismissed for default they were not liable for the decree passed on its restoration. The executing Court after recording evidence of the parties, disallowed the objections. Their appeal to the District Judge having failed, the sureties have come to this Court in second appeal.

(3) L. Ram Niwas, the learned counsel for the appellant, has referred to O. 38 R. 9 C.P.C. and contended that since an attachment made under O. 38 R. 5 ipso facto comes to an end on the suit being dismissed, the liability of the sureties must have terminated when the suit was dismissed for default. He has, however, not been able to cite any authority in support of his contention. Where an order dismissing the suit for default is set aside on an application for that purpose, the suit is revived as it was on the day when it was dismissed. The proceedings taken in the suit upto that date must also be deemed to have been revived and to have remained in force when the dismissal is set aside. An interlocutory order that had been made in the suit before it was dismissed for default should continue to have the same force when the suit is revived. No fresh order for attachment of the property of the judgment-debtor was required after the dismissal had been set aside. On the restoration of the suit the security bond given by the defendant is also restored and the decree-holder would be entitled to enforce the security bonds. This principle of law appears to be now well established.

(4) It is next contended by Shri Ram Niwas that the appellants had stood sureties for Jaimal Singh and not for his wife. The argument is that they had themselves liable to pay the amount of the decree that might be passed against him, but since he had died during the pendency of the suit, the sureties were not liable to pay the amount of the decree, that had been passed against his widow Mts. Attro. In the first instance this objection was not raised by the appellants in either of the Courts below and cannot be allowed to be raised for the first time in second appeal. Otherwise also I do not find any substance in the contention. The sureties took upon themselves to pay the decretal amount in place of Jaimal Singh, if the suit against him was decreed. It is wrong to say that no decree was passed against

Jaimal Singh. The mere fact that he died during the pendency of the suit would not be of any importance and would not absolve the sureties of their liability so long as the decree was against his assets. Mst. Attro was not made personally liable under the decree and the same was not being executed against her. Reliance is being placed on a case reported as 'Mohip Narain v. F. A. Shaw', 25 WR 250 Cal but the facts of that case were quite different. There the surety had made himself liable for the due performance of the duties of a servant to his master. On the termination of the lease in favour of latter for the management of which the principal had been employed, he was succeeded by some other lessee. In view of these facts it was held that the surety must be taken to have entered into the contract only for the time during which the relation created by the instrument of suretyship continued, and with reference only to the person to whom he made himself responsible. I do not see how this decision can have any application to the facts of the present case.

(5) The last objection of the appellants that the security deed was only for the appearance of the judgment-debtor has not been accepted by the Courts below. It is belied by the contents of the deed itself and the evidence to the contrary cannot be relied upon. I do not see any ground to differ from the concurrent finding of the Courts below on a point purely of fact. The scribe of the deed was examined by the decree-holder and he deposed that the sureties had taken upon themselves the liability to pay the decretal amount, in case the principal failed to pay.

(6) In the result the appeal is dismissed with costs. The counsel fee shall be Rs. 20/-.

D.H. *Appeal dismissed.*

A. I. R. (39) 1952 PEPSU 23 (C. N. 15)

TEJA SINGH, C. J. AND CHOPRA, J.

Jaggar Singh, Appellant v. Crown.

Criminal Appeal No. 49 and Murder Ref. No. 22 of 2005; D/- 22-11-1948.

(a) Criminal P. C. (1898), S. 288 — Previous statements brought on record of Sessions Judge — Evidentiary value — Witness resiling from previous statement — Rule of caution.

The words "for all purposes" used in S. 288 Cr. P. C. are important and when the Presiding Judge in exercise of the discretion vested in him by law allows previous statement made by a witness in the presence of the accused, to be brought on his record, for practical purposes there is no difference between that evidence and the evidence that is made before the Judge himself. There is nothing in the section to show that the statement before it can be made the basis of conviction must be corroborated by some other evidence. It is however, safe to observe, as a rule of caution that unless the Court comes to the conclusion that the evidence admitted under this Section is of such a nature that is must be accepted as wholly true and there is nothing to shake its veracity, the evidence should not be acted upon until there is forthcoming some other evidence of independent character that corroborates it.

Thus where a witness makes two different statements and one is entirely contradictory to the other, in order that one of those statements should be implicitly relied upon for convicting the accused, it is safe that some sort of evidence corroborating that statement should be forthcoming. What the corroborating evidence should be is again a matter that will depend upon the peculiar facts of each case. 'Held', that no such corroborating evidence was forthcoming in the case and hence the accused was given the benefit of doubt. A I R (23) 1936 Lah 357 and A I R (33) 1946 Lah 48 Ref. (Para 5)

Anno: Cr. P. C., S. 288 N. 7.

(b) Evidence Act (1872), S. 27 — Statement after discovery — Admissibility.

Where after certain clothes are taken out of a pond, the accused makes a statement that he had removed them from the person of the deceased after he had killed him and thrown them into the pond, the statement does not come within the purview of S. 27 and is not admissible in evidence. (Para 8)

Anno: Evi Act, S. 27 N. 3.

Banwari Lal (Amicus Curiae) for Appellant — Asst. Govt. Advocate, for the Crown.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('36) A I R (23) 1936 Lah 357: (37 Cri L J 567) (Pr 5)

('46) A I R (33) 1946 Lah 48: (47 Cri L J 232) (Pr 5)

('46) A I R (33) 1946 Lah 380: (47 Cri L J 980) (Pr 5)

('87) 51 Pun Re 1887 (Cr) (Pr 5)

TEJA SINGH, C. J.: This is an appeal from an order of the Sessions Judge, Bhatinda convicting the appellant under S. 302 I. P. C. and sentencing him to death. There is also before us a reference for the confirmation of the death sentence.

(2) The facts of the prosecution case briefly are as follows: A few days before the alleged occurrence Mehar Singh deceased got hold of a Muslim woman and brought her to his house. The appellant, who is a bachelor and is the brother of the deceased, wanted him to hand over the woman to him. The deceased did not agree to this. Accordingly, there was some sort of altercation between the two. We are told that the deceased returned to his house just when it was getting dark, and the appellant who was concealing himself behind the door fell upon him with a Gandasa and struck him once on the head and then on one of the legs. The deceased then fell down and died there and then Mst. Gurdialo and Mst. Bhuri, wife and daughter respectively of the deceased, witnessed the incident but they were unable to do anything. The date of occurrence is said to be 22nd Assauj, 2004.

(3) The report to the police was made by one Ramnarain Singh. His statement is that he heard of the tragedy from somebody in the village and wrote a Ruqqa to the Sub-Inspector incharge of Kot Fatta Police Station, which is at a distance of about 4 Kos from the village. The Sub-Inspector, however, deposed that he got the Ruqqa on the 25th Assauj, and proceeded to the place of occurrence without registering the case. There he met Mst. Gurdialo and Mst. Bhuri and recorded the statements of both. The case was registered on the strength of the former's statement. It is also in evidence of the Sub-Inspector that he sent for the statement made by the accused to the Sub-Inspector the latter recovered a Kurta and a Kachhera alleged to be the property of the deceased and a Gandasa, the so-called weapon of offence.

(4) A number of witnesses were examined by the prosecution to prove, inter alia, the motive and the fact that the dead body was cremated on the morning following the night of the alleged occurrence: but the fate of the case must rest on the statements of Mst. Gurdialo and Mst. Bhuri, who were said to be the eye-witnesses. Both these witnesses went back upon the evidence that they had given in the Committing Magistrate's Court and the learned

Sessions Judge transferred those statements to the Sessions record under S. 288 of the Criminal P. C. Ex. P/E is Mst. Gurdialo's statement. In that statement she first deposed to the motive and averred that after the deceased had brought Mst. Budhan to his house the accused came to him and wanted him to allow him have the woman. The deceased declined to accede to the accused's wishes and upon this a dispute took place between the two. As regards the incident her evidence was that both she and her daughter Mst. Bhuri were in the house when the deceased was attacked by the accused with a Gandasa. She further averred that after having killed her husband the accused shut her up in the house and did not allow her to go out. According to this statement there was no other person present at the time the occurrence took place. Hazara, Bhag Singh and Jagir Singh wanted to come up on hearing the noise; but the accused and Bhani, the uncle of the accused and the deceased, who accompanied the accused did not allow them to do so. The story that this witness gave in the Sessions Court was different from that given by her in the Court of the Committing Magistrate in material respects. As regards the motive her statement was that both Bhani and the accused wanted the Muslim Woman and this resulted into a quarrel between all three of them, the deceased on one side and Bhani and the accused on the other. So far as the cause of her husband's death is concerned she stated that he was murdered but the murderer was not the accused but Bhani. The Government Pleader had her declared a hostile witness and cross-examined her with the permission of the Court. The explanation that she gave for her previous statement was that she had been tutored by the Sub-Inspector and whatever she said in the committing Magistrate's Court she did so under his influence. Mst. Bhuri is a girl of 18 years. Ex. P/F is the copy of the statement that she made in the committing Magistrate's Court. Therein she averred that both the accused and Bhani wanted the Muslim woman and had a quarrel with the deceased because he would not allow them to have her. She claimed to be present at the house when her father was murdered and deposed that she saw the accused hitting the deceased with the Gandasa. Like her mother she also went back upon this statement when she was examined in the Sessions Court, and when she was confronted with it by the Government pleader she said that the statement had been made at the instance of the Sub-Inspector.

(5) The counsel for the accused urged that since both these witnesses did not implicate the appellant in the Sessions Court, inspite of the fact that the evidence given by them in the Committing Magistrate's Court was different, the learned Sessions Judge was wrong in convicting the appellant. The Assistant Government Advocate, on the other hand, contended that in view of the fact that the previous statements of both these witnesses had been transferred to the Sessions record under S. 288 Criminal P. C. and they constituted substantive evidence, no fault could be found with the conviction of the appellant. I agree with the learned Asstt. Government Advocate that a statement duly brought on the record of the Sessions Court and properly proved, becomes a sustantive piece of evidence and it can be acted upon like any other evidence. The section reads as below:

> "The evidence of a witness duly recorded in the presence of the accused under Chap. XVIII may, in the discretion of the Presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872."

The words "for all purposes" used in the section are important and when the Presiding Judge in exercise of the discretion vested in him by law allows a previous statement made by a witness in the presence of the accused, et cetera, to be brought on his record, for practical purposes there is no difference between that evidence and the evidence that is made before the Judge himself. I also agree with the learned counsel that there is nothing in S. 288 Criminal P. C. to show that the statement before it can be made the basis of conviction must be corroborated by some other evidence. But it must be remembered at the same time that when a witness makes two different statements and one is entirely contradictory to the other, in order that one of those statements should be implicitly relied upon, some sort of evidence corroborating that statement should be forthcoming. I do not mean to say that this is an absolute rule, because much depends upon the circumstances of each case. But it is safe to observe it as a rule of caution. What the corroborating evidence should be is again a matter that will depend upon the peculiar facts of each case. The learned Asstt. Government Advocate referred us, inter alia, to two Bench decisions of the Lahore High Court reported as 'Niranjan Singh v. Emperor', A I R (23) 1936 Lah 357 and 'Shamira Mandu v. Emperor', A I R (33) 1946 Lah 380. In the first case the learned Judges referred to the observations made by Plowden J. in 'Umar v. Empress', 51 P R 1887 (Cr) and held that there was no difference in law between the evidence admitted under S. 288, Criminal P. C. and any other evidence. But at the same time they pointed out that there was ample evidence to corroborate the previous statements of the witnesses. In the latter case these are the remarks that Ram Lall J. made:

> "A view had prevailed in the Calcutta Court that in the circumstances where a witness makes a statement at one stage of the proceedings and completely resiles from that statement at a later stage that witness's statement should be ignored unless there was independent corroboration. The proposition of law then is this that a statement of a witness made before the Committing Magistrate duly transferred to the Sessions record under S. 288 is substantive evidence for all purposes but as a matter of caution requires corroboration. As an abstract proposition this may in large number of cases be accepted as true but corroboration can be found in the circumstances surrounding a case and it has been consistently held by this Court that corroboration as a matter of law is not required."

In another case 'Parita v. Emperor', A I R (33) 1946 Lah 48 to which I was a party the statements of witnesses made in the Committing Magistrate's Court, upon which they had gone back while giving evidence in the Sessions Court, were not acted upon because they were not corroborated by other independent evidence. Taking into consideration these cases and a number of other decisions of High Courts in India, I would hold that unless the Court comes to the conclusion that the evidence admitted under S. 288 Criminal P. C. is of such a nature that it must be accepted as wholly true and there is nothing to shake its veracity, as a rule of caution that evidence should not be acted upon until there is forthcoming some other evidence of independent character that corroborates it. Applying this rule to the previous evidence of Mst. Gurdialo and Mst. Bhuri I have not the slightest hesitation in coming to the conclusion that the correctness of it is open to grave doubt and it is highly unsafe to record the conviction of the accused merely on the strength of it, unless the prosecution can point out other corroborating evidence in support of it. It must be remembered that though both Mst. Gurdialo and Mst. Bhuri deposed that they were the eye-witnesses

to the gruesome murder of the deceased they did not take any steps to report the matter to the police. In fact, there is no evidence that they raised a hue and cry either or tried to attract the attention of their neighbours. As I have observed in the earlier part of this judgment it was left for Ramnarain Singh, an utter stranger to the family, to make the report to the police and even he did not know of the incident either from Mst. Gurdialo or Mst. Bhuri. The explanation given by Mst. Gurdialo for her inaction in her first statement is absolutely unconvincing, because even if it be accepted as true that the accused shut her up in her house for the night, obviously she was free next morning and it should not have been difficult for her either to proceed to the police station herself or to send some one else for the report. In addition, it may be mentioned that two of the first cousins of the deceased lived in the village. I cannot understand what was there to prevent Mst. Gurdialo from sending either of them to the Police Station. Furthermore, Mst. Gurdialo is contradicted by Mst. Bhuri as regards the disposal of the dead body. Mst. Gurdialo would have us believe that the dead body was taken away by the accused or some one else during the night, and was disposed of but Mst. Bhuri's statement was that she as well as her mother sat by the dead body which lay in the courtyard throughout the night and it was cremated next morning. The other important contradiction in the statements of these witnesses is that whereas according to Mst. Gurdialo no one else excepting she and her daughter witnessed the incident, Mst. Bhuri deposed that Mal Singh saw the murder being committed by the appellant. It is noteworthy that the prosecution did not take the courage of examining Mal Singh as their witness. He was cross-examined in the Sessions Court by the accused's counsel and deposed that he did not see anything at all.

(6) The learned Sessions Judge has relied upon two facts which according to him corroborate the evidence given by Mst. Gurdialo and Mst. Bhuri in the committing Magistrate's Court; (i) that the accused had a strong motive to commit the crime, and (ii) that the clothes of the deceased and the weapon of offence were recovered at the instance of the appellant. As regards the motive Mst. Bhuri's statement in the Committing Magistrate's Court, to which reference has already been made above, shows that both Bhani and the appellant wanted the Muslim woman and tried to force the deceased to give her to them. When faced with the statement the learned Asstt. Government Advocate was constrained to admit that Bhani had as much motive to fall foul of the deceased as the appellant. This means that if we are to go by motive alone, Bhani might as well have been the murderer. If we consider this fact in the light of Mst. Gurdialo's statement, that Bhani accompanied the appellant the time the latter struck the deceased and carried a Gandasa like him, it cannot be said that the existence of the motive can be taken to corroborate the evidence of Mst. Gurdialo and Mst. Bhuri.

(7) With regard to the recoveries we have the statement of the Sub-Inspector that the appellant first took him to a pond and from there brought out a shirt and a Kachha. There is however, no evidence to connect these two clothes with the deceased, except the statement of the Sub-Inspector himself, who by the very nature of things could have no personal knowledge about them. It is admitted by the Sub-Inspector that he did not have these clothes identified by any one. One of the witnesses deposed that even though Mst. Gurdialo was present at the time of the recovery of the clothes they were not shown even to her. It is stated in the memorandum relating to the recovery of the clothes that they were blood-stained; but no evidence was led to prove this fact. It is admitted that they were not sent to the Chemical Examiner. In the circumstances, it cannot be held that the clothes belonged to the deceased or that he was wearing them at the time he was attacked and, consequently their recovery even if held established does not advance the prosecution case.

(8) Evidence was also examined by the prosecution to prove that after the appellant had brought out the clothes from the pond he made a statement to the effect that he had removed them from the person of the deceased after he had killed him and thrown them into the pond. But a statement of this kind made after the recovery does not come under the purview of S. 27 of the Indian Evidence Act and is not admissible in evidence.

(9) Coming now to the recovery of the Gandasa. Here the evidence is that the appellant produced it from the roof of a house belonging to Mal Singh. Mal Singh contradicted the prosecution evidence on this point and I see no reason to disbelieve him. But even if we assume that the Gandasa was recovered it cannot connect the appellant with the crime, nor can this fact be utilized to corroborate the statements of Mst. Gurdialo and Mst. Bhuri before the Committing Magistrate's Court for the simple reason that it has not been proved that it was the the same Gandasa with which the deceased was killed. There were no marks of blood on it, nor did any of the witnesses excepting Mst. Gurdialo, ... depose that they saw the appellant using it. Mst. Gurdialo stated before the Committing Magistrate that she identified the Gandasa as the weapon with which the appellant hit her husband; but this statement can have no value. On her own showing the occurrence took place when it had become dark and I do not think it was possible for her to identify it after several months.

(10) Before concluding it is necessary to refer only to one other fact, i.e. the manner in which the dead body was disposed of. Mst. Gurdialo in her statement that she made in the Committing Magistrate's Court suggested that the dead body was cremated by the appellant and Bhani during the night. Jagir Singh PW/1 Bhag Singh PW/3, Bhag Singh PW/4 and Behal Singh PW/8 averred that the cremation took place on the following day and all of them took part in it. Of these Jagir Singh and Bhag Singh are the first cousins of the deceased. No doubt they are also the first cousins of the appellant, but it is difficult to believe that they would shield him for this reason, particularly if the murder was committed in cold blood.

(11) Taking all these facts into consideration I am of opinion that the prosecution has not been able to bring the offence home to the appellant. In any case, it has not been established beyond doubt that the appellant killed the deceased in the manner deposed to by Mst. Gurdialo and Mst. Bhuri in the Committing Magistrate's Court and the case is not free from doubt. In the result I would allow the appeal, set aside the conviction and sentence of the appellant and direct that he be released forthwith. The reference is not accepted and the sentence of death is set aside.

(12) CHOPRA, J.: I agree.

D.R.R. *Appeal allowed.*

A. I. R. (39) 1952 PEPSU 26 (C. N. 16)

TEJA SINGH, C. J. AND GURNAM SINGH, J.

Chandu Lal, Petitioner v. Tek Chand, Respondent.

Civil Revision No. 101 of 1951, D/- 4-10-1951.

Civil P. C. (1908), Section 115 — 'Case decided' — Order that Court-fee paid was insufficient.

An interlocutory order passed in the course of a case can be regarded as a 'case decided', but in order to decide whether it should be so regarded we must turn to the nature of the order and the facts of the case. When an interlocutory order is of a formal nature, such as adjourning a case to another date, summoning witnesses, etc., it does not amount to a 'case decided' but when it decides an important question relating to the rights of the parties or when the point decided thereby affects the jurisdiction of the Court it must be characterised as a 'case decided.' The true test for deciding whether a particular interlocutory order should or should not be looked upon as a case for the purposes of S. 115, is to be deduced not from the meaning of the word 'case' but from the proper scope and limits of the revisional jurisdiction conferred upon the High Court by that section. Where an order by which a Court holds that the Court-fee paid by the plaintiff on the plaint is insufficient and calls upon him to make up the deficiency involves merely the determination of the valuation of the subject-matter of the property, the order cannot be regarded as a "case decided." But if it depends upon the decision of the question whether the suit falls under one or the other of the particular sub-section of Section 7 it can properly be regarded as a "case decided."

The suit was for partition and court-fee of Rs. 10/- only was paid by the plaintiff. The view taken by the District Judge was that the plaintiff was not in joint possession of any part of the property to which the suit related and accordingly the suit came within the purview of Section 7 (iv) (b) of the Court-fees Act.

'Held' that the order made amounted to a "case decided." The order, however, did not involve the question of jurisdiction and the mere fact that it was wrong on merits was not a ground for revision. Further it was open to plaintiff to have his plaint rejected by refusing to make the payment and then to appeal from the order rejecting his plaint on the ground that the Court-fee paid by him was proper. Thus the remedy by way of an appeal could not be regarded as hard. Hence revision petition could not be accepted. 'Case law discussed.'

(*Paras 7, 9, 12*)

Anno: C. P. C., S. 115, N. 4, 5, 8, 13, 27-b.

B. Dalip Chand, for Petitioners; Jagan Nath, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('17) 40 Mad 793: (AIR (4) 1917 P C 71) Pr 10)
('34) AIR (21) 1934 All 620: (57 All 17 FB) (Pr 3)
('43) AIR (30) 1943 Lah 65: (ILR (1943) Lah 257 F B) (Prs 3, 7)
('28) 51 Mad 664: (AIR (15) 1928 Mad 416) (Pr 6)
('44) AIR (31) 1944 Mad 315: (ILR (1944) Mad 626 FB) (Pr 3)
('36) AIR (23) 1936 Oudh 22: (11 Luck 529 FB) (Pr 3)
('24) 3 Pat 930: (AIR (11) 1924 Pat 673) (Pr 12)
('29) AIR (16) 1929 Pat 427: (119 Ind Cas 78) (Pr 13)
('35) AIR (22) 1935 Pat 186: (155 Ind Cas 617) (Pr 14)
('37) 16 Pat 766: (AIR (25) 1938 Pat 22 F B) (Pr 3)
('49) 1 Pepsu L R 1 (Prs 3, 7)

TEJA SINGH, C. J.: This revision petition is directed against the order of District Judge, Bhatinda who ordered the plaintiff to pay ad valorem court-fee. The suit was for partition and Court-fee of Rs. 10/- only was paid by the plaintiff. On the defendant's objection the following issue was framed: "Has the Court-fee been correctly affixed?"

The view taken by the District Judge was that the plaintiff was not in joint possession of any part of the property to which the suit related and accordingly the suit came within the purview of Section 7 (iv) (b) of the Court-fees Act.

(2) When the petition came up for hearing before Gurnam Singh, J., in single Bench, Shri Jagan Nath, counsel for the respondent, raised an objection that the revision was not competent. Gurnam Singh, J., being of opinion that the question raised was of considerable importance and the authorities cited by the parties' counsel revealed that there was a conflict of opinion in the different High Courts referred the matter to a Division Bench.

(3) Both sides are agreed that in view of the words of Section 115, Civil Procedure Code the first condition that the petitioner must satisfy is that the order of the Court below which he assails amounts to a 'case decided.' The term 'case' has been the subject-matter of comment and discussion in a large number of cases but it has not been possible to define it exhaustively. There appears, however, to be a consensus of opinion on this point that it is incorrect to say that no interlocutory order passed in the course of a case can be regarded as a 'case decided' and whether or not a particular interlocutory order is a case decided must depend on the nature of the order and the circumstances of the case in which it was made. Reference in this connection should be made to 'Gordhan Dass v. Ram Saran Dass', 1 Pepsu L R 1 in which I referred to and discussed some of the leading cases on the point, including 'Bibi Gurdevi v. Mohammad Bakash', AIR (30) 1943 Lah 65. Shri Jagan Nath has cited two Full Bench decisions, one of the Allahabad High Court 'Messrs Gupta and Co. v. Kripa Ram Brothers', AIR (21) 1934 All 620, and the other of the Oudh Chief Court, 'Paras Nath v. Ran Bahadur', AIR (23) 1936 Oudh 22, in which it has been held that the order of a trial Court holding that the Court-fee paid on the plaint was not proper and calling upon the plaintiff to pay additional Court-fee is not a 'case decided' within the meaning of Section 115, Civil Procedure Code. The petitioner's counsel, on the other hand, relies upon the Full Bench decisions of the Patna and Madras High Courts, 'Ramkhelawan Sahu v. Surendra Sahi 16 Pat 766 and 'C. Murthiraju v. C. Subbaraju', AIR (31) 1944 Mad 315. In the Allahabad case Sulaiman, C. J., who wrote the Judgment of the Full Bench held that the word 'case' is not an exact equivalent of the word 'suit' and that it is something wider. He observed:

"It cannot be a case unless it is a proceeding which can be regarded as something separate and in a sense independent from the suit under hearing and the termination of that proceeding should be somewhat different from mere orders passed in the ordinary trial of the suit itself. Where the case is a proceeding which can be considered separate and distinct and is finally disposed of by an order which terminates it it may well be considered to be a 'case decided' although the suit has not in one sense been completely disposed of."

(4) The leading judgment in the Oudh case was that of King, C. J., and the view taken by him was

that when an interlocutory order has been passed or a preliminary issue has been decided in a pending suit only a part of the suit or part of the case is decided and not the whole case. The learned Judge also observed that the passing of an interlocutory order or the decision of a preliminary issue which does not result in deciding the whole suit is not the decision of a case within the meaning of Section 115 because no record of such a decided case exists or can be constructed apart from the record of the pending suit. This aspect of the matter was not considered expressly in the Patna and Madras cases and the learned Judges proceeded on the assumption that a decision on a question of court-fee was a 'case decided.' In the Patna case Courtney — Terrell, C. J., while coming to the conclusion that the order of the trial Court was revisable made the following observations:

"It is quite true that where a lower Court has jurisdiction to decide questions of law and fact as between the parties the superior Court will not exercise revisional jurisdiction against the decision whether it be right or wrong, but the superior Court will interfere in revision where the jurisdiction is derived from statute and the matter is one of construction of a statute."

(5) The learned Judge also observed that in deciding the question of Court-fee the Court is deciding an issue as between the Crown and the plaintiff and should its decision be adverse to the plaintiff it amounts to a decision to refuse to exercise his jurisdiction to try the issues as between the plaintiff and the defendant.

(6) In the Madras case the Full Bench followed a previous Bench decision of their Court 'Kulandaipandichi v. Ramaswami', 51 Mad 664, in which it had been held that an application lay to the High Court for the revision of an order passed by a lower Court where that Court had erroneously directed the plaintiff to pay an additional Court-fee because the insistence on the payment of the additional Court-fee amounted in the circumstances to a refusal to exercise jurisdiction.

(7) After hearing learned counsel at considerable length and on going through the various cases cited by them I still stick to the opinion to which I gave expression in 'Goverdhan Dass's case: (1 Pepsu L R 1.) that an interlocutory order passed in the course of a case can be regarded as a 'case decided', but in order to decide whether it should be so regarded we must turn to the nature of the order and the facts of the case. Though it is not possible to lay down a comprehensive test, it may be stated that when an interlocutory order is of a formal nature, such as adjourning a case to another date, summoning witnesses, etc., it does not amount to a 'case decided' but when it decides an important question relating to the rights of the parties or when the point decided thereby affects the jurisdiction of the Court it must be characterised as a 'case decided.' As was pointed out by Bhide, J., in his judgment in the Lahore Full Bench case 'Bibi Gurdevi v. Mohd. Bakash', AIR (30) 1943 Lah 65, the true test for deciding whether a particular interlocutory order should or should not be looked upon as a case for the purposes of Section 115, Civil P.C., is to be deduced not from the meaning of the word 'case' but from the proper scope and limits of the revisional jurisdiction conferred upon the High Court by that Section. The learned Judge observed:

"From the standpoint of language, pure and simple, there seems to be no good reason why one branch of a suit should be held to be a 'case' but not another and the word may include any interlocutory order. This does not, of course, mean that purely formal orders such as those relating to an adjournment or the summoning of a witness, etc., could be looked upon as 'cases.' But when a decision relates to some matter in controversy affecting the rights of the parties, I do not see why it should not be looked upon as a 'case."

(8) In the same case Tek Chand, J., observed that the case is wide enough to include a decision on any substantial question in controversy between the parties affecting their rights, even though such order is passed in the course of the trial of the suit.

(9) Now, as regards the order by which a Court holds that the Court-fee paid by the plaintiff on the plaint is insufficient and calls upon him to make up the deficiency, it may involve merely the determination of the valuation of the subject-matter of the property or it may depend upon the decision of the question whether the suit falls under one or the other of the particular Sub-section of Section 7. To make my meaning clear, suppose the suit is for possession of a particular property and while the plaintiff has valued it at one amount, the defendant's objection is that the property is of more value than that stated by the plaintiff. In deciding whether the court-fee paid on the plaint is proper the court has merely to determine the correct value of the property and if it comes to the conclusion that such value exceeds the value given in the plaint the order calling upon the plaintiff to make up the deficiency in Court-fee cannot be regarded as one affecting the parties' rights, and in view of what I have said above the order cannot be regarded as a "case decided." Now take another case in which the plaintiff brings a suit for a declaration of his title to the suit property and alleges that he is in joint possession of the property along with the defendant. The defendant denies the plaintiff's possession and contends that he is in possession of the property in his own right. With a view to deciding whether the Court-fee paid by the plaintiff is sufficient, the Court will not only have to determine the valuation of the property but also the nature of the defendant's possession and the question whether the plaintiff had any right in the property. Consequently the Court's decision on the question of Court-fee will be a decision affecting the parties' rights and can properly be regarded as the "case decided." The order which is the subject-matter of the present revision petition belongs to the second category rather than the first. Though the suit is for partition of the property the plaintiff paid a Court-fee of Rs. 10/-, because his position was that he was a member of a joint Hindu family with the defendants and consequently he was in joint possession of the entire property. The District Judge did not say in so many words in his being in joint possession but in view of the fact that he held that the case was governed by Section 7 (iv) (b) this is what the implication of his finding is. I am, therefore, inclined to think that the order made by him amounts to a "case decided."

(10) This, however, does not solve the whole difficulty, because in order that this Court should interfere on the revision side another condition has to be satisfied, namely, that the subordinate Court should appear (a) to have exercised jurisdiction not vested in it by law; (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity. There is ample authority for the proposition that this condition is imperative and unless it exists the High Court has no power to entertain the revision petition even if the order is wrong in law. Bhide, J., dealt with this point in his judgment in the abovementioned case in the following words:

".....In the first place, it (i.e. S. 115) applies only when no appeal lies to the High Court.

Secondly, its scope is restricted to those cases in which some question affecting jurisdiction falling within the purview of Cls. (a), (b) and (c) of the section is involved. It was held by their Lordships of the Privy Council in 'Balakrishna Udayar v. Vasudeva Ayyar', 40 Mad 793 that the section applies to jurisdiction alone the irregular exercise of it or the illegal assumption of it. Consequently, an interlocutory order even if it is erroneous, e.g. an erroneous decision on a question of law such as that of limitation or res judicata will not be open to revision unless the decision involves some question affecting jurisdiction also as specified in the Section. The extent of orders open to revision is thus very much narrowed down by the conditions imposed by the section itself."

(11) The petitioner's counsel has not been able to convince me that the District Judge while holding that the case was governed by S. 7(iv) (b) of the Court-fees Act exercised jurisdiction not vested in him by law, or failed to exercise jurisdiction so vested. All that he urged was that his decision was wrong on merits but when a Court has jurisdiction to decide a matter it has jurisdiction to decide it rightly or wrongly and the mere fact that it decided wrongly does not prove any lack of jurisdiction. Nor is there any ground to hold that the District Judge committed any illegality or material irregularity in recording his decision.

(12) Before concluding I would like to make mention of one more fact. As the very words of S. 115 go to show the remedy by way of revision is a permissive remedy and it has been held in a large number of cases that it should be granted very rarely and in exceptional cases, either when no other remedy is open to the litigant or if it is refused great hardship or irreparable injury would result to the petitioner. See in this connection the observations made by Bhide and Dalip Singh JJ. in their judgment in the Lahore Full Bench case. In the present case it cannot be denied that if the petitioner was so sanguine of his position that the order demanding additional Court-fee was erroneous it was open to him to have his plaint rejected by refusing to make the payment and then to appeal from the order rejecting his plaint on the ground that the Court-fee paid by him was proper. It is admitted by the petitioner's counsel that the Court-fee on appeal from the order rejecting the plaint would have been only Rs. 100/- or so and the petitioner is not too poor to be able to afford that much money. This means that the remedy by way of an appeal could not be regarded as hard. In 'Mani Lal v. Durga Prasad', 3 Pat 930 Jwala Prasad J. laid down the principle that should be followed in cases of this kind in the following words:

"The principle is that ordinarily an interlocutory order is not capable of revision, particularly when there is another remedy available to the injured party but where the order complained against is such as is calculated to cause irreparable loss to the injured party and there is no right of appeal and no remedy available to the party an interlocutory order may be revised under S. 115, Civil P. C. read with S. 15, Charter Act (S. 107, Government of India Act)."

(13) In 'Maharaj Bahadur Singh v. Raja Prithichand Lal', A I R (16) 1929 Pat 427 Fazl Ali J. followed the abovementioned case and observed that the question whether an order directing additional Court-fee to be paid satisfies the tests laid therein depends upon the circumstances of each case.

(14) In a later case, 'Ramkinkar Singh v. Jogendra Nath', A I R (22) 1935 Pat 186, another Judge of the Patna High Court held that where the lower Court passes an order on a matter of Court-fees and the decision on this point does not affect the matter of jurisdiction, there is only a question of law and no revision is competent, as another remedy by way of appeal is open to the party. In the light of these decisions and in view of what I have said above, I hold that even if other conditions were satisfied and the petition was competent, it cannot be accepted and I would dismiss it with costs.

(15) The record of the case shall be sent back to the trial Court. The Parties' Counsel have been directed to cause their respective clients to appear therein on the 22nd October, 1951.

(16) GURNAM SINGH, J.: I agree.

D.H. *Revision dismissed.*

A. I. R. (39) 1952 PEPSU 28 (C. N. 17)

CHOPRA, J.

Sher Singh, Petitioner v. Chiranji Lal, Respondent.

Criminal Revision No. 91 of 1951, D/- 27-9-1951.

Criminal P. C., (1898), S. 520 — "Court of Appeal" meaning — Power of Sessions Judge to pass order.

The words 'Court of Appeal' in S. 520 mean the Court to which an appeal would ordinarily lie from the order of the trial Court. In this sense a Magistrate of first class being Subordinate to the Sessions Judge the latter can make any substantive order, if thought fit, in respect of the property dealt with by the former under S. 517. It does not make any difference whether the party to the proceeding has approached the Sessions Judge by way of revision, or an application or appeal. (Para 2)

Anno: Cr. P. C., S. 520, N. 1, Pt. 3.

S. Ujagar Singh, for Petitioner; P. L. Handa, for Respondent.

JUDGMENT: The respondent was charged for having committed theft in the house of the petitioner on 1-9-1950 and to have stolen certain articles which included currency notes worth Rs. 600/-. The report of the incident was lodged in Police Station, Behru nine days after the incident. The police during investigation recovered four currency notes of Rs. 100/- each from the accused and also two currency notes of the same denomination from one Atma Singh at his instance. The trial Magistrate did not believe the evidence examined by the prosecution with respect to recovery of stolen property from the accused or at his instance, and acquitted him of the charge. He, however, directed that the cash recovered from, or at the instance of, the accused be delivered to the complainant. The accused approached the Sessions Judge with a petition for revising the direction given by the trial Magistrate as regards the disposal of the currency notes. The learned Sessions Judge acting under S. 520, Criminal P.C., set aside the order and directed that the currency notes in question should be delivered to the accused. The present is a petition of the complainant against this order of the Sessions Judge.

(2) It is contended by S. Ujagar Singh that the learned Sessions Judge on a petition for revision could have only referred the case to this Court under S. 438, Criminal P.C., for an order under S. 439 of the Code. His argument is that the revision could not be treated as an appeal and no order under S. 520, could be made by him. I, however, do not see any substance in this contention. Section 520, clearly gives all Courts of appeal, confirmation, reference and revision powers to modify alter, or annul any order made by the trial Court under Ss. 517, 518 or 519 of the Code. The words 'Court of appeal' under S. 520 mean the Court to which an appeal would ordinarily lie from the order of the trial Court. In this case Magistrate 1st Class, Patiala, was subordinate to the Sessions Judge, Patiala, the latter Court which had powers of

appeal, confirmation, reference, or revision in respect of the orders of the Magistrate could make any substantive order, if thought fit, in respect of the property dealt with by the former under S. 517. It did not make any difference whether the accused had approached the Sessions Judge by way of revision, or an application or appeal. The Sessions Judge was within his powers to treat the revision as an appeal. The contention of the learned counsel is, therefore, repelled.

(3) On merits S. Ujagar Singh has not been able to point out anything against the order passed by the learned Sessions Judge. The evidence relating to recovery of the stolen property from or at the instance of the accused, was not believed by the trial Judge, and he nowhere in his judgment found that the currency notes were the subject-matter of the theft. This was because there was absolutely no evidence that the notes produced by the accused or recovered from Atma Singh, were those which had been stolen from the complainant. He had kept no record of the numbers of the currency notes of which he had been deprived. According to him he had lost six notes of Rs. 100/- each, but as against this his wife gave a different denomination and the number of the currency notes of which he had been deprived. The accused, on the other hand, claimed these notes to be his and urged that he produced them to the police as a result of their pressure by incurring a loan from one Jawala of Patiala. A bond dated 12-9-1950, evidencing this loan, was also produced and got proved by him. In view of all these facts I have no hesitation to agree with the learned Sessions Judge that the notes produced by the accused or recovered from Atma Singh were not proved to be the subject-matter of the theft in question, and that they must be returned to the accused. In the result this petition is dismissed.

V.S.B. *Petition dismissed.*

A. I. R. (39) 1952 PEPSU 29 (C. N. 18)

TEJA SINGH C. J. AND PASSEY J.

Harbir Singh, Petitioner v. The State and another.

Criminal Misc. No. 12 of 1950, D/- 9-4-1951.

Criminal P. C. (1898), Ss. 173, 190, 202 — Magistrate's refusal to accept recommendation of Police under S. 173 — Power of Magistrate to call upon complainant to produce evidence.

Section 173 deals with the final report of the Police and it can either amount to a charge or it may contain the recommendation that no offence having been made out the case should be cancelled. If the report is that an offence had been committed the Magistrate can take cognizance of it under S. 190 (1) (b). If on the other hand, the report is that the case is false, clause (1) (b) of S. 190 does not apply and no cognizance of the offence can be taken by the Magistrate. The Magistrate has every right to look into the Police Diaries, to carefully scrutinise the investigation and to make up his mind independently of what the Police has said, as to whether the recommendation made by them is well founded. This means that it is open to the Magistrate to accept the Police recommendation or not. If he accepts it he is to cancel the case, but if he does not, all that he can do is to make a note that he does not agree with the police and does not accept their recommendation. Before making an order the Magistrate, if he so desires, may hear the complainant but he cannot call upon him to produce any evidence or to record evidence that may be produced before him either by the complainant or the alleged offender. The Magistrate's order that the offence be cancelled or his refusal to accept the Police recommendation cannot prejudice either party for the simple reason that the order is not judicial and the aggrieved party can always agitate the matter further. If the aggrieved party be the complainant he can put in a complaint in Court and the Magistrate after having taken cognizance of it can record preliminary evidence under S. 202, but S. 202 has no applicability in the case of a Police report. A I R (35) 1948 Lah 184(F B) 20 Ind Cas 211 (Cal), A I R (19) 1932 Mad 673, Rel. on; A I R (21) 1934 Mad 175, Dist. (*Para 9*)

Anno : Cr. P. C., S. 173, N. 10, S. 190, N. 20, S. 202, N. 2.

S. Tirath Singh and S. Dara Singh, for Petitioner; Advocate General, for the State.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('13) 20 Ind Cas 211 : (14 Cri L Jour 387 Cal) (Prs 6, 9)

('48) A I R (35) 1948 Lah 184 : (49 Cri L Jour 531 F B)) (Pr 5)

('32) A I R (19) 1932 Mad 673 : (33 Cri L Jour 785) (Pr 7)

('34) A I R (21) 1934 Mad 175 : (35 Cri L Jour 698) (Pr 8)

TEJA SINGH, C. J.: This application which purports to be under Section 561-A of the Criminal Procedure Code, and Section 226 of the Constitution of India, has arisen under the following circumstances.

(2) On the strength of a report made against the petitioner by the Custodian of the Muslim Evacuee Property, a case under Section 409, I. P. C., was registered by the Police. After the case had been investigated the Police came to the conclusion that no offence had been made out against the petitioner and recommended that the case be cancelled. On 23-6-1950 the Magistrate, before whom the report was placed, ordered that the person (Brij Lal Palta) at whose instance the Custodian had started proceedings be summoned. Brij Lal Palta appeared on 10-7-1950 and requested the Court to grant him opportunity to adduce evidence in support of his allegations. On 11-8-1950 the Magistrate recorded Brij Lal Palta's statement and then made an order sending for the record of a case. Three or four adjournments were given for this purpose. Inspite of the fact that no process was issued by the Magistrate to the petitioner, he appeared of his own accord in Court on 11-8-1950 and made an application which was rejected by the Magistrate. After that the case was adjourned from time to time and Brij Lal Palta was asked to produce his evidence. The application to this Court was made on 20-11-1950.

(3) It is contended on behalf of the petitioner that the whole procedure adopted by the Magistrate was illegal and that he had no power to take any evidence and it is prayed that in the first place the Magistrate should be directed to decide the matter pending before him without taking into consideration the evidence that he has already recorded and without taking further evidence, or in the alternative that he should decide the case without delay.

(4) After hearing the petitioner's counsel and the learned Advocate General my opinion is that neither Article 226 of the Constitution of India nor Section 561-A Criminal Procedure Code has any application and since, however, the matter has come before us and it appears to me that the proceedings are being taken by the Magistrate in his judicial capacity it is desirable that we should pronounce our opinion on the points raised before us and afford proper relief under Section 439, Criminal Procedure Code.

(5) Both sides are agreed that the report which was submitted to the Magistrate was under Section 173, Criminal Procedure Code. It was held by a Full Bench of the Lahore High Court, of which I was a member, in 'Emperor v. Hayat Fateh Din', A I R (35) 1948 Lah 184 that when a Police report is made to a Magistrate under Section 173, Criminal Procedure Code for the cancellation of the report and the Magistrate cancels the report, he acts merely as an administrative or ministerial officer and not as a Court. Relying upon this authority learned counsel for the petitioner contended that the Magistrate had no right to summon any evidence. He further contended that when a Magistrate takes evidence in a case he can do so only in his judicial capacity, that is to say, after he had taken jurisdiction of a case and jurisdiction of a case can be taken only under Section 190, Criminal Procedure Code, none of the conditions of which was satisfied here. Section 190 lays down that a Presidency Magistrate, a District Magistrate, a Sub-Divisional Magistrate or any other Magistrate specially empowered in this behalf may take cognizance of any offence: (a) Upon receiving a complaint of facts which constitute such offence. (b) Upon a report in writing of such facts made by any Police officer; and (c) Upon information received from any person other than a Police officer, or upon his own knowledge or suspicion, that such an offence has been committed.

(6) Clause (a) does not apply, because there was no complaint before the Magistrate, nor was there any applicability of clause (c) because the Magistrate had before him a Police report and it was evidently on that report that he acted. As regards clause (b) the position of the learned counsel is that that too had no applicability because before cognizance can be taken of an offence on a police report it would be shown that the report amounts to a charge but in the present case the report was that no offence had been committed. In support of this contention counsel cited 'Sarba Mohaton v. Emperor', 20 Ind Cas 211 (Cal). In that case a report had been lodged with the Police which was found to be false after investigation and the Police recommended that the case be cancelled. The Sub-Divisional Magistrate, before whom the report was placed for cancellation of the offence called upon the complainant to prove his case and then launched the prosecution against him under Section 476. It is not mentioned in so many words in the judgment but it is obvious that the complainant had been given an opportunity by the Magistrate to substantiate his allegations by evidence. It was observed by the learned Judges that there was no provision of law under which the Magistrate passed the order. They also observed that Section 202, Criminal Procedure Code under which a complainant can be asked to adduce evidence in support of his case before process is issued to the accused had no applicability for the reason that there was no complaint.

(7) The other case cited before us is 'Benkata Subba Rao v. Naraharisetty Anjanayulu', A I R (19) 1932 Mad 673. The facts of that case were that a report was made to the Police about kidnapping. The Police after investigation sent in a referred charge-sheet to the Sub-Divisional Magistrate who ordered the Police to put in a charge sheet. In reply to this the Police again put in a referred charge-sheet. Meanwhile, the Sub-Divisional Magistrate who passed the order directing a charge-sheet to be put in was succeeded by another. The latter agreed with the Police and directed the case to be treated as one of a civil nature. An application to revise this order was made before the Sessions Judge who ordered further inquiry into the complaint. Against this order of the Sessions Judge the accused made a revision petition to the High Court. It was held that since the order of the Sub-Divisional Magistrate did not amount to taking cognizance of the offence it could not be revised by the Sessions Judge. This case does not therefore, exactly cover the point which has arisen in the present case, but it is an authority for the proposition that when a case comes to a Magistrate under Section 173, Criminal Procedure Code, it is not a judicial proceeding. It follows that all that a Magistrate has to do on receiving the police report is to make an order that the offence be cancelled, or to make a note that he does not accept the recommendation of the police and let the matter stand at that. The Section does not empower the Magistrate to call for any evidence.

(8) The learned Advocate General drew our attention to a Bench decision of the Madras High Court 'Rangaswami Goundan v. Emperor', A I R (21) 1934 Mad 175 where a complainant whose case had been found to be false by the Police was asked to appear in Court and show cause why his complaint should not be struck off. No question of examining any evidence arose and accordingly the decision does not go counter to the contention of the petitioner's counsel. Moreover, it was held by the Bench that the Court while giving notice to the complainant and asking him to show cause did not act judicially but only in an executive capacity.

(9) The point stressed before us by the learned Advocate General was that when the police makes a final report in a case and that report comes to a Magistrate for action it becomes his duty to apply his mind to the facts and in order to be able to take a correct decision it may sometimes be necessary for him to hear the person at whose instance the Police started the investigation, or even to take evidence. I cannot accept this contention in its entirety. Section 173 deals with the final report of the Police and it can either amount to a charge or it may contain the recommendation that since no offence having been made out the case should be cancelled. If the report is that an offence had been committed the Magistrate can take cognizance of it under Section 190 (1) (b). If on the other hand, the report is that the case is false, clause (1) (b) of Section 190 does not apply and no cognizance of the offence can be taken by the Magistrate. I agree with the learned Advocate General that the Magistrate has every right to look into the Police Diaries, to carefully scrutinise the investigation and to make up his mind independently of what the

Police has said, as to whether the recommendation made by them is well-founded. In fact, I would go further and say that it is the Magistrate's duty to do all this. This means that it is open to the Magistrate to accept the Police recommendation or not. If he accepts it he is to cancel the case, but if he does not all that he can do is to make a note that he does not agree with the police and does not accept their recommendation. I also agree with the learned Advocate General that before making an order the Magistrate, if he so desires, may hear the complainant but he cannot call upon him to produce any evidence or to record evidence that may be produced before him either by the complainant or the alleged offender. I may point out that the Magistrate's order that the offence be cancelled or his refusal to accept the Police recommendation cannot prejudice either party for the simple reason that the order is not judicial and the aggrieved party can always agitate the matter further. If the aggrieved party be the complainant he can put in a complaint in Court and the Magistrate after having taken cognizance of it can record preliminary evidence under Section 202, Criminal Procedure Code, but as pointed out in 'Sarba Mohaton's case', 20 Ind Cas 211 (Cal) section 202 has no applicability in the case of a Police report.

(10) The result is that in exercise of the powers vested in this Court under Section 439, Criminal Procedure Code, I would set aside the lower Court's order whereby he called upon or allowed the complainant to adduce evidence to quash the proceedings relating to the evidence that has already been recorded by him and to send back the case to him with the direction that he should make a proper order under Section 173, Criminal Procedure Code in the light of what has been said above. The record of the case shall be sent back to the Court below forthwith. The petitioner has been directed to appear before the Magistrate on 18th April, 1951.

(11) It has been brought to my notice that the Magistrate concerned (S. Diali Ram) has now been transferred from Faridkot to Mansa. Since Mansa is in the same District and though stationed at Mansa S. Diali Ram's jurisdiction extends to the whole District and it was he who initiated the proceedings for taking evidence etc. the case shall go to him for further proceedings.

(12) KESHO RAM PASSEY, J.: I agree.

D.H. *Order accordingly.*

A. I. R. (39) 1952 PEPSU 31 (C. N. 19)

CHOPRA J.

Teja Singh and others, Petitioners v. Hamir Singh and others, Respondents.

Civil Revn. No. 77 of 1950, D/- 23-10-1950.

(a) *Civil P. C. (1908), S. 115 — Case decided.*

An order refusing amendment of a plaint though interlocutory one is a 'case decided' as it is a decision on a substantial question between the parties and results in shutting out a part of the plaintiff's claim. A. I. R. (23) 1936 All. 686 (F B), Not foll.; A I R (30) 1943 Lah 65 (F B), 1 Pepsu L R 1, Rel. on. (Para 3)

Anno: C. P. C. S. 115 N. 4, 5.

(b) *Civil P. C. (1908), O. 6 R. 17 — Amendment of plaint when to be allowed.*

Where the suit was for possession of land left by a male proprietor governed by Customary Law on the ground that the plaintiffs were his collaterals and that the adoption alleged to have been made by him had in fact never taken place and it was further clearly alleged that the deceased had no right to make an appointment and that the same was invalid according to custom, the plaintiffs by introducing the amendment that the property was ancestral do not want to change the nature of their suit or to add any new cause of action. The amendment is meant to give the right description of the property in suit and not to alter its character. There should be no objection to allowing an amendment of the kind, even after the period of limitation for the suit has expired. A I R (25) 1938 Mad 669 A I R (22) 1935 Mad 202. A I R (22) 1935 Pat 86 Rel. on. (Para 4)

Anno: C. P. C. O. 6 R. 17 N. 2, 3, 13, 19.

(c) *Transfer of Property Act (1882), S. 3 — Notice — Registration of document.*

Mere registration of a document does not amount to a notice to all the world. Unless there are circumstances from which a presumption could be raised, the mere fact that the deed was registered does not fix the plaintiffs with the knowledge of its execution on a certain date. (Para 5)

Anno: T. P. Act S. 3 N. 34.

(d) *Civil P. C. (1908), S. 115 — Discretionary orders.*

It is not every erroneous order that calls for the exercise of revisional powers, but where the non-interference results in denial of justice or causes an irremediable harm to a party the High Court can and must interfere. Where the Trial Court in disallowing an amendment of plaint did not properly exercise its discretion and acted under a misapprehension the order, which is palpably wrong and would result in manifest injustice, must be set aside. (Para 6)

Anno: C. P. C. S. 115 N. 20.

Atma Ram, for Petitioners — Jagan Nath, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('36) A I R (23) 1936 All 686: (I L R (1937) All 17 F B) (Prs 2, 3)

('43) A I R (30) 1943 Lah 65: (I L R (1943) Lah 257 F B) (Pr 3)

('35) A I R (22) 1935 Mad 202: (67 Mad L Jour 924) (Pr 4)

('38) A I R (25) 1938 Mad 669: (182 Ind Cas 19) (Pr 4)

('35) A I R (22) 1935 Pat 86: (154 Ind Cas 103) (Pr 4)

('49) 1 Pepsu L R 1 (Pr 3)

Civil Revn. No. 100 of 2003 (Pepsu) (Pr 2)

ORDER: In a suit for possession of agricultural land and a vacant site brought by the petitioners' collaterals of one Sunder Singh deceased, while challenging both the factum and validity of an adoption alleged to have been made by the latter omitted to state in the plaint that the property was ancestral 'qua' them. The adoption which amounted to appointment of an heir was effected through a registered deed dated 4-7-2000. The plaintiffs alleged that the appointer was not mentally fit to understand the nature of the document and was too old and infirm to willingly execute it, and on these grounds the factum of adoption was totally denied. The validity of the adoption was also challenged on the ground that it could not be made without the consent of all the reversioners. The suit, which was filed on 27-6-2006 after the death of Sunder Singh in Jeth 2004, was opposed by Hamir Singh, the adoptee, and in the written

statement filed by him on 2-8-2006 it was 'inter alia' pleaded that the plaintiffs had no 'locus standi' to challenge validity of the adoption inasmuch as the suit-land was not stated to be ancestral 'qua' them. On the next day, i. e., 3-6-2006 the petitioners, realising their mistake, applied for an amendment saying that the property was ancestral and that the petition writer had inadvertently omitted to so mention it in the plaint An effort during evidence was made to prove that the draft from which the petition writer copied out the plaint did so recite it. It was, however, not believed by the trial Judge although he did not finally base his decision on its rejection. He declined to accept the prayer solely on the ground that it would deprive the defendant of a valuable right of limitation that had already accrued to him. This is plaintiffs' petition for revising that order.

(2) A preliminary objection is taken by Mr. Jagan Nath that the order did not amount to a 'case decided' under S. 115 C. P. C. and, therefore, no revision was competent. Reliance is placed on a Full Bench decision of the Allahabad High Court in 'Mt. Suraj Pali v. Ariya Prethinidhi Sabha', AIR (23) 1936 All 686 (FB). The judgment in which it was held that an order refusing to allow an amendment of a pleading could not be questioned in revision is, no doubt, directly on the point. Mr. Atma Ram, on the other hand, has referred me to an unreported judgment dated 25-8-2003 of the erstwhile Patiala High Court in 'Mst. Harnam Kaur v. Bachan Singh', Civil Revn. No. 100 of 8-5-2003 in which a contrary view was taken by Hon'ble the Chief Justice deciding the case in Single Bench. On his attention having been drawn to the Allahabad Full Bench case he preferred to follow the view taken in another case previously decided by him, a reference to which was made in the judgment, and also by a Full Bench of his own Court.

(3) The question is whether the order which, no doubt, is an interlocutory one amounts to a 'case decided' within the meaning of S. 115 C. P. C. Sometimes back there was a good deal of controversy on the interpretation of a 'case decided' but now it has been held by almost all the High Courts in India that it would not be correct to say that no interlocutory order passed in the course of the suit should be regarded as a case decided. An order which though passed in the suit may nevertheless be an order which decides a case within the frame of the suit. It may be the decision on a substantial question in dispute between the parties affecting their rights. This would depend upon the nature of the order and the circumstances of the case in which it was made. There may, on the other hand, be some purely formal or incidental orders which would not be covered by it. Now it has to be seen under which category an order refusing amendment would fall. I personally think that it falls under the first as it is a decision on a substantial question between the parties and results in shutting out a part of the plainitffs' claim. The contrary view adopted in AIR (23) 1936 All 686 (FB) was mostly based on its own previous decisions. The view consistently held by that Court had been that an order allowing amendment could not be made the subject of revision. The Full Bench was of the opinion that there would be an anomaly in holding that if the application is allowed the case is not decided, but if it is not allowed the case is decided. This appears to have led the Court to decide that an order refusing amendment was also not open to revision. The narrower interpretation sometimes placed on a 'case decided' has been departed from in several later decisions and this Court in particular has been of the view that it is wide enough to include a decision on a substantial question in dispute between the parties that materially affects their rights. The detailed and well-considered judgment of the Full Bench of Lahore High Court in 'Bibi Gurdevi v. Mohammad Bakhsh', AIR (30) 1943 Lah 65 (FB), in which this wider interpretation was accepted as correct, was recently followed by Hon'ble the Chief Justice of this Court in 'Gordhan Das v. Ram Saran Das', 1 Pepsu L R 1. Patiala High Court, of which this Court is the successor, has further been of the view that an order refusing amendment falls under the first category of the two sets of interlocutory orders, and I am in respectful agreement with that view. The objection is, therefore, ruled out.

(4) On merits Mr. Atma Ram vehemently contends that the Court was wrong to suppose that the suit, if brought on the day the amendment was applied for, would be barred by time, and tnat even if it was, there was no justification for refusing amendment because it did not amount to changing the nature of the suit or adding new cause of action or relief. Mr. Jagan Nath refutes this argument by saying that the amendment would result in changing the nature of the suit inasmuch as in the original plaint the plaintiffs only challenged the factum of the adoption while now they want to dispute its validity as well. He further asserts that since the suit, if brought on 3-8-2006, would be beyond time amendment had been rightly refused. The first thing that has to be seen is what is the nature of the amendment. As already observed the suit was for possession of land left by a male proprietor governed by Customary law on the ground that the plaintiffs were his collaterals and that the adoption alleged to have been made by him had in fact never taken place. It was further clearly alleged that the deceased had no right to make an appointment and that the same was invalid according to custom. This was the nature of the suit the cause of action of which was the right of the plaintiffs to succeed to the estate left by the deceased. The validity of the adoption could be challenged only so far as it affected ancestral property since the deceased had an unrestricted right of disposition over his self-acquired property. By challenging its validity they meant to say that the suit-land was ancestral, but this they omitted to specifically mention in the plaint. The plaintiffs by introducing the amendment do not want to change the nature of their suit or to add any new cause of action. What they want is a clarification of the pleadings and rectification of a clumsy mistake made by the petition writer, which would deny them the right they intended to seek. The amendment is meant to give the right description of the property in suit and not to alter its character. It would not be in consonance with justice to deny them the right to rectify a defect in the plaint which does not affect any substantial change in the right they originally claimed. They should not be penalised for, and deprived of the right because of, the carelessness of the petition-writer. There has been no undue delay in applying for the amendment either. The mistake was brought to the notice of the plaintiffs on 2-8-2006 the day the written statement was filed and they came forward with the prayer on the following day. There should be no objection to allowing an amendment of the kind, which does not introduce a new cause of action or change the nature of the suit, even after the period of limitation for the suit has expired. It is argued that allowing amendment would work grave injustice to the defendants inasmuch as it would deprive them of a valuable right which had accrued to them by influx of time. The validity of the adoption is said to have become immune from being attacked because the period of limitation had already expired. The contention, however, is untenable on

two fold grounds. Firstly the validity of the adoption had already been challenged in the original plaint. It may be remembered that it was clearly stated that the adoption was invalid according to custom and that it could not stand in the way of the plaintiffs succeeding to the deceased. The plea, therefore, is not being taken for the first time by the amendment. The property that was to be affected by the adoption was made the subject-matter of the suit. The adoption could be ineffective only with respect to property over which the adoptor had limited power of disposition and that could be the property that was ancestral qua the objector. The amendment, therefore only amounted to a clarification of the nature of the property that was already in dispute, which was in consonance with the intentions of the plaintiffs. A brief reference may here be made to the case cited by Mr. Jagan Nath in support of his argument. In 'Doraiswami Iyengar v. Radhakrishna', AIR (25) 1938 Mad 669, the plaintiff wanted to take up an alternate case in the amended plaint, which was inconsistent with the case originally set up. In a suit for the price of a pair of diamonds sold to the defendant the latter's plea was that he only acted as a broker for the sale by the plaintiff to a third person. The plea was accepted by the trial Court and the plaintiff in appeal wanted to amend the plaint so as to hold the defendant liable as a broker. The prayer was rejected on the ground that it amounted to change the specific legal relation taken in the original plaint and also the nature of the suit. The other two authorities 'Srirangam Chettiar v. Sornam Pillai', AIR (22) 1935 Mad 202 and 'Tipan Prasad Singh v. Secy. of State', AIR (22) 1935 Pat 86 rather support the case of the petitioners. In AIR (22) 1935 Mad 202 in the petition, as it originally stood, where the acts of insolvency were mentioned the words "with intent to defeat and delay his creditor" were owing to a defective drafting omitted. The object of the amendment was to insert these words so that the requirements of law might be complied with. The amendment was considered to be "of a most formal kind" and allowed. In AIR (22) 1935 Pat 86 the suit was against the Secretary of State and in the plaint no averment regarding a notice under section 80, Civil P. C., having been served on the defendant had been made. The amendment was prayed on the ground that though the notice had in fact been given the typist by over-sight omitted to mention it in the plaint. The amendment, which had been disallowed by the trial Court was allowed by the High Court on revision.

(5) Again in this case I do not feel satisfied that the suit to challenge the validity of adoption had become time-barred on 3-8-2006 when the amendment was applied for. It is correct that the limitation for such a suit provided by the Patiala Limitation Custom Act (X of 2000) which applies to this case, is six years. According to Article 4 of the Schedule the period begins to run from the 'the date on which the alleged appointment of an heir becomes known to the plaintiff'. The alleged adoption is dated 4-7-2000 and the application was made only a month after the expiry of the period of six years, i.e., on 3-8-2006. In the plaint although the actual date on which the plaintiffs came to know of the document was not mentioned yet it was stated that the deed was got secretly executed at their back and without their knowledge. The plaintiffs might succeed in showing, if they were put to its proof, that they came to know of it more than a month after it was executed. There is, thus, nothing on the record on which it could be definitely held that the period for the relief had already run out. I do not agree with Mr. Jagan Nath that mere registration of a document amounts to a notice to all the world. Unless there are circumstances from which a presumption could be raised, the mere fact that the deed was registered does not fix the plaintiffs with the knowledge of its execution on that date. From whatever angle it may be viewed the order of the trial Judge, in my opinion, is erroneous.

(6) The next and the last question is whether the order should be interfered with in revision. I can concede that it is not every erroneous order that calls for the exercise of revisional powers, but where the non-interference results in denial of justice or causes an irremediable harm to a party this Court can and must interfere. Refusal to allow amendment in this case would deprive the plaintiffs for ever of their valuable right to challenge an interference in the ordinary rule of succession created by a person whom they would otherwise succeed. This would shut out from them a part of the claim prayed for in the suit. The trial Court did not properly exercise its discretion and appears to have acted under a misapprehension. The order, which is palpably wrong and would result in manifest injustice, must therefore be set aside. The order of the trial Judge, dated 14-6-1950 is set aside and the case is sent back to him with the direction that the amendment should be allowed subject to payment of Rs. 10/- as costs to the defendants. The parties, through their counsel have been directed to appear in the Court of Sub-Judge, 1st Class, Fatehgarh Sahib on 13th November 1950.

(7) In the result the petition is accepted with costs.

D.H. *Revision allowed.*

A. I. R. (39) 1952 Pepsu 33 *[C. N. 20.]*

TEJA SINGH, C. J. AND GURNAM SINGH. J.

Bakhshi, Appellant v. Naraina, Respondent.

Letters Patent Appeals Nos. 52 and 53 of 2006, D/- 16-10-1950.

Custom (Pepsu) — Ancestral land — Presumption and proof.

The mere fact that the remote ancestor was the founder of the village does not raise any presumption that every inch of the land that was later on found to be in the possession of his descendants was held by him. In fact, it is now well recognised that even the mention of the name of a common ancestor in pedigree table raises no presumption about the ancestral nature of the land. (Para 6)

Where the land which had devolved upon the descendants of a common ancestor got mixed up with the land which the descendants appropriated out of the lands abandoned by others and it is not possible to separate those lands the whole must be treated as non-ancestral. (Para 6)

Where the land is got by a sort of relinquishment or gift and not in the exercise of the right of succession, the land, cannot be said to be ancestral. (Para 6)

Where although at the time of the Settlement one of the Khatas, was jointly owned by all the descendants of the common ancestor but the persons who existed at the time of the settlement were descended from the common ancestor in the fifth or sixth degree no presumption can be raised that the land had devolved upon them from the common ancestor. (Para 8)

Jagan Nath, for Appellant; S. Tirath Singh, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

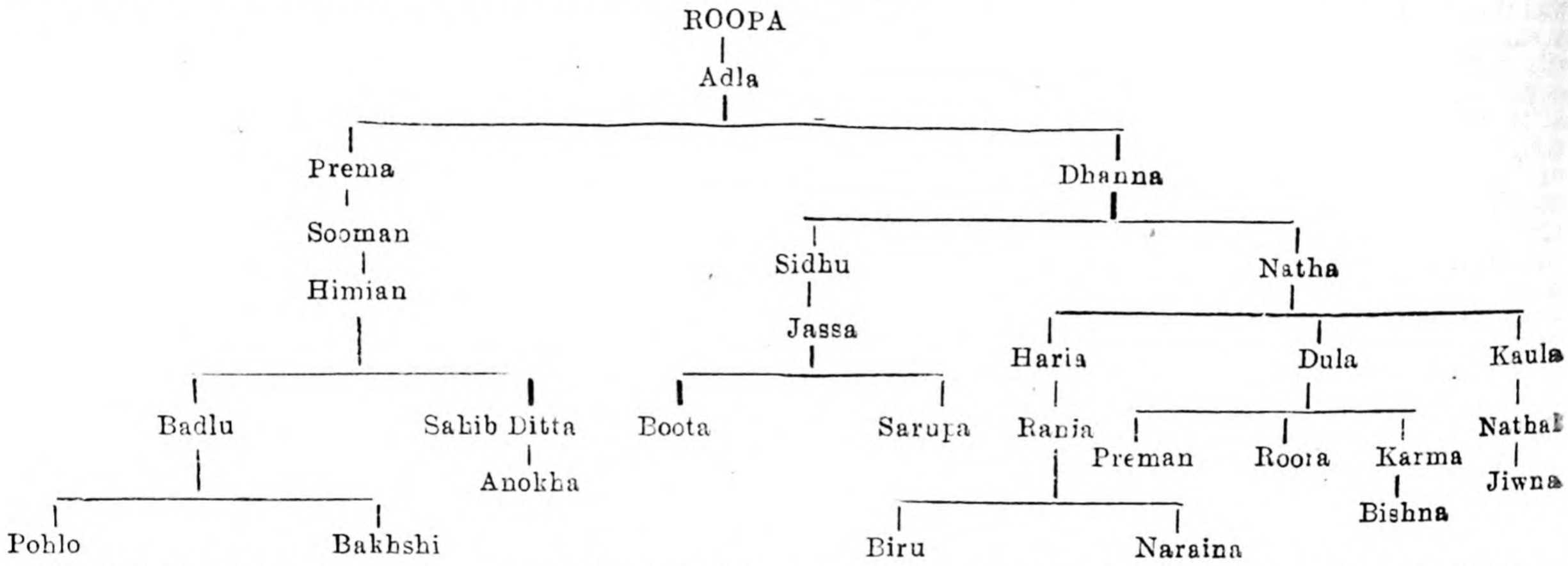
('84) 31 Pun Re 1894 (Pr 6)

('10) 109 Pun W R 1910: (7 Ind Cas 995) (Pr 6)

TEJA SINGH, C. J.: These are two connected appeals from the two appellate decrees of a learned single Judge of this Court and the only question that we are called upon to determine is whether the suit property in both the cases was ancestral 'qua' the plaintiffs. In order to be able to appreciate the points urged by counsel it is necessary to give briefly the facts.

(2) On 7-12-1997, one Naraina of village Isra gifted certain agricultural land of his to Mt. Dalip Kaur, daughter of his brother Biru. On the same day Bishna, a collateral of Naraina, gifted his agricultural land to Mt. Dayal Kaur, the other daughter of Biru. Bakhshi and Pohlo who are collaterals of Naraina and Bishna in the sixth degree brought two separate suits challenging the gifts. They contended that the land was ancestral 'qua' them and that according to custom the donors had no right to give them away. The defendants in each case denied the ancestral nature of the land and further contended that the plaintiffs being remote reversioners had no right to maintain their respective actions in the presence of nearer collaterals, i.e., Bishna in one case and Naraina in the other. The trial Sub-Judge found against the plaintiffs on all the material points and dismissed both the suits. The plaintiffs preferred appeals to the District Judge who disregarded with the trial Sub-Judge as regards the ancestral nature of both the lands, and holding that the existence of Bishna in one case and Naraina in the other did not affect the plaintiffs 'locus standi' to bring the suits, because they had both consented to the gifts, decreed the suits. On appeals by the donees the learned single Judge held that the property in neither case had been proved to be ancestral and as a result set aside the decrees of the District Judge and dismissed both the suits.

(3) That the plaintiffs are the sixth degree collaterals of Naraina and Bishna is not denied. Their relationship will be clear from the following pedigree-table prepared at the time of the Settlement:



(4) Though Roopa is shown as the father of Alda in the above table a reference to the Kafiat Dehi of the village appended to the pedigree table will, however, show that probably he was his remote ancestor.

(5) In both the cases the plaintiffs as well as the alienors are descended from Adla. So in order that the lands which were the subject-matter of the two suits could be regarded as ancestral it should be proved that they belonged to Adla and they descended upon Bishna and Naraina by succession.

(6) The plaintiff's counsel admits that there is no direct evidence on record in support of these facts; but he depends upon the circumstances which in his opinion raise a strong presumption in the plaintiffs favour. First of all he drew our attention to the fact that the village was founded by Isar, who was the remote ancestor of Adla and Roopa. No doubt it is mentioned in the Kaifiat Dehi that Isu was the founder of the village, but this fact by itself does not raise any presumption that every inch of the land that was later on found to be in the possession of his descendants was held by him. In fact, it is now well recognised that even the mention of the name of a common ancestor in the pedigree table raises no presumption about the ancestral nature of the land. In this case there is another distinguishing feature and it is this that according to the Kaifiat Dehi the village was first situated on a different site, the one which is now occupied by the Dera of Sadhs, and later on it was shifted to another site. The relevant part of the Kaifiat Dehi reads as follows:

"When the number of Isu's descendants increased all of them with the exception of Roopa, Bhagu, Bhakhta and Thakaria, who are the ancestors of the owners of the village now, migrated to other villages such as Dodh Gill, etc., Roopa, Bhagu, Bakhta and Thakria left the site of the old village and founded the new village at its present site. They divided the entire area of the village into four equal parts."

There is nothing to show that the area of the village originally was and what it was during the time of Roopa, Bhaga and Bhagta and Thakria. It is important to note that at the time of the Settlement the land owned by Dhanna's branch amounted to 144 bighas of which 129 bighas and 17 biswas stood in the names of the members of the branch individually and 14 bighas and 13 biswas was joint. As compared with this the land owned by the descendants of Preman was 92 bighas and 2 biswas. It was explained by the appellant's counsel that the disparity between the holdings of the two branches was due to various reasons, one of them being that the descendant's of Bakhta migrated to some other place and the land that they owned was appropriated by Rupa's descendants. In support of his contention learned counsel referred us to the following part in the Kaifiat Dehi:

"In Samvat 1886 the descendants of Bakhta left the village for an unknown destination and their one-fourth share was taken over by the descendants of Ladha with the concurrence and consent of other owners. This led to the division of the permanent village into the following three Pattis: Patti Ladha one half, Patti Bhagu one-fourth and Patti Thakria one-fourth."

Now the pedigree-table makes no mention of Ladha and we do not know what happened to him or to

his descendants if he left any, and whether he and they were in any way related to Roopa. It was suggested by the appellant's counsel that probably Ladha and Roopa were the same persons and it was because of a clerical mistake or mistakes in copying that Ladha came to be written as Roopa and Roopa as Ladha. There is no warrant for this assumption and it must be dismissed as a mere conjecture. The case has been in Court for about six years, the suits were instituted in the trial Court on 16-8-2001 and if there was any mistake in the copies, surely it was open to the plaintiffs to have it brought to light and rectify it but they did nothing of the kind. In addition, even if we assume that Ladha was no other than Roopa, according to the pedigree table the land which had devolved upon his descendants from him got mixed up with the land which they appropriated out of the lands that Bakhta's descendants had abandoned. Since it is not possible to separate those lands now, even if we assume that Roopa's land was ancestral the whole must be now treated as non-ancestral. The appellant's counsel argued that because Bakhta's land was ancestral it did not cease to be so in the hands of the descendants of Roopa, and referred us to 'Natha Singh v. Harnam Singh', 31 Pun Re 1894 and 'Thakar Singh v. Khark Singh', 109 Pun W R 1910. Now the facts of these cases were quite distinguishable. In the Punjab Record case the person who had got hold of the land abandoned by the original owner was a close relation of the latter and was presumably his sole heir. This means that he appropriated the land in exercise of the right of succession. In the present case we do not know the exact relationship between Bakhta's descendants who abandoned the land and those of Roopa who appropriated it. Apart from this, Roopa's descendants were not the only descendants of the common ancestor that were in existence then. So it cannot be said that they got the land in exercise of the right of succession. The Kaifiat Dehi refers to the concurrence and the consent of the other owners. This means that they too had some sort of right in the land and accordingly, so far as their shares in the land are concerned, the descendants of Roopa got them by a sort of relinquishment or gift. In Thakar Singh's case the facts are not clear from the judgment and if I may say so with respect it is not very helpful. The learned Judge remarks that

> "lands given up by other co-sharers on coming to Dhanna Singh in virtue of his relationship and the fact that the land had been held by the common ancestor of the absconder and Dhanna Singh would clearly be held to be ancestral"

were meant to apply to the facts of that particular case and cannot be taken to lay down a general principle. Again what is important is that in both the cases cited by counsel the land which was subsequently abandoned was proved to be ancestral but no such proof is forthcoming in the present case and there is no data for holding that the land which Bakhta's descendants abandoned was ancestral. The only circumstances upon which counsel relied was that Bakhta was one of the descendants of Isu and Isu according to the pedigree-table was the founder of the village. In my opinion, this did not raise the presumption that land that Bakhta's descendants held at the time they left the village for another place had descended to them from Isa, particularly so when the site of the present village is quite different from the site of the original village and the change of the site must have resulted into the change of lands forming the village.

(7) At this stage mention need be made of another fact to which reference is made in the Kaifiat Dehi. This is how the second paragraph reads:

> "A Government jungle consisting of 500 bighas of land was lying uncultivated. Before Samvat 1900 that jungle was given to the Zamindars on payment of Nazrana. The amount of the Nazrana is not known but Khatris, Brahmins, Tarkhans and Kahars also contributed to it. Every one of them was given land according to the Nazrana paid by him and every one of them has been regarded as Malik Qabza. In 1916 Samvat some land out of the Shamilat was granted to Jhanjar Jats and in 1918 the area of the village which comprised 21 Bhars swelled to 25 Bhars....."

This would go to show that additions to the land that the owners of the village got from their ancestors have all along continued and this is another obstacle in our way of presuming any part of it to be ancestral.

(8) Last of all counsel drew our attention to the fact that at the time of the Settlement one of the Khatas, i.e., Khata No. 81/128 was jointly owned by all the descendants of Adla. Taking into consideration the fact that the persons who existed at the time of the settlement were descended from Adla in the fifth or sixth degree. I am not prepared to raise the presumption that the land had devolved upon them from Adla. In any case, because of great difference between the holdings of the different branches and of the other facts enumerated above, I do not think that any presumption can be raised with regard to the land in suit which is quite different from that comprised in the joint khata.

(9) For all these reasons, I would hold that both the appeals must stand dismissed with costs.

(10) GURNAM SINGH, J.: I agree.

G.M.J. *Appeals dismissed.*

A. I. R. (39) 1952 Pepsu 35 *[C. N. 21.]*

CHOPRA J.

Jai Narain, Petitioner v. Ganeshi Lal, Respondent.

Civil Misc. No. 60 of 2006, D/- 4-12-1950.

Debt Laws — Patiala Relief of Indebtedness Act (5 of 1993 Smt.), S. 30 — Decree passed in suit instituted after passing of Act — Objection under S. 30 can be raised in execution — C. P. C. Ss. 11 Expl. IV and 38.

An objection u/s. 30 can be taken during the execution of a decree which was passed in a suit instituted after the commencement of the Act, although the judgment-debtor had failed to avail of it during the trial of the suit: AIR (32) 1945 Lah 33, Rel. on. *(Paras 1, 3)*

Anno: C. P. C. S. 11 N. 2, 23; S. 38 N. 8.

Ram Niwas, for Petitioner; Gurbachan, for Respondent.

Case referred to:

('45) AIR (32) 1945 Lah 33: (219 Ind Cas 153) (Pr 3)

ORDER: The point of law involved in this revision is whether an objection under S. 30, Patiala Relief of Indebtedness Act (V (5) of 1999) can be taken during the execution of a decree which was passed in a suit instituted after the commencement of the Act. A money suit brought by Ganeshi Lal respondent on 2-2-2002 was decreed to the extent of Rs. 225/- against the petitioner on 16-12-2002. On execution proceedings being taken out the judgment-debtor took objection that the principal amount advanced was only Rs. 50/- and that the rest of the decretal amount consisted of interest. The objection was based on the provisions of S. 30, Cl. (1), Patiala Relief of Indebtedness Act 1999 (Act V (5) of 1999) and it was prayed that the decree-holder be required to produce his ac-

counts from which the contention could be substantiated. The decree-holder resisted the application on the ground that since the objection had not been taken during the trial of the suit it could not be raised in the execution proceedings because the executing Court could not go behind the decree. The Courts below have found in favour of the decree-holder and dismissed the objections. I cannot fail to remark that the executing Court unnecessarily gave ten adjournments for the hearing of the application and took more than six months to decide the only question. The District Judge is of the opinion that the suit having been filed after the promulgation of the Act the judgment-debtor could have availed of the relief given by S. 30, if he so desired, during the trial and no objection having been then taken debars him from raising it before the executing Court.

(2) It is contended by Mr. Ram Niwas, the learned counsel for the petitioner, that the order of the District Judge is against the provisions of the Act which enjoins on the Court hearing the suit and also on the Court executing the decree to see that the sum claimed was not larger than twice the amount actually advanced. The learned counsel for the respondent refutes the contention by arguing that the executing Court cannot go behind the decree and that an objection that could have been raised by a party during the suit and was not so raised must be deemed to have been decided against him. It is correct that under S. 11, C. P. C. any matter which might and ought to have been made ground of defence in the suit would be deemed to have been a matter directly and substantially in issue. By the application of the principles laid down in this section read with explanation (4) it can be argued that the defendant who could have taken up the plea of Damdupat during the trial but failed to do so should be considered to have waived it and the Court can be taken to have by implication decided the objection against him. But here we have got a special Legislation which provides that the objection of Damdupat is not only to be entertained by the Court passing a decree but also by the Court executing a decree passed in a suit which was instituted after the enforcement of the Act. The very language of the section makes it clear that in suits brought after the commencement of the Act not only is a Court debarred from passing a decree but it is also debarred from executing a decree if it is found to offend against the rule of Damdupat. The argument that the objection could only be raised in the suit and not raising it then amounted to a decision by implication against the defendant would render a part of the section redundant. The section reads as follows:

> "In any suit brought after the commencement of this Act in respect of a debt as defined in S. 7, as advanced before the commencement of this Act no Court shall pass or execute a decree or give effect to an award in respect of such debt for a larger sum than twice the amount of the sum found by the Court to have been actually advanced, less any amount already received by a creditor in excess of the amount due to him under Cl. (3) of sub-s. (2) of S. 5 of this Act."

(3) A simple interpretation of the words used in the section shows that even if no objection was taken during the trial the objection that the decree-holder was not entitled to realise more than twice the amount of the money advanced by him could still be raised in execution proceedings and the executing Court would be debarred from executing the decree if in its opinion the decree offends against the rule laid down in the section. In view of this special provision of law. The principles lay down in S. 11 read with explanation (4) would have no application to this case, and the special enactment must have precedence over the principles of implied decision. In coming to this decision I have not been unmindful of the general principles of law and procedure, that weighed with the District Judge, that an executing Court is to execute a decree as it is and is not to go behind it or to question its validity. But the Act enjoins upon the executing Court to refuse to execute a decree for the sum that it finds to be in excess of double the amount actually advanced. However unreasonable it may appear to be the law must have its course, and the Courts are only to interpret it in its plain meaning and apply it as it stands. In the view that I take I am supported by a judgment of the Lahore High Court in 'Firm Jog Dhian Jiwan Das v. Ram Kaur', A I R (32) 1945 Lah 33 in which on a similar objection being taken by a judgment-debtor of a decree passed in a suit instituted after the enforcement of the Punjab Relief of Indebtedness Act (VII (7) of 1934) Abdul Rehman J. observed that

> "the plain meaning of this section shows that the mere omission to raise the objection during the trial stage would not debar a person from raising that objection after the decree had been passed against him".

S. 30, Punjab Act is just the same as S. 30 of the Act under consideration (Act V (5) of 1999). I would, consequently, hold that the judgment-debtor could take up the objection in the executing Court although he had failed to avail of it during the trial of the suit. The revision is, therefore, accepted and the order of the trial Court as well as that of the District Judge set aside. The case is remanded to the Executing Court for decision of the application on merits in accordance with law. The parties have been directed through their Counsel to appear in the Court of Sub-Judge II Class Narnaul on 18th Dec., 1950. No order as to costs.

V.B.B. *Case remanded.*

A. I. R. (39) 1952 Pepsu 36 *[C. N. 22.]*

CHOPRA AND PASSEY, JJ.

Mohar Singh, Appellant v. Rehabilitation Minister and others, Respondents.

F.A.O./L.P.A. No. 2 of 1951, D/- 18-10-1951.

(a) Patiala State Judicature Farman (1999), Clause 53 — Rules under — Rules 1, 6 — Validity.

The Law of Limitation is one of procedure and the power given by the Farman to the High Court to frame rules to regulate the procedure includes the power to frame rules as to the time within which a petition for leave to appeal or an appeal from the order of a Single Judge could be presented. Rules Nos. 1 and 6 providing such limitations are consequently held to be intra vires. (Para 4)

(b) (Pepsu) Ordinance (X (10) of 2005), Clause 68, Proviso — Certificate and Appeal under Clause 52 — Applicability of Rules 1, 6 made under Clause 53 of Patiala State Judicature Farman (1999).

Clauses 44 and 53 fell under the second part of the Patiala Judicature Farman and Clauses 52 and 68 of the Ordinance No. X are both included in its third part. It, therefore, necessarily follows that rules framed for the purposes of Clause 44 of the Judicature Farman, would be applicable to Clause 52 of the Ordinance. The plain meaning of the proviso is that Clause 52 of Ordinance No. X of 2005 is to be read in place of Clause 44 of the Patiala Judicature Farman 1999, when these words are used in Rules 1 and 6. The rules framed under the Farman remained in force for the purpose of getting a certificate and for filing

a letters patent appeal under Clause 52 of Ordinance No. X of 2005. (*Paras 3, 5*)

Ram Karan Dass, for Appellant; Advocate-General (for No. 1); P. L. Handa (for No. 2) and Banwari Lal (for No. 3); for Respondents.

CHOPRA, J.: A petition under Article 226, Constitution of India for the issue of a writ of certiorari was dismissed by a Single Bench of this Court in limine on 30th October 1950. An application for a certificate for leave to appeal to a Division Bench was presented on 30-11-1950. The certificate prayed for was granted to the petitioner on 21-12-1950. This appeal under Clause 52 of Ordinance No. X of 2005 against the order dismissing the petition for writ, was presented on 17-1-1951. A preliminary objection has been taken by the respondent that the appeal was not presented within the prescribed period of 60 days and was, therefore, time-barred. An objection to the propriety of the certificate has also been taken on the ground that the application therefor was not presented within the prescribed period of 30 days. After hearing the counsel for the parties at length we are of the opinion that both the preliminary objections must prevail.

(2) In order to understand the points involved in the case a reference to the relevant provisions of law has to be made. Before integration of the erstwhile Patiala State into the Union, the law in this State governing such appeals was provided in the Patiala State Judicature Farman of 1999. Clause 44 of this Farman allowed an appeal to be filed to the High Court against a judgment or order of one Judge of that Court provided that the case was certified to be a fit one for appeal by the Judge deciding it. Clause 53 of the Farman authorised the High Court to make rules regulating their own procedure and the procedure of the Civil Courts subject to its superintendence. Rules framed under this Clause by the High Court provide limitation of 30 days for an application under Clause 44 for leave to appeal, and that of 60 days for filing an appeal. The period in both these cases is to be counted from the date of the pronouncement of the judgment or order sought to be, or appealed from. These Rules Nos. 1 and 6 respectively are to be found in Volume 2 Appendix A Part (b) of the Rules and Orders of the High Court of Judicature at Patiala. On the formation of the Union, the Farman referred to above was repealed and was superseded by Ordinance No. X of 2005. Provision for an appeal to the High Court against the judgment or order of a Single Judge of that Court, was made by Clause 52 of this Ordinance. This appeal was again made subject to a certificate granted by the Judge who decided the case or in his absence by the Chief Justice. Power to make rules was given to the High Court by Clause 68 of the Ordinance. Amongst other things the High Court was given powers to regulate its practice and procedure. It is enacted by a proviso added to this clause that until fresh rules are made, those framed under the second part of the Patiala Judicature Farman 1999, shall continue in force and be deemed to have been made in this part of the Ordinance, if they were not inconsistent with the provisions of that part.

(3) The contention of the respondents is that the rules framed under the Farman remained in force for the purpose of getting a certificate and for filing a Letters Patent Appeal under Clause 52 of Ordinance No. X of 2005, under which the certificate in the present case was granted and the appeal was filed and since the application for certificate was presented more than 30 days after the order and the appeal was also filed after more than 60 days, the appeal should be dismissed as time-barred. The objection is met by Mr. Ram Karan Das, the learned counsel for the appellant, on two fold grounds. Firstly, he urges that the rules framed under the Farman were ultra vires the Statute and secondly, that even if they were intra vires they had no application to the present case.

(4) On the first point his contention is that Clause 53 of the Farman did not specifically empower the High Court to frame rules to provide limitation for presenting an application for a certificate or for filing a Letters Patent Appeal. Precisely what he means to say is that while Sub-clause (e) of Clause 53 empowered the High Court to make rules regulating their own procedure and the procedure of civil Court subject to its superintendence, this power did not include the power to make rules providing limitation for the purpose of getting a certificate or filing a Letters Patent Appeal. He, therefore, maintains that the rules framed by the High Court were beyond the powers given to it by this Clause, and that they were ultra vires. In support of his argument he has made reference to Clause 22 of the same Farman which empowered the President of the Judicial Committee to make rules for regulating the practice and procedure of the Judicial Committee. Stress is laid on the fact that this Clause specifically stated that this power included the power to frame rules as to the time within which petitions for special leave to appeal to the Judicial Committee were to be presented. Our attention has also been drawn to Clause 27 of Ordinance No. X of 2005, which took the place of Clause 22 of the Farman. Sub-clause (e) of Clause 27 of the Ordinance, again expressly empowered the President of the Judicial Committee to frame rules including other matters, as to the time within which appeals and petitions for special leave to appeal to the Court were to be presented. Reference has also been made to such rule-making powers given under certain other Statute and it is contended that unless such power was expressly conferred by the legislation to the High Court, the power to frame rules to regulate its procedure did not include the power to frame rules as to limitation. The learned counsel for the respondents have, on the other hand, urged that the Law of Limitation is one of procedure and that the power given by the Farman to the High Court to frame rules to regulate the procedure included the power to frame rules as to the time within which a petition for leave to appeal, or an appeal from the order of a Single Judge could be presented. I see much force in this contention. Rules of limitation are prima facie rules of procedure. It is an admitted principle of law that when an Act prescribes a period of limitation for the institution of particular proceedings, it does not create any right in favour of any person or give him a cause of action, but simply prescribes that the remedy can be exercised only within a limited period and not subsequently. It is for this reason that in respect of any particular suit or proceeding, the law of limitation applicable is the law which is in force on the day on which such suit or proceeding is instituted, notwithstanding that the cause of action may have arisen before such Act came into force. The law relating to the time within which a petition for a certificate for leave to appeal or a Letters Patent Appeal could be presented in a matter of procedure, and, in my opinion, the High Court which was empowered to make rules to regulate their own procedure had also the power to make rules providing limitation therefor. The contention of Shri Ram Karan Das that wherever the legislature so intended, they expressly provided that the powers to frame rules regulating the pro-

cedure would include powers to frame rules as to the time within which certain proceedings could be started, is based on a wrong notion of the principles of interpretation of statutes. The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the section and when it is so used, the words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also things which the interpretation clauses declare that they shall include . The word "include" is always intended to be enumerative and not exhaustive. It has an extending force and does not limit the substantive part of the provision to the instances given. The fact that no power to frame rules on the matter in question was specifically given by Sub-clause (e) of Clause 53 of the Farman would not make any difference when it authorised the High Court to frame rules to regulate its procedure. This is because it clearly included such powers, and the fact that in certain other Statutes or in another part of the same Farman such powers were specifically mentioned to be included in the powers to frame rules regarding practice and procedure, would not be of any importance. I am, therefore, of the considered opinion that the High Court was authorised to frame rules as to the time within which an application for certificate, or an appeal under the Letters Patent, could be presented. Rules Nos. 1 and 6 providing such limitations are consequently held to be intra vires.

(5) Mr. Ram Karan Das next contends that even if the rules be intra vires they have no application to the present case. It is urged that Rule 1, under reference provides that an application for grant of a certificate that the case is fit for appeal under Clause 44 of the Patiala Judicature Farman 1999, shall be made within 30 days from the pronouncement of the judgment or order, and Rule 6 limits that an appeal under the same clause of the Farman shall be filed within 60 days. The argument is that the application and the appeal in the present case were not presented under Cl. 44 of the Farman and since they had been presented under a different law, i.e., Cl. 52 of Ordinance No. X of 2005, the rules would have no application. It is stressed that the words used in the rules were not ambiguous and the same having been confined to petitions and appeals under a particular Farman, should not be held to be applicable to petitions and appeals under a different Statute. Certain authorities enunciating general principles of interpretation of Statutes have also been referred to by the learned counsel. It is correct that when the words of a Statute are clear, it is not within the province of a Court, simply with a view to avoid apparent anomalies, to put such an interpretation on the words as they are incapable of bearing. The primary rule of interpretation of Statutes is that the intention of the legislature is to be gathered from the language used in the Statute, because the business of the interpreter is not to improve the Statute but to expound it. There cannot be any quarrel with respect to these general principles of interpretation, but their application to the present case does not lead to an inference favourable to the appellant. As already observed, the Patiala Judicature Farman, 1999 was repealed and was succeeded by Ordinance No. X of 2005 on the formation of the Union. A provision similar to Clause 44 of the Farman was made in Clause 52 of the Ordinance with slight modifications. Clause 68 of the Ordinance gave powers to the High Court to make rules to regulate its practice and procedure. A proviso was, however, added to this Clause keeping in force the rules framed under the repealed Farman. It would be worthwhile to reproduce the words used in the proviso. They are:

"Provided that the rules framed under the second part of the Patiala Judicature Farman 1999, shall until the rules are made, and so far as they are not inconsistent with the provision of this part, continue in force and be deemed to have been made under this part."

Now Clauses 44 and 53 fell under the second part of the Patiala Judicature Farman and Clauses 52 and 68 of the Ordinance No. X are both included in its third part. It, therefore, necessarily follows that rules framed for the purposes of Clause 44 of the Judicature Farman, woud be applicable to Clause 52 of the - Ordinance. The concluding phrase "and be deemed to have been made under this part" is particularly significant, and the plain meaning of the proviso is that Clause 52 of Ordinance No. X of 2005 is to be read in place of "Clause 44 of the Patiala Judicature Farman 1999" when these words are used in Rules 1 and 6.

(6) The counsel for the appellant has conceded that the petition for the certificate, as also the appeal were not presented within the time prescribed by these rules and if these are held to be intra vires and applicable to the present case, his appeal would not be within time. In view of the decision arrived at by me the preliminary objection must prevail. The appeal is, consequently, dismissed. Since the appeal fails on a preliminary point the parties are directed to bear their own costs.

(7) PASSEY, J.: I agree.

D.H. *Appeal dismissed.*

A. I. R. (39) 1952 Pepsu 38 *[C. N. 23.]*

CHOPRA, J.

Mt. Ido, w/o. Baru, Petitioner v. Gainda Singh, Sobha Singh; Respondent.

Criminal Revision No. 103 of 1951, D/- 28-9-1951.

Criminal P. C. (1898), S. 190 (1) (b) — "Such facts", meaning of — Complaint to police — Report by police to Magistrate for cancellation of case — Magistrate trying and convicting accused — Legality of trial.

The words "such facts" used in Cl. (b) of S. 190, have to be read with Cl. (a), and they mean "facts which constitute such offence." Where on a complaint to the police a report is made by the police to the Magistrate for cancellation of the case such a report cannot be said to be a report of facts which constitute an offence. All that the Magistrate has to do, on receiving such a report, is to make an order that the case be cancelled, or to make a note that he accepts the recommendation of the police. And if the complainant wants to proceed with the case and get a judicial decision from the Court, he can present a regular complaint under S. 190. In the absence of such a complaint the Magistrate acts without jurisdiction in taking cognizance of the case on the referred report of the police. There being no regular complaint before him, he cannot proceed on with the case. AIR (19) 1932 Mad 673; AIR (39) 1952 Pepsu 29, Foll.; AIR (19) 1932 Mad 673 ; 14 Cr L J 387 Cal, Rel. on; 48 Cr L J 774 (Lah), Dist. (Paras 3, 7)

Anno: Criminal P.C., S. 190, N. 20.

S. Hanwantbir Singh, for Petitioner; S. Kartar Singh, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('07) 5 Cri L J 275: (1907 All W N 93) (Prs 4, 5)

('13) 20 Ind Cas 211: 14 Cri L J 387 (Cal) (Pr 3)

('47) 48 Cri L J 774: (231 Ind Cas 354 Lah) (Pr 4)

('48) AIR (35) 1948 Lah 184: (49 Cri L J 531 FB) (Pr 3)

('32) AIR (19) 1932 Mad 673: (33 Cri L J 785) (Pr 2)

('13) 14 Cri L J 290: (19 Ind Cas 946 Nag) (Prs 4, 5)

('51) Cri Misc. No. 12 of 1950, D/- 9-4-1951: (AIR (39) 1952 Pep 29) (Pr 6)

JUDGMENT.: The facts that have given rise to this petition for revision are as follows: Gian Singh respondent, lodged a report in police station Amloh alleging that Mt. Ido, the petitioner, had committed criminal trespass by breaking open the lock of the house that was in his possession. This report was made on 7-1-1950. Sodhi Hukam Singh, Assistant Sub-Inspector, Amloh went to the village on the following day and after recording the statements of the witnesses produced by the complainant, reported for the cancellation of the case and also for proceedings under S. 182 to be taken against the complainant. The latter approached the Assistant Superintendent of Police and complained that the Investigating Officer had not taken all of the evidence which included documents proving his possession of the house. The Assistant Superintendent of Police deputed the Sub-Inspector Amloh to make further investigation in the case. The Sub-Inspector after due investigation again made a report for cancellation of the case, but he did not recommend the complainant to be proceeded against under S. 182, I.P.C. The District Magistrate, Bassi, before whom this report was placed, sent it to Magistrate 1st Class, Amloh for necessary orders. The Magistrate on receiving the papers sent for the complainant who appeared before him on 1-7-1950. A brief statement of the complainant was recorded that day wherein he only stated that he wanted to lead further evidence in the case. It was then adjourned to 17-7-1950. Another statement of the complainant was recorded on this later date in which he merely deposed that he was producing certain documents evidencing his title and possession of the disputed house. The Magistrate thereupon passed the following order:

> "The file perused and the document filed by the complainant perused, which clearly show that the possession of the house in dispute was obtained by the complainant. The cancellation report produced by the police is not accepted, but there is prima facie case under S. 448, I.P.C., against the accused, to be summoned on deposit of Talwana, the case to be registered. The file to come up on 31-7-1950."

The case then took its regular course and the evidence of the parties was recorded. The trial Magistrate in the end found the charge to be proved against Mt. Ido, one of the accused. He convicted her under S. 448, I.P.C., and awarded a sentence of Rs. 50/- fine. In default of payment of fine she was to undergo simple imprisonment for a period of one month. The possession was directed to be delivered to the complainant under S. 522, Criminal P.C. The convict presented a petition for revision to the Sessions Judge, Kapurthala, which was dismissed. She has now come in revision to this Court.

(2) The main point urged by S. Hanwantbir Singh, the learned counsel for the petitioner, is that there was no legal complaint before the Magistrate, on which he could take cognizance of the case. The police had moved for its cancellation and the complainant had not presented any complaint before him. The only order that he could make with respect to the report of the police was to accept it or refuse to accept it. The argument is that if the Magistrate did not agree with the report, he could not proceed on with the case on that report without any separate complaint having been presented before him by the complainant. Reference has been made to S. 190, Criminal P. C., which enumerates the ways in which a Magistrate can take cognizance of an offence, and reliance has been placed on 'Venkata Subba Rao v. Naraharisetty Anjanayulu', AIR (19) 1932 Mad 673. I see much of force in the objections taken by the learned counsel. There are only three ways in which a Magistrate can take cognizance of an offence and they are described in S. 190, Criminal P.C., (a) upon receiving a complaint of facts which constitute such offence; (b) upon report in writing of such facts made by any police officer; and (c) upon information received from any person other than the police officer, or upon his own knowledge or suspicion that such offence has been committed.

(3) It is not disputed that (a) and (c) have no application. The words 'such facts' used in Cl. (b) have to be read with Cl. (a) and they mean 'facts which constitute such offence.' A report by the police for cancellation of the case cannot be said to be a report of facts which constitute an offence. The report, on the other hand, was that no offence had been made out. All that the Magistrate had to do, on receiving such a report, was to make an order that the case be cancelled, or to make a note that he did accept the recommendation of the police. The matter would have rested there and the party aggrieved could have proceeded further in accordance with law. If the complainant wanted to proceed on with the case and get a judicial decision from the Court, he could present a regular complaint under S. 190 and the Magistrate would then have taken cognizance of it. In the Madras authority to which reference has already been made, the police after investigation sent a referred charge-sheet to the Magistrate who ordered the police to put in a challan in the case. On the matter going to the High Court it was held that the order of the Sub-Divisional Magistrate did not amount to taking cognizance of the case. In 'Sarba Mahton v. Emperor', 20 Ind Cas 211 (Cal), an information lodged with the police was reported to be false. The Sub-Divisional Magistrate before whom this report was placed, ordered the complainant to prove his case. After recording his statement and the evidence produced by him, the Magistrate directed that proceedings under S. 476, Criminal P.C., be taken against him. On a revision to the High Court it was held that the order of the Magistrate calling upon the complainant to produce evidence and prove his case did not come within any of the provisions of the Criminal P.C. A Full Bench of the Lahore High Court in 'Emperor v. Hayat Fateh Din', AIR (35) 1948 Lah 184, held that the Magistrate making an order on a report of the police for cancellation of the case acted merely as an administrative or ministerial officer and not as a Court.

(4) S. Kartar Singh, the learned Counsel for the respondent, has, on the other hand, argued that the police after investigation of a cognizable case has to submit a report to the Magistrate giving the result of the investigation and the Magistrate, even in cases where the report is for cancellation of the case, can make such order as he thinks fit. It is argued that if the Magistrate did not agree with the report of the police, he could take cognizance of the case on that report. Reference has been made to Cl. (3) of S. 173, Criminal P.C. The words 'otherwise as he thinks fit' are interpreted as to

mean that the Magistrate when he does not agree to discharge the accused of the bond taken from him could make any other order he thought fit. The learned Counsel in support of his argument has cited a Division Bench decision of the Lahore High Court in 'Mohd. Nawaz v. The Crown', 48 Cri L J 774 and reference to the following remarks 'on page 777' has particularly been made.

"It will be seen that the Magistrate has been given power to make such order as he thinks fit in the case. He may direct that the bond furnished by the accused be discharged and it is obvious that such an order would be appreciated in a case in which the Magistrate agrees with the opinion of the police officer and considers that further proceedings are not necessary. The Magistrate is, however, not bound by the Police Officer's opinion, and relying on the material furnished in the report the Magistrate may, if he chooses, take cognizance of a case against the person whom the police officer believed to be innocent, or against other persons, who may appear to the Magistrate on the basis of the report to be guilty of an offence".

The facts of this case, however, were quite different. A regular challan under S. 302, I. P. C., against two persons, Mohammad Iqbal and Mahbub, was presented by the police before a Magistrate who took cognizance of it. The Police then applied for further investigation into the case, which was allowed. They then presented a fresh challan in respect of the same offence against different set of persons and reported that Mohammad Iqbal and Mahbub who were subsequently found to be innocent, be discharged. The Magistrate acting under S. 173 (3), Criminal P. C., discharged the two accused and proceeded against the persons reported against in the second challan. The latter accused moved the Sessions Judge in revision, who referred the case to the High Court under S. 438, Criminal P. C. The point stressed was that since the Magistrate had already taken cognizance of the case, his order discharging Mohammad Iqbal and Mahbub was without jurisdiction. It was held that where a Magistrate has already taken cognizance of a case against an accused on a police report to the effect that there was sufficient evidence against him showing that he had committed the offence charged, the case is not one where police had reported insufficiency of evidence or lack of suspicion and the Magistrate has no power to discharge the accused person under S. 173(3). This sub-section was found to exclusively relate to the case provided for in S. 169. The order of the Magistrate discharging the accused was, therefore, set aside. The observations reproduced above were made with respect to a case in which the police had taken action under S. 169, Criminal P. C. and were obiter dicta. I do not think the learned Judges meant to lay it down that in all cases where the police had made a report for cancellation of a case, the Magistrate could refuse to accept the report and also take cognizance of the offence on that report. Reliance while making the observations was placed on two cases reported as 'Emperor v. Dalip Singh', 5 Cri L J 275 (All) and 'Sarwa v. Emperor', 14 Cri L J 290 (Nag).

(5) In 'Emperor v. Dalip Singh', 5 Cri L J 275 (All) a complaint was made to the police against Ram Sahai charging him with theft of the timber of two trees. The police enquired into the case. One Dalip Singh alleged that the accused had cut the trees with his permission and asserted that he had a right to dispose of them. The Investigating Police Officer expressed his opinion that the dispute was one of a civil nature and sent up a charge sheet with the recommendation that the case should be expunged from the list of crimes. The Magistrate before whom the report was placed, examined certain evidence and ordered that a charge of theft should be instituted against Dalip Singh and that Ram Sahai should be summoned as a witness. The High Court on revision set aside this order on the ground that the case was prima facie one of a civil nature. The question whether the Magistrate was competent to make the order he did, was not finally considered or decided. In 'Sarwa v. Emperor', 14 Cri L J 290 (Nag) a challan of Lachhman Singh was put in by the police before a Magistrate who considered that one Sarba was also to be joined as an accused. Process accordingly was issued to Sarba and he was tried along with Lachhman Singh. Both of them were eventually convicted. Objection was taken to the legality of the cognizance taken by the Magistrate against Sarba. It was held that the Magistrate had taken cognizance of Sarba's offence under Cl. (b) and not under Cl. (c) of Subs. (1), S. 190, Criminal P. C. It is thus clear that none of these authorities has got any bearing upon the point in dispute before me.

(6) The point, I think, is fully covered by a decision of the Division Bench of this Court in 'Harbir Singh v. The State', Cri Misc. No. 12 of 1950 decided on 9-4-1951. The facts of this case were these: In a case registered under S. 409, I. P. C., the police after investigation, came to the conclusion that no offence had been made out against the accused and recommended that the case be cancelled. The Magistrate before whom the report was placed, ordered the complainant to be summoned. The latter then requested the Court to grant him time to adduce evidence in support of his allegations. The Magistrate accepted the request and adjourned the case for the purpose. The statement of the complainant and some other evidence were thereafter recorded. The matter having been taken to the High Court it was held that the order of the Magistrate was without jurisdiction and it was, consequently, set aside. The learned Chief Justice, who delivered the judgment in the case after referring to various authorities cited before him, observed as follows:

"Section 173 deals with the final report of the police and it can either amount to a charge or it may contain the recommendation that no offence having been made out, the case should be cancelled. If the report is that an offence has been committed the Magistrate can take cognizance of it under S. 190 (1) (b). If on the other hand, the report is that the case is false, Cl (1) (b) of S. 190 does not apply and no cognizance of the offence can be taken by the Magistrate."

(7) For all these reasons, I am of the opinion that the Magistrate acted against jurisdiction in taking cognizance of the case on the referred report of the police. There being no regular complaint before him, he could not proceed on with the case. All his further proceedings are vitiated and must, therefore, be quashed. In view of this finding of mine the conviction recorded by the Magistrate must be set aside. The petition is, therefore, accepted and the order of the Magistrate dated 19-1-1951 set aside. The fine if paid, shall be refunded.

V.S.B. *Conviction set aside.*

A. I. R. (39) 1952 Pepsu 40 *[C. N. 24.]*

KARTAR SINGH J.

S. Gurbux Singh and others, Petitioners v. Asa Singh, Respondent.

Civil Revn. No. 153 of 2005, D/- 20th Jeth 2006.

Civil P. C. (1908), O. 22, R. 9 — "From continuing the suit" — Suit actually not proceeding at time of death of plaintiff — Abatement of suit Setting aside of.

Abatement of an action on the death of plaintiff refers to an action which is proceeding on the date of his death. The use of the words "was prevented by any sufficient cause 'from continuing' the suit" in R. 9 of O. 22 and "shall proceed with the suit" in R. 3 of that Order expressly support this view. Therefore, if the suit is not proceeding 'de facto' on the 90th day after the death of the sole plaintiff, due to the fact that the suit was stayed, then there is no sense in giving an application to the Court when the Court can pass no orders for the legal representatives of the deceased being made a party and proceeding with the case which is not pending before it.

A suit instituted on 21st Jeth 1998 was stayed and records were called by a special tribunal appointed by the Ruler of the State. The case was returned to the trial Court for necessary action on 29th Sawan 2003. When the parties were summoned by the Court, it transpired that plaintiff had died on 2nd Maghar 1998. The case was then directed to have abated. In revision against the concurrent finding of the lower Courts rejecting the application made by the sons of the deceased plaintiff to set aside the abatement:

'Held' that as the case was not pending before the trial Court during the ninety days after the death of the plaintiff an application to that Court would have been fruitless; that there was sufficient cause as contemplated by S. 5, Limitation Act and O. 22 R. 9, Civil P. C. in the circumstances of this case and therefore the abatement of the case should be set aside. (Paras 7, 8, 10)

Anno: C. P. C., O. 22 R. 9 N. 4, 8.

L. Dalip Chand, for Petitioners — L. Jai Kishan Khosla, for Respondent.

Case referred to:

('96) 1896 P J 674 (Pr 8)

JUDGMENT: This is a revision petition against the concurrent finding of the lower Courts rejecting the application dated 28th Maghar, 2003, given by S. Gurbux Singh and his brothers for an order to set aside abatement in consequence of the death of their father S. Jagat Singh, the sole plaintiff in this case.

(2) After institution of this suit on 21st Jeth, 1998, the proceedings were going on, when this case and several others, in which this plaintiff S. Jagat Singh was a party, were stayed and their records were called by a special tribunal constituted under gracious commands consisting of S. Bachittar Singh Sahib Minister of Works and previous Judge of the High Court and Sardar Niranjan Prashad Sahib (Retd.) Judge of the High Court. The last interlocutory order in this case was dated 17-6-1998.

(3) This case and similar other cases were returned to the trial Court for necessary action by the High Court order dated 29th Sawan, 2003 when they were no longer required by the High Court or the special tribunal. When the parties were summoned by the trial Court, it transpired that S. Jagat Singh plaintiff had died. This case was, therefore, directed by the trial Court on 3rd of Katik, 2003, to have abated. S. Gurbux Singh and others, the sons of S. Jagat Singh, applied to the trial Court on 28th Maghar, 2003 for an order to set aside the abatement. The trial Court rejected this prayer on 27th Chet, 2003. The District Judge confirmed that decision on 11th Jeth, 2005.

(4) It is not disputed by the parties that S. Jagat Singh died on 2nd Maghar, 1998. The counsel for the defendant-respondent contended that this suit abated under O. 22, R. 3, Civil P. C., when no application was made within the time limited by law for the legal representatives of the deceased plaintiff being made a party. The period of limitation for making this application according to the counsel for the defendant-respondent, was 90 days from the date of the death of the plaintiff under Art. 176, Limitation Act.

(5) The counsel for the petitioners argued that the application of the petitioners dated 28th Maghar, 2003, was made under O. 22, R. 9, Civil P. C., for an order to set aside the abatement. It is contended that the facts of the case showed that the petitioners were prevented by sufficient cause from making the application in question within the time prescribed by law, and that the abatement should, therefore, have been set aside by the Courts below.

(6) The words 'abate' or 'abatement' have not been defined in the Civil P. C. Wharton's Law Lexicon, Edn. 11, gives the meaning of the word 'abate' as "To prostrate, break down, remove or destroy." Mozley and Whiteley's Law Dictionary shows that abatement of an action or suit takes place when, from some supervenient cause, one of the parties thereto is no longer before the Court; so that, unless his place be supplied, there is no one to proceed therein. Dictionary meaning of the word "abate" according to Webster is "To bring entirely down or demolish; to put an end to; to do away with; as to abate a nuisance or to abate an action." Rule 3 of O. 22, Civil P. C., shows that on the death of the sole plaintiff in a case where the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representatives of the deceased plaintiff to be made a party and 'shall proceed with the suit.' The suit shall abate if no application is made for this purpose within the time limited by law. Rule 9 of O. 22, Civil P. C., shows that the Court shall set aside the abatement, if it is proved that the applicant was prevented by any sufficient cause 'from continuing the suit.'

(7) All these provisions clearly imply that abatement of an action on the death of a person refers to an action which was proceeding on the date of the death of the plaintiff. The use of the words "was prevented by any sufficient cause 'from continuing the suit' " in R. 9 of O. 22, Civil P. C., and "shall proceed with the suit" in R. 3 expressly supports that view. This suit was not proceeding 'de facto' on the 90th day after the death of S. Jagat Singh which took place on 2nd Maghar, 1998, as it had been stayed and no proceedings were going on. This case was not pending before the trial Court on the 90th day after the death S. Jagat Singh. There was, therefore, no sense in giving an application to the Court when the Court could pass no orders for the legal representatives of the deceased being made a party and proceeding with the case which was not pending before it. The parties are to be made only in cases which are pending before the Court. The record of this case does not show that any proceedings were taken in this case before the special tribunal. No application could, therefore, be given for this purpose even before that tribunal.

(8) R. 9 of O. 22 of the Civil P. C., lays down that the Court shall set aside the abatement if it is proved that the petitioner was prevented by any sufficient cause from continuing the suit, which had abated. Dr. Nand Lal, while referring to the case of 'Collector of Broach v. Balwant Rai', 1896 P J 674, has remarked in his commentary on the Civil P. C. under R. 9 of O. 22 that 'sine die', postponement of an appeal is a sufficient cause. More-

over sub-rule (3) of the said R. 9 makes the provisions of S. 5, Limitation Act, applicable to the applications made under sub-r. (2) of that Rule. Delay in applying for setting aside the abatement could not, therefore, stand in the way of the petitioners if they had sufficient cause as contemplated by S. 5, Limitation Act. The facts of this case definitely show that the petitioners had a sufficient cause as contemplated by S. 5, Limitation Act and R. 9 of O. 22, Civil P.C.

(9) One of the reasons given by the trial Court and by the lower appellate Court for dismissing the application dated 28th Maghar, 2003, is that the petitioners should have given the application for their being brought on the record within the period of limitation. This application could be returned by the Court and could be kept by them for being placed on the record when the case re-started. This argument has been attacked by the learned counsel for the petitioners on the ground that giving of such an application could serve no purpose as no suit was in fact pending before the trial Court at that time.

(10) Both the Courts below have not referred to any legal provisions under which they expected the petitioners to have applied to the trial Court for their being brought on the record as legal representatives of the deceased and then to have obtained those applications sent back for being presented to the Court if and when this case was revived. Even if there were any law, a 'bona fide' ignorance of law, where there is no question of bad faith or negligence, can be in proper cases a good excuse for extension of the period of limitation vide 'AIR (24) 1937 Nag 199*. The trial Court and the first appellate Court thus acted in this case in the exercise of their jurisdiction illegally and with material irregularity in not setting aside the abatement. This revision petition is accepted and abatement of this suit is set aside. The trial Court shall proceed with the suit in accordance with law. The costs in these proceedings shall be the costs in the suit. The parties are directed through their counsel to appear before the District Judge, Sangrur on 14th Har, 2006, for getting directions for appearance before the trial Court. Pronounced.

V.S.B. *Revision allowed.*

*This citation seems to be not correct.—Ed.

A. I. R. (39) 1952 Pepsu 42 *[C. N. 25.]*

CHOPRA, J.

Gurmit Singh, Appellant v. Labhu Ram, Respondent.

Second Appeal No. 108 of 2006, D/- 19-11-1951.

Civil P. C. (1908), S. 148 and O. 6, R. 18 — Order of appellate Court directing amendment of plaint within certain time — Order confirmed in appeal — Failure to amend within time — Court to which application for extension of time should be made.

Under O. 6, R. 18, Civil P. C the amendment has to be made within the time fixed or extended by the Court that allows the amendment. Directions contained in the mandate of the appellate Court are beyond the judicial discretion of the lower Court and hence must be implicitly followed. Hence where an appellate Court allows the plaintiff to amend his plaint within a certain time it is not competent to a subordinate Court to extend that time. (*Para 4*)

If an appellate Court while remanding a case to the trial Sub-Judge limits the time within which the plaintiff is to amend his plaint, and if the suit is dismissed because the plaintiff could, for no fault of his, not comply with the direction, the appellate Court can, when the case again comes before it in appeal, extend the time as provided by S. 148, C. P. C. The same rule would apply if, under similar circumstances, the suit is decreed and an objection is taken by the defendant in appeal. (*Para 5*)

Anno: C. P. C. S. 148, N 2, 7, 9 and 10; O. 6, R. 18 N. 1.

Kidar Nath, for Appellant; Daya Sarup, for Respondent.

Case referred to:

('32) AIR (19) 1932 Lah 235: (137 Ind Cas 76) (Pr 5)

JUDGMENT.: This is an appeal by the plaintiff against the appellate decree of the District Judge, Kapurthala dismissing his suit on a preliminary ground. The case has a checkered history and the facts that are necessary to understand the point involved are as follows:

(2) Mehar Singh, father of the present appellant, brought a suit in the Court of Sub-Judge Phagwara, for a permanent injunction against Labhu Ram respondent. The dispute related to a vacant site which the plaintiff claimed to be his and in his possession. The defendant resisted the suit on various grounds, one of which was that the plaintiff was not in possession of the site and, therefore could not sue merely for an injunction. This plea found favour with the Sub-Judge and the suit was consequently dismissed on 22-12-1999. The plaintiff went in appeal to the District Judge who agreed with the trial Judge that the plaintiff should have filed a suit for possession, but he allowed him (the plaintiff) to amend the plaint and add a prayer for possession of the site. This order of the District Judge is dated 18-6-2000 and it directed that the plaintiff should put in the amended plaint on 9th Katik, 2000. The plaintiff filed an appeal in the High Court of the erstwhile Kapurthala State, against the decision of the District Judge that a suit for injunction did not lie. His appeal was dismissed on 12-10-2000. He presented a petition for revision against the judgment of the High Court to the Judicial Committee which met the same fate and was dismissed (in limine), on 20-1-2001. It may be mentioned here that neither the High Court nor the Judicial Committee fixed any time within which the amended plaint was to be presented. On 1-2-2001, i.e., within 14 days of the order of the Judicial Committee, the plaintiff approached the Sub-Judge to sent for the record which had not reached there by them, so that he (the plaintiff) might be able to put in the amended plaint. On 31-2-2001, when probably record reached the Court of the Sub-Judge, the latter directed that the amended plaint be put in on 29th Har, 2001. The plaintiff presented the amended plaint on the appointed day. After framing issues on the pleas of the parties and recording evidence thereon, the Sub-Judge decreed the suit on 29-12-2003, and granted the plaintiff a decree for possession of the site in question. Labhu Ram then preferred an appeal against this decree to the District Judge, Kapurthala. It was contended before him that the amended plaint had not been presented within the time originally allowed and therefore the amendment should have been refused and the suit dismissed. The learned District Judge found force in the objection, accepted the appeal and dismissed the suit on that ground alone. The plaintiff having died, his son Gurmit Singh has now come in second appeal to this Court.

(3) Shri Kidar Nath Tiwari, the learned Counsel for the appellant in the first instance contended that the order of the Sub-Judge dated 31-2-2001 requiring the plaintiff to put in the amended plaint

on 29th Har, 2001, was an order under O. 6, R. 17, C. P. C., and that having been complied with, the amendment was in accordance with law and made within the time allowed. The argument is that after the time previously allowed for amendment had expired, the Sub-Judge made a new order allowing the plaintiff to amend the plaint. Obviously the contention is devoid of any force. When the plaintiff had once been allowed to amend the plaint by the District Judge, there was no question of the same having been ordered afresh by the Sub-Judge. The Sub-Judge was simply to comply with the orders made by the appellate authority and not to pass any fresh order allowing amendment. It is next urged that since the record of the case had not reached the Sub-Judge by the time the amended plaint was to be presented, the order could not be complied with. A reference has been made to the order of Sub-Judge, dated 27th Katik 2000, which shows that the record had not reached him till then. It may be observed that the District Judge while allowing the amendment had not directed the record to be sent to the Sub-Judge for further proceedings in the suit. Before the record could reach the Sub-Judge the plaintiff went in appeal to the High Court and then in revision to the Judicial Committee. Under these circumstances, the learned Counsel contends, the plaintiff could have put in the amended plaint within 14 days of the order of the highest Court. Reliance is placed on O. 6, R. 18, C. P. C., which provides that where no time is limited for that purpose, the amendment can be made within 14 days of the order. As already observed, the record having not been received by the Sub-Judge even after the decision of the Judicial Committee, the plaintiff applied within 14 days of the order of the said Committee — for the record being sent for in order to enable him to amend the plaint. The learned Counsel, therefore, stresses that the amended plaint should be considered to have been presented within the time allowed by the law. This argument must have had much of force, if the amendment had in fact been made within 14 days of the decision of the Judicial Committee. An appeal having been filed against the order of the District Judge, his judgment could be considered to have merged in the decision of the appellate Court. The case having been finally decided by the Judicial Committee, the amendment could have been made within the time allowed by the final Court. Since no time had been fixed by that Court it could have been done within 14 days of its decision, as provided by O. 6, R. 18, C. P. C. But the difficulty is that the amendment was not actually made even within this period. That might have been because the record had not reached the Sub-Judge by then and had to be sent for on plaintiff's application, but the fact remains that the amendment was not made within the time allowed by the law.

(4) The next question is whether the Sub-Judge in view of these facts, could extend the time and fix a date by which the amendment could be made. It is contended by Shri Daya Sarup, the learned Counsel for the respondent, that since the time had been originally fixed by the District Judge, it could not be extended by the Sub-Judge and the contention appears to be correct. Order 6, Rule 18 C. P. C., makes it clear that the amendment has to be made within the time fixed or extended by the Court that allows amendment. It is also the general rule that directions contained in the mandate of the appellate Court are beyond the judicial discretion of the lower Court and hence must be implicitly followed. Where time to do a certain thing is fixed by an appellate Court in its order or decree, it is not competent to a subordinate Court to extend that time. The natural consequence is that the contention of the appellant that since the amendment was made within the time subsequently fixed by the Sub-Judge it should be held to be legal and properly made, loses all its force and must be repelled.

(5) Now, it cannot be denied that it has been a very hard case for the plaintiff. For no fault of his he has been deprived of the assistance of the Courts and justice for which the Courts are meant, on merely a technical ground. To accuse him of having gone in appeal to the High Court and then in revision to the Judicial Committee is ridiculous and to penalise him for having done so would go against the canons of both equity and law. Every litigant has an indefeasible right to approach a higher or the highest tribunal for decision of his rights, if the law allows it. The plaintiff was within his rights to get a final decision from the highest Court as to whether he was entitled to the relief prayed for without amending his plaint. If the time allowed by District Judge for amending the plaint had, in the meantime, expired he should not be made to suffer for it. And again, he cannot be blamed for not presenting the amended plaint within fourteen days of the decision of Judicial Committee, because the record was not then before the Sub-Judge. He approached the Sub-Judge within that period and the record was ordered to be sent for on his application. In view of these facts, I am of the opinion that the District Judge, instead of dismissing the suit, should have taken recourse to O. 6, R. 18, C. P. C., read with Section 148 of that Code. This would have easily solved the difficulty and relieved the plaintiff of the injustice that has been done to him. That he could do it can hardly be doubted. The time had originally been fixed by his Court and he could extend it. If an appellate Court while remanding a case to the trial Sub-Judge limits the time within which the plaintiff is to do a particular thing, if the suit is dismissed because the plaintiff could, for no fault of his, not comply with the direction, the appellate Court can when the case again comes before it in appeal, extend the time as provided by Section 148, C.P.C. The same rule would apply if, under similar circumstances, the suit is decreed and an objection is taken by the defendant in appeal. Reference in this connection may be made to a judgment of Sir Shadi Lal, C. J., of the Lahore High Court in 'Bodh Raj v. Imam Din', AIR (19) 1932 Lah 235. There the High Court had remanded the case with the direction that the plaintiffs should make good the deficiency in court-fee on their plaint within ten days of the case reaching the trial Court. For certain reasons for which the plaintiffs were not held responsible, the direction could not be virtually complied with and the plaint was therefore, rejected by the trial Judge. The case coming to the High Court again on plaintiffs appeal, it was observed that the technical defect could be rectified by that Court under Section 148, C.P.C., which empowered the Court to enlarge the period even though the one originally fixed may have expired. In the present case, as already observed, I am of the view that it was not only proper but essential for the District Judge to have extended the time which he could under Section 148, C.P.C. Since that has been improperly refused, or has not been done probably because it was not brought to his notice, I think, it can and must be done now in this appeal. I would, therefore, extend the period to the day when the amended plaint was actually presented. The learned District Judge had not decided the appeal on merits, the case has, therefore, to go back to him for decision of other points involved in the appeal.

(6) In the result the appeal is accepted, the decree of the District Judge is set aside and the case is sent back to him for fresh decision of the first appeal on merits. The costs of this appeal shall be costs in the case. The parties have been directed, through their Counsel, to appear before the District Judge, Kapurthala, on 20th December 1951.

K.S. *Appeal allowed.*

A. I. R. (39) 1952 Pepsu 44 *[C. N. 26.]*

CHOPRA, J.

Firm Jawala Sahai, Appellant v. Firm Durgarsi Lal Har Lal, Respondents.

Second Appeal No. 101 of 2006, D/- 14-11-1951.

(a) *Civil P. C. (1908), O. 30, R. 1, Explanation (Patiala) — Retrospective operation — Explanation applies to pending actions.*

O. 30, R. 1, Civil P. C. does not relate to any substantive right of the parties to an action but only gives the mode in which the plaint need be drafted and presented. The explanation added to O. 30, R. 1, by the Patiala High Court is only a rule of procedure and relates to the frame of the suit and extends the application of O. 30, R. 1 to a joint Hindu family trading partnership. The explanation is therefore retrospective and must apply to pending actions in the absence of any thing to the contrary. (*Para 5*)

The mere fact that the notification provided that the Rules would come into force from a particular date does not mean that the framers of the Rules had no intention that they should apply to pending actions. (*Para 7*)

Anno: C. P. C., O. 30, R. 1, N. 1.

(b) *Interpretation of Statutes — Retrospective operation — Statute dealing with procedure — Civil P. C. (1908), Preamble.*

When the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms made applicable to pending actions, do not affect them, but where the enactments merely relates to procedure and do not extend to rights of action, they shall be held to have a retrospective effect, unless it is otherwise provided by the statute itself. (*Para 4*)

Anno: C. P. C., Preamble N. 3.

Ram Niwas, for Appellant; Amar Nath, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('30) 124 Ind Cas 817: (AIR (17) 1930 Cal 422) (Pr 6)

('36) AIR (23) 1936 Cal 593: (167 Ind Cas 615) (Pr 7)

('43) AIR (30) 1943 Lah 238: (208 Ind Cas 431) (Pr 7)

('21) AIR (8) 1921 Nag 170: (69 Ind Cas 870) (Pr 7)

('43) AIR (30) 1943 Pat 18: (44 Cri L J 273 FB) (Pr 6)

('44) AIR (31) 1944 Pat 147: (22 Pat 577) (Pr 6)

JUDGMENT.: This is plaintiff's second appeal in a money suit decreed by the trial Sub-Judge but dismissed on appeal by the District Judge, Narnaul on the ground that the plaintiff, a Hindu family firm, could not sue as such under O. 30, R. 1, C. P.C. The suit was brought on 6-1-1997 and was for Rs. 211/12/- the price of goods supplied to the defendant. It was previously dismissed as time-barred by the trial Court on 6th Magher 2000. Appeal by the plaintiff to the District Judge was accepted on 8-7-2002, the suit was held to be within time and the case remanded to the trial Court for decision on merits. An additional issue incorporating an objection raised by the defendant in the written statement, was framed by the District Judge. The issue ran as follows:

"Whether the plaintiff's form a joint Hindu family and the suit in the name of the firm was *not* maintainable? O.D."

(2) The trial Sub-Judge on receiving back the case found in favour of the plaintiff on all the issues and decreed the suit. The defendant then went in appeal to the District Judge, which was accepted on the ground that the plaint had not been properly framed. The additional issue was decided in favour of the plaintiff and the suit was consequently dismissed. This is plaintiff's second appeal against the decision of the District Judge.

(3) Shri Ram Niwas for the appellant has strenously contended that certain amendments were made to the first schedude of the Code of Civil Procedure by the rules framed by the Patiala High Court under Clause 53 (e) of the Patiala Judicature Farman, 1999. These rules were contained in Notification No. 126 of 18-1-2002, and after necessary sanction of His Highness Shri 108 Maharajadhiraj Mahendra Bahadur, were published in the His Highness' Government Gazette, Patiala, dated 21st Jeth 2002. These rules were to come into force on the day they were published in the Gazeztte Rule No. 56, added the following explanation to Order 30, R. 1 C. P.C.

"This rule applies to a joint Hindu trading partnership."

It may be remembered that these rules were enforced when the plaintiff's appeal against the original decree of the trial Sub-Judge dismissing his suit on the point of limitation, was pending before the District Judge. The additional issue was framed by the District Judge and the case remanded to the trial Court after these rules had had the force of law. It is urged by Shri Ram Niwas that this amending law which related only to procedure and did not affect the rights of the parties, must have been given a retrospective effect and applied to the pending action. The argument is that the District Judge after his rule had been enforced, was wrong to decide the issue in favour of the defendant and dismiss the suit. In my opinion there is much force in the contention.

(4) It is an admitted principle of the interpretation of statutes that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms made applicable to pending actions, do not affect them, but where the enactments merely relate to procedure and do not extend to rights of action, they shall be held to have a retrospective effect, unless it is otherwise provided by the statute itself. If a statute deals merely with the procedure in action and does not effect rights of the parties it will apply prima facie, to all actions pending as well as future. Maxwell on Interpretation of Statutes at pages 198 and 199 states as follows:

"No person has a vested right in procedure. He has only a right of prosecution or defence in the manner prescribed for the time being by or for the Court in which he sues and if an Act of Parliament alters that mode of procedure, he has no other right than to proceed according to the altered mode. The general principle however, seems to be that alterations in procedure are retrospective."

(5) The explanation added to Order 30, Rule 1, C.P.C., was only a rule of procedure. It related to the frame of the suit and extended the application of Order 30, Rule 1, C.P.C., to a joint Hindu family trading partnership. Order 30, Rule 1, C.P.C., by providing that two or more persons could sue or be sued in the name of their firm, created an exception to the general rule that they should sue or be sued in their individual capacity. This rule was not considered to be applicable to the case of a business carried on by a joint Hindu family for the reason that the members of such a family do not constitute a firm and do not carry on business in partnership. The benefit of the rule was, therefore, not given to a business carried on by a joint Hindu family. It was to avoid this difficulty that the High Courts in India, under their respective rule-making power, enacted rules extending the application of O. 30, R. 1, C.P.C., to suits brought by or against joint Hindu family firms as well. A similar rule was framed by the High Court, Patiala in 2002. The effect of this enactment was that in a suit on behalf of a joint Hindu family firm it was not necessary that the plaint be signed and verified by or on behalf of all the members of the family and all of them need not be joined as plaintiffs. As in the case of other firms the suit could be brought in the name of the firm. The rule only enacted the way in which the Courts were to be approached for relief in a particular case. The rule, therefore, does not relate to any substantive right of the parties to an action, but only gives the mode in which the plaint need be drafted and presented. The amending law being one of procedure, in my opinion, must apply to all pending actions. I do not find anything in the statute showing that it was not to apply to the pending proceedings and without that the change in procedure would apply to pending actions also.

(6) Brief reference may here be made to some of the authorities which support the view I take. In 'Janaki Nath v. Nirodbaran Roy', 124 Ind Cas 817, a Division Bench of the Calcutta High Court observed that matters of procedure apply to pending suit, if the law is changed during the pendency of the suit. A Full Bench of the Patna High Court in 'Banwari Gope v. Emperor', AIR (30) 1943 Pat 18, expressed the view that since no person has a vested right in any course of procedure, alterations in procedure are to be retrospective, unless there is some good reason against it. The same High Court in 'Abdul Razak v. Kuldip Narain', AIR (31) 1944 Pat 147, maintained that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts.

(7) Shri Amar Nath for the respondent referred me to the two cases relied upon by the learned District Judge and also cited 'Dibendra Narain v. Jogendra Narain', AIR (23) 1936 Cal 593, in support of his argument that a retrospective effect should not be given to a statute unless the legislature expressly so provides in the statute itself. The facts of these cases however, were quite different. In 'Lakhmi Chand v. Bajirao', AIR (8) 1921 Nag 170, the question was whether a provision of the C. P. Tenancy Act of 1920 could be given a retrospective effect. The law that was under consideration was not one of procedure; it related to the rights of the parties and it was, therefore, held that Statutes which take away or impair vested rights under existing laws or attach a new disability in respect of transactions or considerations already passed, must be presumed not to have a retrospective operation. In 'Feroze Ahmad v. Akbar Ali', AIR (30) 1943 Lah 238, the Court was considering the application of Section 4 of the Punjab Debtor's Protection Act 1936 to a pending case. It was not disputed that it was a law of procedure and that it would have retrospective effect, unless the statute itself clearly provided to the contrary. On a consideration of the language used in the section itself, the Court came to the conclusion that it was intended to apply only to cases coming up after the law came into force. The last of the cases relied upon by the Counsel for the respondent 'Dibendra Narain', v. Jogendra Narain', AIR (23) 1936 Cal 593, also cannot be of any help to him. The law under reference was one that related to the rights of the parties and it was consequently held that it could not have a retrospective effect unless the legislature had clearly provided that it would have such an effect. I do not also see any substance in the contention of the learned Counsel that the Rules framed by the High Court were not intended to have retrospective effect because the notification No. 126 by which they were enforced had provided that the Rules would come into force from the date of their publication in the Patiala Government Gazette. I have already observed that an amending law, even though it relates to procedural matters would not be given retrospective effect, if the amending statute makes it clear that the amendment should have only prospective effect. But the mere fact that the notification provided that the Rules would come into force from a particular date, does not mean that the framers of the Rules had no intention that they should apply to pending actions. The words used are capable of giving the notification both prospective and retrospective effect. Since I am of the view that the law relating to procedure must have a retrospective effect, unless the statute provides that it will not have such an effect and also that no such provision is to be found in the Rules framed by the High Court, the decision of the District Judge must be set aside.

(8) Another fact that cannot be lost sight of is that if the Rule had not come into existence, the plaintiff could have applied for amendment of his plaint. This he probably did not do because the suit was not in any way defective according to law that had come into force. In any case, the learned District Judge could not have dismissed the suit after the new law had come into existence and when according to the new law there was nothing wrong in the frame of the suit. No other point has been urged by the Counsel of the parties.

(9) In the result the appeal is accepted with costs, the decree of the District Judge set aside and that of the trial Court restored.

K.S. *Appeal allowed.*

A. I. R. (39) 1952 Pepsu 45 *[C. N. 27.]*

CHOPRA, J.

Amar Singh, Appellant v. Jangir Singh, Respondent.

Second Appeal No. 111 of 2006, D/- 14-11-1951.

Hindu Law — Alienation — Legal necessity — Auction sale — Presumption.

Where an alienee who is an outsider, finds that the alienor's debt is a decretal debt he need not make any further enquiry, and the reversioners will not be allowed to go behind the decree. This rule, however, will not apply where it becomes clear that the alienee's suspicion could have been aroused by the surrounding circumstances or where it is proved that he actually had knowledge of the bad faith of the decretal transaction. Sale of property in execution, for satisfaction of a decree,

would constitute a valid necessity, unless it is proved that the decree is collusive or that the debts which resulted in it, were illegal or immoral. In the case of an auction sale during execution proceedings an outsider purchaser should, therefore, be presumed to have satisfied himself that the debt formed a valid necessity for the sale. (*Para 2*)

P. L. Handa, for Appellant; Ramkaran Dass, for Respondent.

JUDGMENT.: This second appeal arises out of a suit for a declaration that an auction-sale of a vacant site in favour of the appellant will not bind the plaintiff's reversionary rights after the death of the judgment-debtor. The site in question was sold to Amar Singh appellant for Rs. 44/- by an order of the Sub-Judge, Mansa, on 26-1-1998 in execution of a decree against Mt. Gurnam Kaur widow of Kartar Singh. Jangir Singh, a collateral of her husband, brought the present suit on 9th Jeth 2001. The trial Court originally decreed the suit, but the case on coming to the High Court was remanded for fresh decision on merits. It was then dismissed by the trial Sub-Judge, but the Additional District Judge, Bhatinda accepted the plaintiff's appeal and decreed the suit. The defendant has come in appeal.

(2) The only point that has been urged by the learned Counsel for the appellant is that the District Judge was not right in holding that the sale was not for legal necessity. It is argued that a decretal debt by itself forms valid necessity for a sale of ancestral land, unless it is proved by the person impugning the sale that the debt was the result of extravagant habits of the judgment-debtor or was incurred for immoral purposes. The contention is not without some force. I am of the view that where an alienee who is an outsider, finds that the alienor's debt is a decretal debt he need not make any further enquiry, and the reversioners will not be allowed to go behind the decree. This rule, however, will not apply where it becomes clear that the alienee's suspicion could have been aroused by the surrounding circumstances or where it is proved that he actually had knowledge of the bad faith of the decretal transaction. Sale of property in execution, for satisfaction of a decree, would constitute a valid necessity, unless it is proved that the decree is collusive or that the debts which resulted in it, were illegal or immoral. This principle of law appears to me to be well established. Even in a voluntary sale all that is required of an alienee is to see that the debts for which the sale is effected, are actually due and had not been incurred for immoral purposes or out of extravagance. In the case of a decretal debt the alienee can presume that the debts are actually due and unless the indications are that he must be aware or could have known that the debtor was of extravagant habits or used to lead an immoral life, he should be taken to have satisfied himself that it was a just antecedent debt. In the case of an auction-sale during execution proceedings an outsider purchaser should, therefore, be presumed to have satisfied himself that the debt formed a valid necessity for the sale.

(3) It has next to be seen if in the present case there were circumstances which should have led the auction-purchaser to believe that the decretal debt was raised for immoral or extravagant purposes. Partap Singh, the decree-holder, appeared as a defendant's witness and stated that the debt had been advanced by him in small items at various occasions to Kartar Singh and to his widow after his death. The two witnesses examined by the plaintiff, who deposed that Kartar Singh was a drunkard, did not belong to the village of the parties. They could not say when Kartar Singh got into the habit of drinking. As already observed, the sale was effected in the year 1998 and no suit was brought by the plaintiff for more than three years. It is also significant that he himself was one of the bidders when the property was being sold. He must have been aware that the property was released in favour of the highest bidder. His not taking any action for three years and the fact that he gave a bid himself, go to show that he felt satisfied that the decree was for valid antecedent debts. Taking into consideration all the facts of the case, I feel satisfied that the auction-sale in favour of the appellant was for necessity and that the suit must fail.

(4) The appeal is consequently, accepted with costs, the decree of the District Judge set aside and that of the trial Court restored.

V.R.B. *Appeal allowed.*

A. I. R. (39) 1952 Pepsu 46 [*C. N. 28.*]

CHOPRA, J.

Siri Ram, Appellant v. Bishan Singh and another, Respondents.

Second Appeal No. 15 of 2006, D/- 12-11-1951.

(a) Limitation Act (1908), Arts. 142 and 144 — Applicability — Burden of proof — Suit for possession on basis of title — Defendant must prove adverse possession for statutory period.

In a suit within Article 144 the initial onus on plaintiff is to establish his title and he is not under any obligation to prove his possession within twelve years of the suit. When the plaintiff's title has been proved or is admitted, the burden is on the defendant to establish that he, or persons through whom he claims, has or has been in possession adverse to the plaintiff for over twelve years before the suit. The defendant has also to prove when his possession became adverse. The rule that the plaintiff must prove his possession within twelve years of the suit, applies only to the case of a plaintiff basing his claim on his prior possession. (*Para 3*)

Hence, where the plaintiff brings a suit for possession of certain land encroached upon by the defendant on the strength of his title without reference to prior possession or dispossession the suit would be governed by Art. 144 and not by Art. 142 and the plaintiff will be entitled to succeed on the proof of his title unless the defendant is able to displace it by proof of adverse possession for the statutory period. (*Para 3*)

Anno: Limitation Act Arts. 142 and 144, N. 2, 5, 87.

(b) Civil P. C. (1908), O. 41, R. 1 — New case — New plea as to adverse possession cannot be allowed for first time in appeal — Limitation Act (1908), Arts. 142 and 144.

Where the defendant has not raised the plea of adverse possession in his written statement and no issue on the point has consequently been framed, the appellate Court would not be justified in making out a new case of adverse possession for the defendant which the plaintiff had no time to meet or rebut. (*Para 4*)

Anno: Civil P. C., O. 41, R. 1, N. 12; Limitation Act, Arts. 142 and 144, N. 97.

P. L. Handa, for Appellant; S. Kartar Singh, for Respondents.

JUDGMENT.: This appeal has arisen out of a suit brought by Siri Ram for possession of 8 biswas of agricultural land on the allegation that it formed part of Khasra No. 1628 which belonged to

him and that the defendants had taken possession of it by including it to their adjoining fields Nos. 1029 and 1030. The defendants' plea was that they were the owners of the land in dispute and that the plaintiff had never any thing to do with it. It was also pleaded that the plaintiff's suit was barred by time. The trial Court granted a decree in favour of the plaintiff. The learned District Judge on appeal by the defendants has thrown out the suit on the ground that the plaintiff had not proved his possession within the statutory period of twelve years before bringing the suit. This is plaintiff's second appeal.

(2) As regards the ownership of the land there can be little dispute. Both the Courts below have found that it belonged to the plaintiff and that finding is not contested before me. In the year 2002 the plaintiff applied to the revenue authorities for determination of the correct boundaries of his field No. 1028. The local qanungo and the patwari after measurement at the spot, found that 8 biswas of land out of Khasra No. 1028 had joined with Khasra Nos. 1029 and 1030 which belonged to the defendants. A plan of the fields showing the encroachment made by the defendants was also prepared. After the report of the Qanungo, dated 8-11-2002, the application of the plaintiff was consigned to the record room and the latter was left to take proper steps to get possession of the land. He then brought the present suit on 4-5-2003. As already observed, the plaintiff based the suit on his title and alleged that the defendants were in illegal possession of the land which belonged to him. The defendants, on the other hand, denied the plaintiff's title and alleged that they were the real owners. On these pleadings the plaintiff was called upon to prove that he was the owner of the land, and that it had been unlawfully encroached upon by the defendants. The plaintiff examined the patwari who had made measurements and submitted a report on his application to the revenue authorities. The relevant papers were proved by him to be correct. Parbhu Mal and Bachna Ram to whom Khasra No. 1028 had been mortgaged by the plaintiff, were also produced to prove plaintiff's title and they supported the plaintiff's claim. Parbhu Mal further stated that the defendants had encroached upon the land bits by bits. Bachna Ram admitted that the defendants were in possession of it since long. In rebuttal Bishen Singh, one of the defendants, put himself in the witness-box and deposed that he was in possession of the suit land for the last sixty years.

(3) The question of title being not in dispute it has to be seen whether, as observed by the learned District Judge, it was necessary for the plaintiff also to prove that he had been dispossessed by the defendants within twelve years of the suit. This is a case in which the plaintiff sued on the strength of his title without reference to prior possession or dispossession. In such a case, the plaintiff would be entitled to succeed on the proof of his title, unless the defendant was able to displace it by proof of adverse possession by himself or his predecessor in title for the whole statutory period. In a suit within Article 144 the initial onus on plaintiff is to establish his title and he is not under any obligation to prove his possession within twelve years of the suit. When the plaintiff's title has been proved or is admitted the burden is on the defendant to establish that he, or persons through whom he claims, has or had been in possession adverse to the plaintiff for over twelve years before the suit. The defendant has also to prove when his possession became adverse. It is a settled law that the onus of establishing title to property by reason of possession for a certain requisite period lies on the person asserting such possession. I do not agree with the contention of the learned Counsel for the respondent that it is Article 142 of the Limitation Act that applies to this case. The suit, as already observed, was on the basis of title of the plaintiff and not on the basis of his former possession and dispossession thereafter. The rule that the plaintiff must prove his possession within twelve years of the suit, applies only to the case of a plaintiff basing his claim on his prior possession. Consequently, where the plaintiff bases his claim on title it is for the defendant to establish his adverse possession over a period of twelve years. The residuary Article 144 must, therefore, govern the facts of the present case.

(4) Now, as regards the adverse possession of the defendants it must, in the first instance, be observed that no such plea was taken by the defendants in the written statement. There they did not plead that the original owner had lost his title because of their continued adverse possession and that they had thereby become owners of the land. No issue on the point was consequently framed. Under the circumstances the learned District Judge was not right in making out a new case for the defendants, which the plaintiff had no time to meet or rebut.

(5) There is no evidence also that the possession of the defendants had been open and under assertion of a title hostile to the real owner for the statutory period of twelve years. It does not stand proved when the defendants included the plaintiff's land to their own adjoining fields. The encroachment might have been made by bits as stated by one of the plaintiff's witnesses. At the time or times the encroachment came into existence the defendants themselves might not have been sure as to where the boundary of their fields fell. Even a little inadvertent or accidental change of the position of the "Doll' separating the fields of the parties to one side for some length, could have resulted in adding a part of plaintiff's land to the fields of the defendants. Measurements at the spot on the plaintiff's application to the revenue authorities revealed that the intervening 'Doll' had been slightly removed towards the north and that this had caused the inclusion of 8 biswas of plaintiff's land to the fields of the defendants. In view of these facts and in the absence of clear and cogent evidence, it cannot be said that the defendant's possession over the suit land was open and hostile to the plaintiff and that it had ripened into ownership by prescription. The solitary statement of the defendant that they had long been in possession of the land would not be enough. In my opinion, therefore, the District Judge was not right in throwing out the plaintiff's suit on the ground of adverse possession of the defendants.

(6) The appeal is, consequently, accepted with costs, the decree of the District Judge set aside and that of the trial Court restored.

K. S. *Appeal allowed.*

A. I. R. (39) 1952 Pepsu 47 [C. N. 29.]

KARTAR SINGH, J.

Panna Lal Sood, Petitioner v. The Jagatjit Distilling and Allied Industries Limited, Respondent.

Civil Miscellaneous No. 207 of 2006, D/- 4-4-1950.

(a) Companies Act (1913), S. 38 — Application for rectification of register by transferee of shares — Company alleging forfeiture of share — Maintainability.

Where a transferee of shares files an application under S. 38 for rectification of the register of

members by entering his name as the holder of certain shares and the company does not dispute the title of the applicant as transferee but alleges that the shares in question have been forfeited for non-payment of the call money the Court will entertain the application especially when no complicated question of law or title is involved between the parties. AIR (9) 1922 All 258, 33 Bom L R 184; AIR (23) 1936 Rang 52; AIR (7) 1920 Cal 789 and 29 Com. Cas 138, Rel on. (*Para 11*)

Anno: Companies Act, S. 38, N. 1, 4.

(b) *Companies Act (1913), S. 30 and Sch. I, Table A, Regs. 24 and 25 — Call made before transferee registered as member — Forfeiture of shares for non-payment— Validity.*

Where the call for payment is made on the transferee of shares before his name is registered as a member under S. 30 (2) the call would be invalid and consequently the forfeiture of shares for non-payment of the call money would also be invalid. (*Paras 16, 20*)

A. N. Khanna, for Petitioner; Radhe Mohan Lal, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('39) 'Premila Devi v. Peoples Bank of Northern India Ltd.', (AIR (25) 1938 P C 284) (Pr 11)

('22) 44 All 151: (AIR (9) 1922 All 258) (Prs 5, 6)

('31) 33 Bom L R 184 (Prs 5, 7)

('36) AIR (23) 1936 Bom 24: (60 Bom 297) (Pr 10)

('50) 51 Bom L R 1012: (AIR (37) 1950 Bom 149) (Pr 16)

('20) 47 Cal 901: (AIR (7) 1920 Cal 789) (Prs 5, 9)

('23) 71 Ind Cas 814: (AIR (11) 1924 Lah 173) (Pr 16)

('41) AIR (28) 1941 Mad 354: (195 Ind Cas 265) (Pr 10)

('49) 1949-19 Comp Cas 138: (AIR (38) 1951 Mad 572) (Prs 5, 11)

('36) 162 Ind Cas 127: (AIR (23) 1936 Rang 52) (Prs 5, 7, 8)

ORDER.: This is an application for rectification of the Jagatjit Distilling and Allied Industries Company's register under Section 38 of the Companies Act by entering the name of Panna Lal petitioner as holder of 15,500 shares Nos. 130871 to 131570, 131671 to 140870 and 145271 to 150870. The material facts bearing on the question of law involved may shortly be stated as follows:

(2) Panna Lal, petitioner purchased 15,500 shares of the above-mentioned numbers of the Jagatjit Distilling & Allied Industries from Mr. L. P. Jaiswal Managing Director, respondent company and sent the scripts delivered to him by the transferor for being transferred in his favour to the company on 5h June 1947 along with the deed of transfer executed in his favour by Mr. Jaiswal. The petitioner also informed the company by a letter of 23rd June 1947, Ex. P. 4, that he was sending Rs. 575/4/- by means of a draft to cover the transfer charges. According to the allegations made by the petitioner in the application as well as in his statement recorded in Court, he did not hear from the company regarding the registration of shares in his name on the basis of transfer for some time and on 20th August 1947 he in the capacity of the Manager if the Traders Bank, New Delhi invited the immediate attention of the Company to return the share scripts that had been sent for transfer. This elicited no reply and another reminder was sent on 7-2-1949, complaining as to why share scripts were being withheld. This time he was, however, informed that the scripts could not be sent to him as they pertained to shares which had been forfeited on account of the fact that the call money was not paid. Accordingly another communication Ex. P. 8 was sent under registered cover asking company to return the scripts immediately as the company could not withhold the scripts in spite of the forfeiture of the shares. But the respondent company reiterated in their letter dated 25th February, 1949, Ex. P. 9 that the share scripts could not be sent to the petitioner as they related to forfeited shares. The petitioner further stated in Court that he had never received any notice of any call having been made by the company in respect of the unpaid amount of the shares and that he came to know only from the report of the Registrar Joint Stock Company, Patiala, that the shares in question were transferred in his name in 1-5-1948 and that the same had been forfeited on 5-5-1948 and on this information he was driven to file this application for the rectification of the company's register as stated above. It was prayed inter alia that the resolution of 6-8-1947 in regard to the call money was ultra vires, illegal and inoperative because the item to consider the making of the said call did not appear on the agenda of the meeting called for 6-8-1947 and that the steps to enforce the call were taken at a time when the country was passing through a crisis of extreme severity and that under the circumstances the alleged forfeiture and removal of the name of the petitioner from the register of members of the respondent company was untenable and contrary to all canons of law and justice.

(3) The application was supported by affidavit and was admitted to full hearing and notice was issued to the respondent company and intimation was also given to the Registrar, Joint Stock Companies, Patiala. The petition was resisted and hotly contested by the respondent company on various grounds. Some of these which form the subject of controversy may be summarised as under:

(a) That the petition was based on allegations which cannot be tried under Section 38 of the Companies Act as under the memorandum & Articles of Association, the Directors of the Company were vested with absolute discretion to make a call and the same cannot be challenged;

(b) That the shares were forfeited for non-payment of the call money and as such the Company was entitled not to return the scripts;

(c) That the averment made in paragraph No. 5 of the petition that the petitioner had no knowledge before February 1949 was wrong and that the petitioner knew all about the call long before;

(d) That the call was made on 6th August 1947, and was to be paid on or before the 30th September 1947, and that the notices were served through post as well as through the press and the final notice was given on 12th April 1948, that if the payment of the call money was not made by the 4th May 1948 the shares would be forfeited. It was claimed that in view of these circumstances the petition was misconceived and the move of the petitioner was mala fide and was made in order to harass the Company.

(4) On one of the hearings arguments were heard on the preliminary objection with regard to the maintainability of the application under Section 38 but in view of the fact that reference was made to the merits of the case in the course

of arguments opportunity was given to both sides to adduce evidence in the form of affidavit or otherwise and the decision on preliminary objection was also held over to be given along with the final disposal of the case. Both sides now have filed their affidavits as well as produced certain documents which have been duly exhibited on the record. Furthermore the petitioner, Panna Lal has come into the witness-box as his own witness while Mr. C. K. Khanna, Secretary of the Company was examined on behalf of the respondent. Some other witnesses were summoned by the petitioner but they were given up and full dressed arguments followed.

(5) To begin with under the preliminary objection that the application is not maintainable under Section 38 the contention of the learned Counsel for the respondent was two fold. Firstly that Section 38 of the Companies Law deals with cases where (a) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of a company or (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, and that for these reasons only an application under Section 38 can be made while the case in hand is one of forfeiture of shares and the remedy lies by way of regular suit and not for the rectification of company's register because no name of any person has been fraudulently or without sufficient cause entered in or omitted f rom the register of members. Secondly, that even if an application is maintainable and in order under Section 38 the point involved is a complicated one and affects the question of title and consequently should not be considered in summary proceedings as Section 38 contemplated. Reliance was placed on 'Jawahar Mills, Ltd., Salem v. Shah Mulchand & Co., Ltd.', reported in (1949) 19 Com Cas 138 (Mad) as well as on 'Union Indian Sugar Mills Co., Ltd.', v. Jaibeo', 44 All 151, 'Matheran Sleam Tramway Co., v. B. N. Lang', 33 Bom L R 184, 'Kasiviswanathan Chettyar v. Indo Burma Petroleum Co., Ltd.', 162 Ind Cas 127 (Rang) and 'Ramesh Chandra v. Jogini Mohan', 47 Cal 901.

(6) In '44 All 151', certain property including the share in question in company known as Union Indian Sugar Mills Company, Limited was held by a family jointly and one Debi Dat who happened to be the Managing Director of the Company alleged that he had separated from the branches of the family and that an elaborate partition was carried with the result that the shares now in dispute were made over to him as part of his share. Their Lordships on the appraisement of the particular facts of that case held that a question of title was involved and the discretionary power of the Court was not judicially exercised under Section 38. On page 154, it was further observed that it is a matter of discretion whether the Court will exercise the summary jurisdiction and in a complicated or doubtful case the jurisdiction ought not to be exercised, but when the legal title of the applicant is clear the order ought to be made. Now in this case there is no dispute with regard to the title of the applicant and transfer of shares has admittedly been made in his favour. The sole question is as to whether any notice was served upon him in regard to the forfeiture or even if it was served whether such notice was valid notice inasmuch as the petitioner's name was registered as a transferee of these shares on 1-5-1948 and the shares were forfeited on 5-5-1948, admittedly without giving any fresh notice.

(7) In the Bombay case, reported in '33 Bom L R 184', also the application was made under Section 38 of the Companies Act for the rectification of the register of members and the principle governing the Court's discretion under Section 38 was discussed but it was held that S. 38 of the Companies Act was widely worded and it was a matter of discretion for the Court whether in any particular case it would hear the petition or leave the parties to a separate suit. This dictum rather furnishes an answer to the contention of the respondent's Counsel and it appears that the scope of Section 38 is not so limited as urged by the learned Counsel for the respondent company.

(8) The other authority relied upon is one of Rangoon High Court reported in '162 Ind Cas 127 (Rang)', wherein it was held that where the directors carry out the provision of Articles of Association in a bona fide manner they cannot be said to be acting without sufficient cause and that it is a misreading of those words in Section 38 Companies Act, to suppose that they confer upon the Court jurisdiction to make a roving inquiry as to whether what has happened is desirable or even reasonable. This apparently does not exclude the jurisdiction of the Court under Section 38 and what is guarded against is that the proceedings under Section 38 do not require any roving inquiry but it does not imply that the bona fides of the company are not to be considered even by way of affidavits or by examining parties in order to adjudicate upon the question in dispute as to whether the removal of the name of the shareholder from the Company's register was warranted by the circumstances and exigencies of the case.

(9) In '47 Cal 901' the proposition has been further explained and it was held that in a simple case where an immediate rectification is essential, it may be desirable to apply under Section 38, but if the case involves complicated question of title, an action should be brought.

(10) On the contrary, the petitioner's Counsel in reply to the preliminary objection relied upon 'Madhava Ramachandara v. Canara Banking Corporation', AIR (28) 1941 Mad 354 and In re: Peninsular Life Assurance Co., Ltd. AIR (23) 1936 Bom 24. In the first case the shareholder of the Canara Banking Corporation Ltd., petitioned for the rectification of the Company's register under Section 38 (1) of the Companies Act and on objection it was held that striking or expunging the member's name from the register is an omission of his name within the meaning of Section 38 (1) (a). In 'AIR (23) 1936 Bom 24', an application was made for rectification of the share register of the Company by deleting certain shares standing that in the list of contributories settled by the Court he may be shown as an owner of 50 shares only. The application was considered under Section 38 as well as S. 184 of the Companies Act and it was held that Section 184 incorporates Section 38 and on an application under that section the Court has power to decide any question relating to the title of the aggrieved person to have his name omitted from the register of shareholder and generally to decide any question necessary or expedient to be decided for the rectification of the register.

(11) On the examination of these authorities, it seems clear to me that the application is maintainable under Section 38 of the Companies Act but it is only to be considered as to whether any complicated question of law is involved as to warrant the institution of a regular suit or the rectification can be made by summary proceedings as applied for under Section 38 by the petitioner. In the light of the principle laid down in the above mentioned cases I am of the considered opinion that the respondent's Counsel has failed to establish that there is any question of title in-

volved between the parties or that the Court is confronted with any intricate question which should not be taken seisin of under Section 38 of the Companies Act. It appears that the respondent's Counsel has tried to evade the issue and sought to take out the case from the ambit of Section 38 in order to drive away the petitioner to protracted litigation. Mr. Radhe Mohan Lal also drew my attention to an observation at page 146 of the Madras Case 'Jawahar Mills Ltd., Salem v. Official Receiver, Shah Mulchand Co., Ltd.', (1949) 19 Com Cas 138 (Mad), which reads as follows:

"There is no decided case in the reports in which the validity of a forfeiture was canvassed in a proceeding for rectification. Palmer on Company Law (1942 Edition) at page 110, refers to the case of Ystalyfera Gas Company, as an instance in point, but on a reference to the report the citation does not seem to be correct. There are no decisions, English or Indian, enabling us to determine the line of demarcation between the accrual of the power and the exercise of the power. That there is a distinction between the power of a company to forfeit share and the exercise of that power is clear from the decision of the Judicial Committee in 'Premila Devi's case.' ('39) 20 Lah 1. Arts. 24 to 30 entitling 'forfeiture of shares' in Table A, in our opinion lay down the further procedure to be followed after there was default in making the payment of a call or the instalment of a call."

(12) I have no dispute with the observation but I do not see in the light of the previous authorities discussed above and relied upon by the learned Counsel for the respondent as to how the jurisdiction is ousted under Section 38, where this Madras Case itself was decided under Section 38. Consequently there is no substance in the objection and the same is repelled. This brings me to the merits of the case.

(13) Mr. A. N. Khanna on behalf of the petitioner contended that in the first place the position of the petitioner is that no notice with regard to the call money was served upon him and this has been stated in an affidavit filed by his client. The Counsel further argued that in paragraph 5 of the application it was definitely stated that the petitioner subsequent to the receipt of the letter dated 16th February 1948, from the respondent company discovered that a call of rupee one per share was made by the directors of the respondent company in pursuance of a resolution dated 6-8-1947 and in reply to this averment the respondent company in their written statement only stated that the allegation made in paragraph 5 of the petition was wrong but did not categorically state that they had actually served the petitioner with any notice from which it follows that no notice was served upon the petitioner and the position now taken up by the respondent company by producing a postal certificate receipt and a copy of the notice dated 24th February 1948, at late stage is not above suspicion. In support of the argument the Counsel further more drew my attention to the list of documents produced by the respondent on the first hearing and another list of the documents relied upon by the respondent comprising of more than a dozen documents and maintained that no reference was made to any notice given to the petitioner with regard to the call money.

(14) On the other hand the respondent's Counsel controverted the argument and averred that the copy of the notice dated 24-2-1948, is forthcoming from the record of the company and was further supported by the sworn testimony of the Secretary as well as by the postal certificate receipt which by no stretch of imagination can be taken as a fictitious one. It was urged that even if this notice was not shown in the list of documents there was no reason to doubt the genuineness of the document. Be that as it may, the matter, does not improve for the simple reason that this copy of notice is dated 24-2-1948 which shows that notice was given to the petitioner at much later stage inasmuch as initial notices for the call money were issued in August 1947 and the call money was admittedly made upon Mr. L. P. Jaiswal and not on the petitioner. It is also significant to note in this connection as argued by the petitioner's Counsel that notice of call money was initially made upon Mr. L. P. Jaiswal although the application for transfer with the company was pending earlier having been made in June 1947. Mr. Khanna maintained that even if any notice was issued to the petitioner it was done so seemingly with the avowed object of realising the money from the petitioner and not from the transferor to whom notice had been given initially. Mr. A. N. Khanna in this respect bitterly attacked the company and stated that to all intents and purposes the company wanted to benefit Mr. L. P. Jaiswal who was their Managing Director and thought of issuing notice to the transferee petitioner at later stages although he had not become a member of the Company because transfer was not registered in his name until then and the company resorted to the device of having registered the transfer a few days earlier i.e., on 1-5-1948 and forfeited the shares on 5-5-1948. This aspect of the question however will be considered while dealing with the question of good or bad faith of both sides in dealing with this affair.

(15) The question on the anvil at present is one of the notice whether it was issued at all or not and in consideration all the facts and circumstances I am of the opinion that some notice might have been issued by the company to the petitioner although there is no clear evidence as to its service. The contents furthermore are not known and it is again difficult to find as to whether notice was a regular one for the purpose of demand made upon him. The next contention of the learned Counsel for the petitioner is that even assuming that notice was served upon the petitioner and the money was not paid then the company could have rejected the transfer proposal and shares should not have been registered in the name of the petitioner. The argument was further stressed that this registration even after non-compliance as alleged by the respondent company with the call money is indicative of the fact that the company wanted to benefit the transferor and take undue advantage of the position of the transferee and fraudulently struck off the name of the petitioner from the company's register.

(16) The other contention in this respect raised by the learned Counsel for the petitioner is that call could not be made in the eye of law upon Mr. Panna Lal, Petitioner before he had become a shareholder in the register of the company under Section 30 (2) of the Companies Act. In this respect it was urged that Section 30 (2) of the Companies Act contemplates not only agreement to become a member of a company but also the registration of his name. Reliance was placed on 'Karachi Oil Products Ltd. v. Shree Narendra Singhji', 51 Bom L R 1012, wherein it was held that forfeiture is treated very strictly by the Courts and directors seeking to enforce it must pursue exactly the course of procedure marked out by the articles. A slight irregularity is as fatal as the greatest. Hence if the call, in respect of which the forfeiture is made is not validily made or if the notice on which the forfeiture is founded

is inaccurate in requiring payment of interest from a wrong date, e.g., the forfeiture is liable to be held invalid. The Counsel maintained that in this case the call as alleged by the respondent was made upon the petitioner before his name was registered and as such the call even if the notice was given was invalid and not warranted by the provisions of Section 30. Reference was also made to Art. 29 of the Memorandum of Articles of Association which reads as follows:

"If any member fails to pay any call or instalment on or before the day appointed for the payment of the same the Directors may, at any time thereafter during such time as the call or instalment remains unpaid, serve a notice on such member requiring him to pay the same, together with any interest that may have accrued and all expenses that may have been incurred by the company by reason of such non-payment."

The Counsel argued that the word 'member' is used in the article itself and no person can be treated as member so long as he is not registered in the company's record as a shareholder. Reliance was placed upon 'Sawanmal Gopi Chand v. Shiv Charan', 71 Ind Cas 814 (Lah) wherein it was held that where the Articles of Association of a Company provided that the company could decline to register without assigning any reason then so long as transferee's name was not registered the transferor would continue to be the owner of the shares held. The learned Counsel concluded that in point of fact no call was made and even if it was made it was invalid inasmuch as the petitioner was not registered as a member at the time of call. Mr. Radhe Mohan Lal on behalf of the respondent had not much to say in reply to this significant contention of the petitioner and faintly argued that the petitioner knew all the time because he was an employee of Traders Bank and as borne out by the evidence he was the nominee of the Traders Bank whose Manager had been attending the Directors' meeting. The Counsel sought to argue that the shares are benami in the name of the petitioner and it was the Traders' Bank people who were actually holding the shares. The argument appears to be beside the point because the company itself registered the shares in the name of Panna Lal and the proposition of Benami is a misnomer and it is the petitioner in whose favour Mr. L. P. Jaiswal transferred the shares for consideration.

(17) The learned Counsel for the respondent finally argued that the company carries on business at Kapurthala which is on the border of the province and in 1947 on account of disturbances there was some dislocation and the petitioner deliberately did not pay the call money and in 1948 when he saw that the company had prospered, he came forward to reclaim his shares and that his move is a mala fide one. It was also pointed out that the petitioner filed a suit at Delhi and then moved this Court for winding up the company and failed, which conduct shows that he was out to harass the company.

(18) The position taken up by the petitioner's Counsel was that it was Mr. L. P. Jaiswal, Managing Director who had sold the shares in favour of petitioner and the call if made at all on the petitioner was only to benefit Mr. Jaiswal as observed above and that the forfeiture of shares was made without any notice and as such was invalid and liable to be set aside. It was further argued that the conduct of the petitioner in filing a suit for injunction at Delhi or applying in this Court for winding up of the company was no bar in his way to safeguard his right because it was the conduct of the respondent company which roused him to move both ways; otherwise the petitioner's interest in the company was already there to the extent of Rs. 30,000/- and there is no reason why he should have avoided the payment of Rs. 15,500/- which could again be claimed against him under the company's law and under the articles of association and that the company had forfeited shares to the extent of Rs. 2/- lakhs as per statement of their Secretary in Court and it appears that the Company was reaping benefit by way of forfeiture to add to its income otherwise they had not issued dividend after 1946. The Counsel averred that it was not that the company had been very prosperous and the petitioner thought of reclaiming his shares but he has come for rectification of the company's register as the company fraudulently forfeited his shares.

(19) In this connection again both sides relied upon the Madras ruling 'Jawahar Mills v. Official Receiver', and Mr. Radhe Mohan Lal contended that in that case on similar grounds the application under Section 38 for the rectification was rejected on the score of inordinate delay and non-payment of call money. The perusal of the judgment, however, reveals a different story because in this Madras case the call was made on 20th August 1939 and the resolution of forfeiture was passed on 25th November 1940. Subsequently several notices were issued one after the other, i.e., on 31st December, then for 20th February 1940, further on for 31st March and the last for 15th September 1941, and as such no less than four notices were issued sheer for the purpose of forfeiture which were not complied with .The application moreover was made on 5th March 1946 after five years and by that time the shares had changed several hands and it was rather impossible to deliver the scripts to the applicant. While in this case the scripts are in tact and have been produced in Court. Consequently, the Madras authority is distinguishable and as observed by the learned Judges the decision was arrived at on the particular facts of that case, and as such it has no bearing.

(20) In the result the forfeiture of shares in question and the consequent omission of the name of the petitioner from the company's register in this case was made under circumstances which are highly suspicious and I have no hesitation in holding that the forfeiture of the petitioner's shares was invalid and the same must be set aside. The application is accordingly allowed with costs and it is ordered that the petitioner's name be entered in the Company's register as a holder of shares No. 130871 to 131570, 131671 to 140870 and 145271 to 150870. The necessary intimation shall go to the Registrar, Joint Stock Companies also under Section 39 of the Companies Act. The petitioner is also directed to deposit the amount of call money of Rs. 15,500/- within 14 days from today either at the registered office of the company or with its bankers, Imperial Bank of India. In default he shall have to bear the consequences according to law.

(21) No arguments were addressed regarding the interest on this call money and I have not considered that aspect of the question. Counsel's fee Rs. 250/- (rupees two hundred and fifty), Announced.

K.S. *Application allowed*

A. I. R. (39) 1952 Pepsu 52 [*C. N. 30.*]

CHOPRA J.

Mangal Singh, Appellant v. Court of Wards, Respondent.

Appeal No. 24 of 1950, D/- 4-10-1951.

Limitation Act (1908), Arts. 181 and 182 — In satisfaction of decree executing Court directing judgment-debtor to lease out property for specified period to decree-holder — Collector directed to give possession to decree-holder — Decree-holder not obtaining possession — Application by decree-holder for revival of execution — Neither Art. 182 nor Art. 181 held applied.

Any application for execution is a substantive application by which proceedings in execution are commenced, and it does not cover applications for revival or continuance of proceedings already commenced. The question whether an execution case is still pending and has not been terminated depends on the interpretation of the order passed by the Court and the inference to be drawn from it as to the Court's intention. An order to consign a case to the record room is not always a judicial order, but sometimes it merely operates as an administrative order. Unless the matter has been finally and completely disposed of, consigning of the file to the record room does not amount to a final disposal of the case. Where the execution had already been taken out and towards satisfaction of the decree the land of the judgment-debtor had been ordered by the executing Court to be leased out to the decree-holder for a particular period and the Collector directed to give possession to the decree-holder, the decree could not be said to have been satisfied or the execution proceedings finally terminated, till the possession of the land had been delivered to the decree-holder and also till he had utilised the fruits of the land towards the decretal amount by remaining in possession of it for the full term of that period. The mere fact that the file was ordered to be consigned to the record room, did not necessarily mean that it had been finally disposed of.

Whereupon no possession being delivered to the decree-holder, the decree-holder approached the Court for revival of the execution, the application could not be considered in substance a fresh application. It was merely an application to revive a former one which had not yet been completely disposed of or one for an order reminding the Collector to comply with the order that had already been made and left uncomplied with. To such a case Art. 182 had no application. The residuary Art. 181 also had no application. Where it was the duty the Court to do a particular thing suo moto independently of any application that might be made, or where the thing to be done, was purely of a ministerial character an application, though made, was not governed by the residuary article.

(*Para 2*)

Anno: Limit. Act, Art. 181 N. 2; Art. 182, N. 2, 143.

Kidar Nath Tiwari, for Appellant.

JUDGMENT: The only point involved in this second appeal is one of limitation. The Court of Wards, respondent in this appeal, obtained a money decree against the appellant on 17-10-1980. Execution proceedings were taken out a number of times. The last application was presented on 25-5-1990 and after protracted proceedings some agricultural land of the judgment-debtor was ordered to be leased out to the decree-holder for a period of ten years in satisfaction of the entire decretal amount. The Collector was required to put the decree-holder in possession of the land and the file was directed to be consigned to the record room. This order of the executing Court was made on 9-1-2000. In spite of some efforts made by the decree-holder the possession, however, was not delivered to him. On 11-11-2003 he approached the Civil Court with an application for revival of the execution proceedings and for an order to be put in possession of the land leased out to him. This application was objected to by the judgment-debtor on the ground of limitation and it was urged that since the application was presented more than three years after the order, it was barred by time. The objection found favour with the executing Court and the application was dismissed as barred by time. No reason was, however, given nor any provision of the Limitation Act according to which the application was found to be beyond time, was referred to. On appeal by the decree holder the learned District Judge, Patiala, set aside the order of the Executing Court and held the application to be within time. This is judgment-debtor's second appeal.

(2) It is contended on behalf of the appellant that the application for restoration of the execution proceedings was in substance a fresh application for execution of the decree or at least of the order of the executing Court. The argument is that the decree holder wanted to get possession of the land which had been leased out to him by order of the excuting Court made on 9-1-2003 and since the decree-holder wanted compliance of that order the application should be considered as one for execution of that order. On these grounds it is urged that the application fell under Art. 182 and the limitation of three years for the same started from the date of the order. In the alternative, it is contended that since it was a fresh application for execution of the decree it was barred under the said Article, because it had been presented more than three years after the final order on the prior application. On a perusal of the order dated 9-1-2000 leasing out the land to the decree-holder and the prayer made in the present application, I am of the opinion that Art. 182 has got no application to the present case. The present application can neither be said to be one for the execution of the decree nor of the order of the executing Court. An application for execution is a substantive application by which proceedings in execution are commenced, and it does not cover applications for revival or continuance of proceedings already commenced. Execution had already been taken out and towards satisfaction of the decree land of the judgment-debtor had been ordered to be leased out to the decree-holder for a particular period. The decree could not be said to have been satisfied or the execution proceedings finally terminated, till the possession of the land had been delivered to the decree-holder and also till he had utilised the fruits of the land towards the decretal amount by remaining in possession of it for the full term of that period. The order was to the effect that the Collector would deliver possession of the land to the decree-holder. So long as this was not done the execution case could not be considered to have been finally disposed of. The mere fact that the file was ordered to be consigned to the record room does not necessarily mean that it had been finally disposed of. The question whether an execution case is still pending and has not been terminated depends on the interpretation of the order passed by the Court and the inference to be drawn from it as to the Court's intention. An order to consign a case to the record room is not always a Judicial order, but sometimes it merely operates as an administrative order. Unless the matter had been finally and completely disposed of, consigning of the file to the record room did not amount to a final disposal of the case. The matter in dis-

pute remained pending till possession had been delivered to the decree-holder and the decree had been fully satisfied. In view of these facts, the application in question cannot be considered to be in substance a fresh application for execution of the decree. It was merely an application to revive a former one which had not yet been completely disposed of or one for an order reminding the Collector to comply with the order that had already been made and left uncomplied with. It was the duty of the Court and of the Collector in compliance of that order, to deliver the land to the decree-holder and the latter was to remain in unobstructed possession of it for a period of ten years before the execution proceedings could be said to be finally disposed of and the decree fully satisfied. I am, therefore, of the opinion that Art. 182 of the Limitation Act has no application to the present case. In view of these facts, the learned counsel for the appellant has conceded that the residuary Art. 181 also has no application. Where it is the duty of the Court to do a particular thing suo motu independently of any application that may be made, or where the thing to be done is purely of a ministerial character an application, though made, is not governed by the residuary article. After the order of the Court dated 9-1-2000 all that was to be done was purely of a ministerial character. No fresh mode of execution was prayed for by the decree-holder. The order already made by the Court was only to be complied with and it was then for the Collector, acting as an administrative officer, to do the needful. If the executing Court was reminded by the decree-holder that its order had not been carried out and prayed that it should be done, the application cannot be considered to be a fresh application for execution or an application which would be governed by the residuary article. The application was simply to draw the attention of the Court to do what it was itself bound to do. The residuary article applied only to applications where the Court is not bound to exercise its powers and do the particular thing, unless moved by an application. For all these reasons, I am of the opinion that the present application did not fall under either of these articles and was, therefore, not barred by time.

(3) In the result the appeal is dismissed. Since no one has put in appearance on behalf of the respondent, no order is made with respect to costs.

R.G.D. *Appeal dismissed.*

A. I. R. (39) 1952 Pepsu 53 *[C. N. 31.]*

CHOPRA, J.

Om Parkash, Petitioner v. Executive Officer, Patiala.

Criminal Ref. Nos. 244 and 245 of 1951, D/- 16-11-1951.

Municipalities — Punjab Municipal Act (3 (III) of 1911), S. 81 — Application for recovery of dues presented to Deputy Commissioner — Latter forwarding it to Tahsildar for necessary action — Tahsildar initiating proceedings for recovery in his capacity as Tahsildar. — Proceedings are without jurisdiction.

Section 81 of the Act provides that a Magistrate having jurisdiction within the limits of the Municipal Committee or at the place where the defaulter resides, may recover the amount claimable by a Committee on an application presented to him for that purpose. (Para 3)

An application for the recovery of the lease money was made by a Municipal Committee to the Deputy Commissioner of the district under S. 81 of the Act. The Deputy Commissioner in his capacity as such officer passed an order thereon forwarding it to the Tahsildar for necessary action. The Tahsildar started proceedings for recovery of the amount without stating that he was functioning as a Magistrate and not as a Tahsildar:

'Held' that the proceedings started by the Tahsildar were without jurisdiction as it must be held in the circumstances that he was acting in his capacity as Tahsildar and not as a Magistrate. The mere fact that both the offices of the Magistrate and Tahsildar were held by him did not lead to the inference that he acted in a capacity different from the one in which the papers had been sent to him by his immediate superior. Further, the Deputy Commissioner who was not acting in his capacity as the District Magistrate had no jurisdiction to entertain the application or pass order upon it. (Paras 3, 4)

D. S. Nehra, for Municipal Committee; Puran Chand; for Petitioner.

ORDER.: These are references by the Additional District Magistrate, Patiala to revise two orders of the Tahsildar, Patiala, dated 13-1-1951 and 14-5-1951 made on applications of the Municipal Committee, Patiala under Section 81 of the Punjab Municipal Act On 23-12-2006 Om Prakash petitioner had got Plot No. 4 in Sabzimandi, Patiala on lease from the Municipal Committee, Patiala for the year 2007. The lease money was fixed at Rs. 9,600/-. Out of this Rs. 3,200/- were paid on the day of the lease and the balance was stipulated to be paid in two instalments of Rs. 3,200/- each, on 14-6-1950 and 17-9-1950. On default having been made by the petitioner, the Executive Officer of the Committee ordered that the District Magistrate, Patiala be moved for the realisation of the first instalment of Rs. 3,200/-. For this purpose a Robkar (on a printed form) on behalf of the Municipal Committee was presented in the office of the Deputy Commissioner, Patiala. The order of the said officer on the back of the Robkar is dated 22-9-1950 and reads as follows:

"D. C. Office, Patiala. Asal haza bagarz karwai wasooli Tahsildar, Patiala, Muraslhoway."

The Tahsildar on receiving the papers issued notice to the defaulter on 10-10-1950 ordered him to be summoned by bailable warrants. Om Parkash appeared on 12-10-1950 and took various objections to the legality of the action. The objections were, however, disallowed by the Tahsildar by his order dated 31-1-1951. The petitioner went in revision to the Additional District Magistrate against the order. It may be mentioned here that the Tahsildar in none of his orders or proceedings had expressed or indicated that he was acting as a Magistrate in the matter.

(2) For the realisation of the last instalment that fell due 17-9-1950, a handwritten application addressed to the Deputy Commissioner, Patiala was presented on behalf of the Municipal Committee. This application is dated 6-2-1950 and the order made thereon is as follows:

"Forwarded to the Tahsildar, Patiala for recovery and necessary action, dated 8/2.

(Sd) Deputy Commissioner, Patiala."

The Tahsildar started proceedings for realising the amount; the identical objections were again raised by Om Parkash. These were rejected by the Tahsildar on 14-5-1951. In this application also the record does not show that the Tahsildar was functioning as a Magistrate. The Additional District Magistrate was approached in revision against this order as well.

(3) The learned Additional District Magistrate by a detailed order referred both these petitions to this Court under Section 438, Criminal P.C. He was of the opinion that the Tahsildar, for various reasons, had no jurisdiction to entertain or take action on the applications and recommended that the orders be quashed. One of these of course, is that a Tahsildar has no jurisdiction to take action under Section 81 of the Punjab Municipal Act. There cannot possibly be any dispute on that point. Section 81 of the Act provides that a Magistrate having jurisdiction within the limits of the Municipal Committee or at the place where the defaulter resides, may recover the amount claimable by a Committee on an application presented to him for that purpose. Shri Daya Sarup, the learned Counsel for the respondent has frankly conceded that Shri Piare Lal, whose orders are in question, acting as a Tahsildar had no jurisdiction to proceed in the matter, but he contends that Shri Piare Lal was also invested with the powers of a Magistrate, Second Class, and had jurisdiction within the limits of the Committee. The argument is that the Tahsildar should be taken to have acted as a Magistrate, although he had missed to express that he was acting in that capacity. I do not think there is any substance in this contention. The manner in which the proceedings started and the subsequent orders which were made thereon, leave no doubt that Shri Piare Lal never thought of acting as a Magistrate and that he was all along acting as a Tahsildar. So far as the second application dated 6-2-1951 is concerned, the matter is so very clear. The application was addressed to the Deputy Commissioner and was presented to, and entertained by him. He sent it, in the capacity of a Deputy Commissioner, to the Tahsildar for necessary action. The latter must ordinarily be presumed to have proceeded on it as such, unless he had stated that he was exercising his Magisterial powers. The mere fact that both offices were held by the same individual does not lead to the inference that he acted in a capacity different from the one in which the papers had been sent to him by his immediate officer. It may be repeated that the Deputy Commissioner had ordered the Tahsildar to take action and proceed in the matter. If Shri Piare Lal was to act in a different capacity, he must have expressed it in so many words, or at least given his designation as a Magistrate while passing orders. No such thing was done and there is nothing to indicate that he acted in the capacity of a Magistrate. Again, the Deputy Commissioner to whom the two applications were presented had no jurisdiction to entertain or pass any orders on them. He may also have been the District Magistrate, but he did not pass the orders in that capacity. The orders which have been reproduced above, make it clear that he passed them as a Deputy Commissioner and not as a District Magistrate. The matter has not been left to conjectures as to the capacity in which he did it.

(4) With the exception that the first application was not addressed to any particular officer all these objections apply with equal force to that application as well. That was also sent by the Deputy Commissioner to the Tahsildar, and the latter must be presumed to have proceeded on it in that capacity. I would, therefore, hold that the two orders under revision were passed without jurisdiction and must be set aside.

(5) In view of my finding that the officer concerned was not legally competent to pass the orders, I should not go into the other objection of the petitioner, which is to the effect that the amount was not recoverable under the Act and hence Section 81 of the Municipal Act had no application. This is a point that shall have to be decided, if raised, when and if proper proceedings are started before a competent authority.

(6) In the result the references are accepted and the orders of the Tahsildar, dated 31-1-1951 and 14-5-1951 set aside.

K.S. *References accepted.*

A. I. R. (39) 1952 Pepsu 54 [*C. N. 32.*]

TEJA SINGH, C. J.

Bharpur Singh, Appellant v. Mallan Singh and others, Respondents.

Second Appeal 389 of 2005, D/- 22-6-1951.

Custom (Punjab) — Alienation — Necessity — Only portion of consideration found for necessary purpose — Court if can convert sale into mortgage — Proper order to be passed.

Where the plaintiff challenges an alienation (sale) made by a person governed by Customary Law on the ground that it is without consideration and necessity and the Court finds that only a portion of the consideration passed for a necessary purpose, that Court does not, and cannot, convert the sale into a mortgage. There is no law under which a Court having, so far as concerns the plaintiff's rights, cancelled a sale, can create a mortgage for the sum of money found to be for necessity. What it does is to find the sale invalid as against the plaintiff and then to rule that, inasmuch as he who seeks equity must do equity, plaintiff, who has benefited by the liquidation of debts that would have been binding on the estate in his hands, must before taking possession after the alienor's death, repay the benefit so received. The Courts are, therefore, wrong in their phraseology when they write of a reversioner in such a redeeming the land after the death of the alienor. (*Para 3*)

92 Pun Re 1909 Foll.

B. Amar Nath, for Appellant; B. Sohan Lal, for B. Daya Sarup, for Respondents.

Case referred to :

('09) 92 Pun Re 1909 : (4 Ind Cas 614) (Pr 3)

JUDGMENT: The facts relevant for the purposes of this appeal are as follows: One Waryam Singh made a sale of his land. His son brought a suit for a declaration that the sale would not affect his reversionary rights on the grounds that Waryam Singh was governed by custom, that the land was ancestral 'qua' him and the sale was without consideration and necessity. The trial Court dismissed the suit and its decree was upheld by the Court of appeal. The plaintiff then came to the High Court on revision. The High Court allowed the revision petition and ordered that the plaintiff could get possession of the suit land from the vendees on payment of Rs. 1214/-. Both sides are agreed that Waryam Singh died during the pendency of the suit and consequently the plaintiff had converted his suit for declaration into one for possession. The present suit was brought on 5-7-2004. It was described as a suit for redemption and the plaintiff claimed that he was entitled to redeem the land on payment of Rs. 1214/-, which was found to be for necessity by the High Court in the previous case. Unfortunately neither the plaint not the written statement of the defendants was properly drafted. As I have already observed the heading of the plaint showed that it was a suit for redemption of a mortgage but there was no definite allegation that relationship of mortgagor and mortgagee subsisted between the plaintiff and the defendants nor was it stated how the mortgage had come into existence, and when. The defendants raised only two pleas; one that the

proper court-fee had not been paid by the plaintiff and the second that the suit was barred by time. They never maintained in so many words that there was no mortgage and consequently the plaintiff had no right to bring a suit for redemption. All that was mentioned in the written statement was that the plaintiff should have executed the decree passed in the previous case and he had no right to bring the present suit after the lapse of such a long time. To make the matters worse, the trial Court did not make any effort to clear the points by taking the parties' statement and contented itself by raising two issues; one regarding court-fee and the other regarding limitation. Both these issues were found against the defendants and the plaintiff's suit was decreed. On appeal the learned District Judge disagreed with the trial Court as regards its finding on the second issue and in the course of his judgment he observed that no formal mortgage had been created by the High Court in the previous case, that the suit for redemption was not competent and that the only remedy open to the plaintiff was to execute the decree passed in the former suit.

(2) My own opinion is that issue regarding limitation was redundant, because if a mortgage came into existence by virtue of the order of the High Court in the previous case, which was made on 2-9-1932, and the plaintiff was entitled to redeem the present suit for redemption was well within time, because the period for a redemption suit is sixty years. The only question that was important in the case was whether there existed a mortgage which the plaintiff could redeem by a suit. It is a pity that this point was not put in issue, but from the trend of the judgments of both the Courts below it is clear that the parties were conscious of it and it was definitely argued by them before the lower Courts. In the circumstances I proceed to give my finding upon this point.

(3) As I have already observed, the plaintiff's prayer in the previous case was that since the alienation made by his father was without consideration and necessity, the same be set aside and he granted a decree for possession of the land without any payment. The trial Judge as well as the Court of appeal found against the alienees on the question of consideration and necessity. The High Court, however, took a different view and held that consideration and necessity for the alienation had been established to the extent of Rs. 1214/-. Accordingly it ordered that the plaintiff could take possession of the land from the defendants alienees on payment of that amount. It also observed that because necessity had been established only for a part of the consideration, it appeared to the learned Judges to be just to convert the same into a mortgage and further observed that that part of the consideration which was found to be for necessity i.e. Rs. 1214/-, should be regarded as mortgage money. But these observations do not form the operative part of the order and they merely amount to an expression of opinion on the part of the learned Judges. The operative part is that the plaintiff can obtain possession of the suit land from the defendants-vendees on payment of Rs. 1214/-. This means that the High Court granted the plaintiff a decree in these terms. In addition, I may mention that in a suit of this kind it was not open to the High Court to create a mortgage in the plaintiff's favour and in this view I am supported by the observation made by Johnstone J. in 'Fazal Ahmed v. Shahab Din', 92 Pun Re. 1909. The learned Judge while discussing how decrees and orders should be made in a case arising out of suit where the plaintiff challenges an alienation made by a person governed by Customary Law on the ground that it is without consideration and necessity, thought it necessary to say what form the interference of Courts in a case of this kind should take. This is what he said:

> "When a sonless male proprietor, subject to Punjab Customary Law, sells a piece of ancestral land and upon a suit by a reversioner for a declaration that the sale, not being for consideration and necessity, does not affect his reversionary interests, the Court finds that only a portion of the consideration passed for a necessary purpose, that Court does not, and cannot, convert the sale into a mortgage, though the language used in judgments and decrees would sometime seem to imply that this was so. We are aware of no law under which a Court having, so far as concerns the plaintiffs' rights, cancelled a sale, can create a mortgage for the sum of money found to be for necessity. What it does, is to find the sale invalid as against the plaintiff and then to rule that, inasmuch as he who seeks equity must do equity, plaintiff, who has benefited by the liquidation of debts that would have been binding on the estate in his hands, must, before taking possession after the alienor's death, repay the benefit so received. The Courts are, therefore, wrong in their phraseology when they write of a reversioner in such a case redeeming the land after the death of the alienor."

The learned Judge also suggested that the decrees should be drawn up, in the following words:

> "It is hereby declared that the sale shall not take effect at all against the reversioners after the death of X but it is also declared that upon the death of X the reversioners shall not be entitled to possession of the land in suit until they have paid the sum of Rs. Y to defendants Nos. ..... or their successors in interest."

He also suggested a similar decree in a suit relating to a mortgage. I respectfully agree with these observations and my opinion is that if the decrees are drawn up in the form suggested in the above mentioned case, most of the difficulties experienced by litigants as well as Courts, would disappear.

(4) It was stressed before me by the appellant's counsel that in this case the defendants did not prove that the High Court judgment was followed by a decree. No doubt no copy of the decree was placed on the record but taking into consideration the usual course of events, I am entitled to presume that the judgment must have been followed by a decree. But even assuming that no decree was drawn up, this could not give the plaintiff a right to bring a suit for redemption which he could only do if there existed a mortgage between himself and the vendees. In view of the fact that I have already held that the judgment of the High Court in the previous case did not create any mortgage, whatever other remedy the plaintiff could possibly have, the suit for redemption did not lie. The result is that the appeal fails and is dismissed. In view of the peculiar circumstances of the case, I would order that the parties shall bear their own costs throughout.

G.M.J. *Appeal dismissed.*

A. I. R. (39) 1952 Pepsu 55 *[C. N. 33.]*

CHOPRA, J.

Anokh Singh, Petitioner v. Nagina Ram, Respondent.

Civil Revn. No. 156 of 2006, D/- 6-10-1950.

Limitation Act (1908), Art. 14 — "Order" of an officer — Starting point.

Punjab Redemption of Mortgages Act did not apply to the Nabha State and an appeal against an order of the Collector sanctioning an applica-

tion for redemption was competent under the local law of Nabha State and Limitation under Art. 14 would start from the date of the order of the Revenue Commissioner dismissing the appeal against the order of the Collector. (*Para 2*)

Anno: Lim. Act, Art. 14 N. 4, 6.

Puran Chand, for Petitioner; Lachhman Dass, for Respondent.

ORDER: Land measuring 3 bighas 6 biswas in village Isra has been the bone of contention between the parties since long. Mt. Jeoni, widow of Lakha Mal was the owner of the land which had remained in possession of Nagina Ram respondent for a number of years. Mt. Jeoni filed a suit for its possession against Nagina Ram which was decreed by the Naib Naxim Amloh on 16-11-1986. On a review application being presented by Nagina Ram the suit was dismissed as time barred. On the basis of this decision Nagina Ram applied for the land to be mutated in his name. The mutation was refused by the Tehsildar against whose order he filed an appeal to the Revenue Member. In his order dated 11th August 1934, the Revenue Member arrived at the conclusion that Nagina Ram was only a mortgagee for Rs. 120/-. He, therefore, ordered that an entry to that effect be made in the revenue records. On 12-11-1994 mutation No. 192 was effected according to which Mt. Jeoni was entered as an owner and Nagina Ram a mortgagee for Rs. 120/-. Mt. Jeoni died somewhere in the year 2001. After her death her heirs, the present petitioners, presented an application for redemption of the land. This was sanctioned by the Collector on 22-6-2002. Redemption having been allowed Nagina Ram filed an appeal to the Revenue Minister which was dismissed on 7th Chet, 2002. The possession in the meantime having been delivered to the applicants, the suit giving rise to the present petition was filed by him on 27-7-2003. In the plaint he alleged that he had become an owner of the land by possessing it adversly against Mt. Jeoni and that his ownership could not be questioned after the decision of the civil suit. He challenged the order of the Revenue Minister as wrong and against facts because he had never been in possession of the land as a mortgagee. The suit was objected to as time barred and the allegations of the plaintiff were totally denied. Both the Courts below have found that the suit was within time and that the plaintiff was owner of the land. The suit was consequently decreed. This is a petition for revision by the defendants.

(2) Mr. Puran Chand, the learned counsel for the petitioners, contends that under Art. 14 of the Limitation Act the present suit ought to have been brought with one year of the order of the Collector. The order of the Collector being of 22nd Assauj, 2002 the suit was beyond time as it was filed after the lapse of the prescribed period. Mr. Lachhman Das concedes that Art. 14 of the Limitation Act applies to the case. He, however, contends that the limitation of one year would be counted from the final order in the proceedings for redemption. According to him the period would start to run on 7th Chet, 2002 when his appeal against the order of the Collector was dismissed. Mr. Puran Chand, however, urges that since the order of the Collector was not appealable according to the Punjab Redemption of Mortgages Act the Revenue Minister had no jurisdiction in the matter and, therefore, the plaintiff could take no benefit of the proceedings in his Court. The counsel, has not been able to satisfy me that the Punjab Redemption of Mortgages Act applied to the Nabha State or that the application presented by the petitioners to the Collector for redemption was under that Act. The petitioners, who were respondents in the appeal, did not take any objection as to the maintainability of the appeal. From this it appears that an appeal against an order of the Collector was competent under the local law of Nabha State. If an appeal did lie I am of the considered opinion that limitation under Art. 14 would start to run from the date of the final order. If the appeal had been accepted and the order of the Collector had been set aside a similar suit by the petitioners could only have been filed within one year of that order. The plaintiffs had a right to seek his remedy from the appellate Court and when he failed he rightly came to the civil Court within one year of that order. I would, therefore, hold that the suit was within time.

(3) Regarding the second point the contention of Mr. Puran Chand is that Nagina Ram was never declared to be an owner of the suit-land by the Naib Nazim Amloh in 1986. All that was decided in that case was that Mt. Jeoni's suit was barred by time because of the long possession of Nagina Ram. It is further stressed that after the order of the Revenue Member dated 11-8-1934 Nagina Ram accepted his position as a mortgagee when he got a mutation to that effect sanctioned in his favour. I, however, do not see any force in either of the two contentions. On the dismissal of Mt. Jeoni's suit for possession of the land as time barred she must be taken to have lost all rights of ownership in it as provided by S. 28 of the Limitation Act. It is not only the remedy that was lost to her but all her rights in the land also got extinguished thereafter, and Nagina Ram thereby became its owner. His approaching the revenue authorities after the decision of the Revenue Member did not divest him of the rights that had already accrued to him. All that he said at the time of the mutation was that the Revenue Member had ordered him to be entered as a mortgagee for Rs. 120/-. The mutation was effected in pursuance of that order and not because of any admission or declaration made by the plaintiff. It was only an involuntary act done in pursuance of the order of the Revenue Member, which did not amount to an estoppel against him and could not prevent him from enforcing the remedy given to him by law. The mere fact that the plaintiff was entered as a mortgagee in the revenue records ever since the order of the Revenue Member would not make any difference nor would it deprive him of his rights. He continued to remain in possession of the land and to enjoy its profits as before.

(4) I see no ground to differ from the concurrent findings of the Courts below. The petition is consequently dismissed. Taking into consideration all the circumstances of the case and the points of law involved I leave the parties to bear their own costs.

K.S. *Petition dismissed.*

A. I. R. (39) 1952 Pepsu 56 *[C. N. 34.]*

CHOPRA AND PASSEY JJ.

Hari Chand, Appellant v. Kartar Singh, Respondent.

Second Appeal No. 316 of 2006, D/- 2-11-1950.

T. P. Act (1882), S. 59 — Unregistered mortgage bond — Admissibility in evidence to prove personal covenant — Registration Act (1908), S. 49.

An unregistered document which is compulsorily registrable, can be used as evidence of a transaction not affecting the property comprised therein, when it is separable and divisible from the part which requires registration. A personal covenant to pay the debt in a mortgage transaction is always considered as such a separable transaction

from the portion of the document charging the property, and consequently an unregistered mortgage document can be admitted as evidence of the personal covenant. (*Para 2*)

Anno: T. P. Act, S. 59, N. 14, Reg. Act, S. 49, N. 23.

R. B. Anant Ram and Dalip Chand, for Appellant; S. Tehal Singh, for the Respondent

CHOPRA.: This appeal arises out of a money suit decreed against the appellant by both the Courts below. The suit was on the basis of a bond dated, 11-1-2004 by which Rs. 1,900/- were advanced to the appellant with agreement to pay interest at the rate of Rs. 1/9- per cent per mensem. In addition to other stipulations certain immoveable property was hypothecated for the payment of the loan.

(2) R. B. Anant Ram on behalf of the appellant argues (1) that the bond being unregistered could not form the basis of a money suit; (2) that the consideration of the bond had been paid by execution of another bond in favour of Balwant Singh brother of the original creditor. I, however, do not see any force in eithter of these objections. Non-registration of a compulsorily registerable document leads only to two consequences: (1) It cannot affect any immovable property comprised therein; & (2) It cannot be received as evidence of any transaction affecting such property. It can, surely, be used as evidence of a transaction not affecting the property comprised therein, when it is separable and divisible from the part which requires registration. A personal covenant to pay the debt in a mortgage transaction is always considered as such a separable transaction from the portion of the document charging the property, and consequently an unregistered mortgage document can be admitted as evidence of the personal covenant. The money suit was brought on the basis of the personal covenant embodied in the bond and was, therefore, competent.

(3) The second objection is simply frivolous. (The rest of the judgment is not material for purposes of this report.)

(4) PASSEY J.: I agree.

V.B.B. *Appeal dismissed.*

A. I. R. (39) 1952 Pepsu 57 *[C. N. 35.]*

TEJA SINGH, C. J. AND CHOPRA, J.

Ujagar Singh and others, Appellants v. Gopal Singh and others, Respondents.

Civil Appeal No. 219 of 2006, D/- 27-6-1950.

(a) *Civil P. C. (1908), O. 41, R. 31 — Judgment of Appellate Court — Contents.*

A perusal of Rule 31 of O. 41, Civil P.C., goes to show that the intention of the framers of the Code was that the judgment of an appellate Court should be self-contained. Among the things and particulars that such a judgment should give, one is "the points for determination." In order to understand and know what the points for determination relate to and why they were raised it is absolutely essential to mention the facts of the case and it is not sufficient merely to state that the facts are given in the judgment of trial Court. Moreover as the judgments of the lower appellate Courts are liable to be questioned in second appeal or in revision, it is only proper that their judgments must not be wanting in proper details, so that when the case comes up before the High Court, the Court should be in a position to have a full grasp of the facts as well as the points for determination without referring to the judgment of trial Court. (*Para 4*)

(b) *Custom (Pepsu) — Gift — Ancestral property — Right to challenge — Chance of succession very remote — Effect.*

Reversion to the collaterals of a donor can take place only if the gifted property is ancestral qua them. Where the land which is gifted is not ancestral, the question of reversion does not arise and consequently the collaterals who cannot be regarded to possess even a remote chance of succession, have no locus standi to challenge the gift. (*Para 5*)

Where the chances of the collaterals to succeed to the suit land are very remote, the suit challenging the gift is purely speculative and it in itself is a sufficient reason to dismiss it. (*Para 11*)

(c) *Custom (Pepsu) — Gift — Surrender — Acceleration of succession — Principles.*

Before an alienation by a female owner holding a limited estate can be regarded as an acceleration of succession it should satisfy the following conditions viz., (1) it should be a bona fide transaction and not a transaction adopted merely as a device to divide the property with the reversioners; and (2) it must amount to complete effacement of the female owner. The question whether a transaction in a particular case satisfies these conditions, must be decided on the facts of each particular case. Where the alienation does not cover the whole of the property owned by the female owner and she either reserves a substantial part of it for herself or gives it to someone else it does not amount to complete effacement on her part but if the property not included in the alienation is a very small part of the whole, it will not prevent the transaction from taking effect as complete effacement. 'Case Law referred.' (*Para 9*)

Atma Ram, for Appellants; Jagan Nath, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('19) 42 Mad 523: (AIR (5) 1918 PC 196) (Pr 8)
('34) 61 Ind App 200: (AIR (21) 1934 PC 105) (Pr 10)
('38) AIR (25) 1938 Bom 438: (ILR (1938) Bom 723) (Prs 9, 10)
('35) AIR (22) 1935 Cal 689: (158 Ind Cas 925) (Pr 9)
('02) 17 Pun Re 1902: (16 Pun L R 1902) (Pr 8)
('33) AIR (20) 1933 Lah 279: (146 Ind Cas 395) (Pr 8)

TEJA SINGH, C. J.: In order to be able to appreciate the questions involved in this second appeal it is necessary to give briefly the facts as proved by the documentary evidence produced by the parties and admitted by their Counsel.

(2) The suit property which consists of 253 bighas of culturable land with the Shamilat appurtenant thereto, originally belonged to Harnam Singh, a Jat of village Ralla. Out of this land Harnam Singh gifted 123 bighas and 12 biswas to his daughter Mt. Biro during his life time. Harnam Singh's collaterals brought a suit for setting aside the gift on the usual grounds that the land was ancestral and Harnam Singh who was governed by customary law had no power to give it away to his daughter in the presence of his collaterals. The suit was dismissed on the ground that the land had not been proved to be ancestral qua the plaintiffs and the decision of the trial Court was maintained upto the Chief Court which was then the highest appellate authority in Patiala State. It appears that out of the remaining land that was left with Harnam Singh some was mortgaged by him with possession and only a small part of it was in his own possession. After his death, which

took place sometime in 1980 Samvat, the land which was in the actual possession of Harnam Singh at the time of his death was taken hold of by his collaterals. On this Mt. Biro brought a suit for possession with respect to that land. She also brought a suit for a declaration in respect of the mortgaged land. In both cases her position was that she was the immediate heir of her father and that the collaterals had no right to succeed to the land. Both these suits were decided in Mt. Biro's favour and thus she became the owner of the entire property which at one time belonged to Harnam Singh. In the beginning of Samvat 2001 Mt. Biro gifted to her sons the whole of the culturable land, that is the land that she had got from her father by means of gift as well as the land that had devolved upon her on his death, together with her share in the Shamilat. The mutation of the gift was entered by the Patwari on the order of the Tahsildar on 25-4-2001 and was ultimately sanctioned on 18-7-2001. The plaintiffs who are Harnam Singh's collaterals instituted the present suit on 23-4-2004. Their allegations were that the land was ancestral qua them and that Mt. Brio possessed only life interest therein and consequently they prayed for a declaration that the gift would not affect their reversionary rights after Mt. Biro's death. The suit was contested both by Mt. Biro and her sons. They denied the ancestral nature of the land. They also denied that the plaintiffs were Harnam Singh's collaterals within the fifth degree and that Mt. Biro's estate was limited in any way. They urged that the plaintiffs had no right to maintain the action and that the suit was liable to be dismissed. The following issues were framed by the trial Sub-Judge:

"1. Is the land in dispute ancestral ?
2. Is the gift in question valid?
3. Are the plaintiffs not within the fifth degree of the alienor and therefore they are not entitled to sue?
4. Are Mt. Basant Kaur, Jagir Singh and Mt. Sham Kaur necessary parties to the suit? and
5. Have the plaintiffs got a cause of action?"

(3) The trial Sub-Judge found issues Nos. 3 and 4 against the defendants and the first issue against the plaintiffs. As regards the second and the fifth issues he held that the gift was valid and since the plaintiffs were not near collaterals and their chances of succession were remote they had no locus standi to maintain the suit. On these findings the suit was dismissed with costs. The plaintiffs appealed, and the additional District Judge who heard the appeal framed the following additional issue:

"Has Mt. Biro gifted the whole of the property which she got from her father Harnam Singh to her sons, Defendants 1?"

After having recorded the parties' evidence on this issue the Additional District Judge found it against the donees. He held that since the gifted land did not cover the entire property that Mt. Biro owned, the gift did not amount to acceleration of succession. As regards the other issues, he did not record any finding on Issue No. 1, because he thought that Mt. Biro's estate being of limited nature her powers of alienation were restricted irrespective of the fact whether the property in her hands was ancestral or not. The second issue he found against the defendants and the last issue he decided in the plaintiffs' favour. In the result he set aside the decree of the trial Court and decreed the plaintiffs' claim.

(4) Before dealing with the various points raised before us I cannot help observing that the judgment recorded by the learned Additional District Judge while disposing of the appeal was not in accordance with the provisions of law. He gave very little facts of the case and practically said nothing about the pleadings of the parties. He merely mentioned the fact that:

"Mt. Biro, widow of Harnam Singh, gifted the whole of the land in dispute to her sons."

and

"the challenging of the said gift was the subject matter of the suit brought by the plaintiffs appellants."

and then after a few other observations quoted the issues and proceeded to give his decision thereon. As regards the circumstances out of which the litigation had arisen and the various points raised by the parties in their pleadings he did not consider it necessary to say anything. All that he said about them is contained in the following observation appearing in his judgment:

"The facts of the case have been sufficiently given out in detail in the lower Court's judgment and need no repetition here."

In my opinion the procedure adopted by the learned Judge was erroneous. It is true that by the very nature of things the judgment of an appellate Court need not be as detailed as that of a trial Court and certain matters which must find place in the judgment of a trial Court need not be repeated by the appellate Court in its judgment, but a perusal of Rule 31 of Order 41, Civil Procedure Code, goes to show that the intention of the framers of the Code was that the judgment of an appellate Court should be self-contained. Among the things and particulars that such a judgment should give, one is "the points for determination." Now, in order that it should be possible to understand and know what the points for determination relate to and why they were raised it appears to me to be absolutely essential that mention should also be made in the judgment of the facts of the case and it is not sufficient merely to state that the facts are given in the judgment of the trial Court. It must be remembered that the judgments, decrees and orders of a District Judge or for the matter of that of all lower appellate Courts are not final. In some cases, they can be questioned in second appeals and in others they are liable to be revised under the revisional powers of this Court. In the circumstances it is only proper that the judgments recorded by all lower appellate Courts in appeals must not be wanting in proper details, so that when the case comes up before the High Court, either on second appeal or on revision, this Court should be in a position to have a full grasp of the facts as well as the points for determination without referring to the judgment of the trial Court.

(5) From what I have said above, it is clear that only half the land in dispute devolved upon Mt. Biro as her father's heir. The other land was gifted to her by her father and since the suit brought by her father's collaterals for having the gift set aside was dismissed her estate so far as that land is concerned could not be analogous to that of a widow's estate. This means that she became complete and full owner of that land and the gift made by her to her sons was not liable to be challenged by her father's collaterals. It was urged before us that since Mt. Biro was Harnam Singh's daughter and it was in that capacity that the gift was made to her, in the event of her line becoming extinct the gifted land would revert to her father's collaterals and for this reason they had the right to sue for declaration that the gift was not legally valid. There is no force in this contention because reversion to the collaterals of

a doner can take place only if the gifted property is ancestral qua them. Since in this case it is conceded that the land was not ancestral, the question of revision does not arise and consequently the plaintiffs who cannot be regarded to possess even a remote chance of succession, have no locus standi to challenge the gift.

(6) As regards the rest of the land the position of the defendants is that since the donees, being the sons of the donor, are her immediate heirs the gift in their favour amounted to acceleration of succession and for this reason the plaintiffs could not have it set aside. Counsel for the plaintiffs challenged this contention on the ground that the property was ancestral and the plaintiffs being collaterals of the fifth degree neither Mt. Biro, daughter of Harnam Singh, nor her sons could succeed to it in preference to them. I find that in the judgment of the Chief Court in the first suit brought by Harnam Singh's collaterals to set aside the gift in Mt. Biro's favour it was mentioned that the plaintiffs were collaterals of the eighth or ninth degree. A perusal of the pedigree-table produced in this case, however, makes me think that the plaintiffs' allegation that they are collaterals of the fifth degree is correct. As regards the question whether the plaintiffs right of succession to the property left by Harnam Singh was superior to that of Mt. Biro and her sons it depended upon the nature of the property left by Harnam Singh. If the property was ancestral qua the collaterals they would have succeeded to it, but if it was non-ancestral it would have devolved upon Mt. Biro and after her upon her sons. As I mentioned above the Additional District Judge did not give any finding on the point whether the property was ancestral or non-ancestral and in my judgment it was not necessary to do so. The succession to the property left by Harnam Singh opened at the time he died. If the property left by him was ancestral and the plaintiffs' right to succeed to it was superior to that of Harnam Sing's daughter they should have exercised it then. From the judgments given by the Courts in the litigation that had ensued between them it appears that the plaintiffs did take possession of the unencumbered land of Harnam Singh but the Courts held that there was no substance in their claim and Mt. Biro was entitled to the property in preference to them. I am inclined to think that the decrees passed in Mt. Biro's favour in those suits debar the plaintiffs from questioning her rights of succession to the property left by Harnam Singh even though the property be assumed to be ancestral. Since, however, this point was not raised by the defendants in the Courts below and it would neither be desirable nor proper to have it agitated before us at this stage, it must be ignored. This much, however, cannot be denied that since Harnam Singh's death took place more than twelve years ago and the property left by him was first in Mt. Biro's possession, and is now in the possession of her sons whatever remedies the plaintffs had to recover that property had become barred by time and Mt. Biro became full owner thereof. This being the case, after Mt. Biro's death the property must go to her sons and not to the plaintiffs. On the other hand, if the property was non-ancestral no question of its going to the plaintiffs in the presence of Mt. Biro and her sons could arise at all. So in whatever way we look at the matter it is clear that Mt. Biro's sons are her immediate heirs and not the plaintiffs.

(7) It was then urged by the plaintiffs' Counsel that even if the donees be regarded as the immediate heirs of Mt. Biro, in order that the gift in their favour may amount to acceleration of succession it should have comprised the whole property that she owned but this was not the case here, because in addition to the land she also owned a house and there was no evidence that the gift comprised the house as well. It appears that this question was raised for the first time in the present form in the Court of the Additional District Judge and because it had not been adverted to either by the parties or by the trial Sub Judge, the Additional District Judge framed the additional issue. The defendants contended that on the same day on which mutation regarding the gift of the land was entered in the revenue papers Mt. Biro executed a document (Exhibit D/1) evidencing the gift of the house. They also produced witnesses to prove the document. The learned Judge of the Court below has discussed that evidence and has come to the conclusion that it could not be relied upon. In my opinion this finding of his is correct and I am inclined to agree with him that Exhibit D/1 was not a genuine document. If it had been executed on the date that it bears and if it were a fact that the house was also gifted along with the land, there is no reason why it should not have been brought to light in the course of proceedings in the trial Court which went on for a fairly long time. It is significant that one of the alleged attesting witnesses to Exhibit D/1 gave evidence in the trial Court and so did Mt. Biro but neither of them said anything about the document or the gift of the house.

(8) The question that we have now to consider is whether the gift by Mt. Biro to her sons can be regarded as acceleration of succession notwithstanding the fact that she did not include therein her house. The principles governing gifts by female owners in favour of their immediate heirs and the conditions that such a gift must satisfy before it can be regarded as an acceleration of succession are now well recognised. It was held by their Lordships of the Privy Council in 'RANGASWAMI v. NACHIAPPA', 42 Mad 523, that an alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a bona fide surrender and not a device to divide the estate with the reversioner. This case was under Hindu Law, but as regards the nature of an estate of a widow or a daughter under Customary Law it stands on the same footing, as that of a widow or a daughter under the Hindu Law. While discussing the right of a widow governed by Customary law to relinquish her estate and thereby to accelerate the succession of her next reversioner to the property left by her husband this is what Mr. Chatterji, J., remarked in 'WAZIR CHAND v. MAKHU', 17 Pun Re 1902:

> "It may be taken as settled ..... that Mt. Bhari was competent to relinquish her widow's estate, and thereby to accelerate the succession of the plaintiffs to the .....property left by Nura, but in my opinion it is essential that she should give up her whole estate and not merely a portion of it. It appears to me that this is the only rational and logical conclusion that can be deduced from the principle of relinquishment. It is the fiction of the intermediate heir being non-existent that gives the reversionary the right to step into succession, just as he would do if the heir had died. But it is necessary for this fiction that the widow should step aside.... altogether and completely efface herself. She does not by her act clothe the reversioner with her rights at all. She takes herself off the line of heirs and puts an end to those rights. It appears to me to follow necessarily from the

above that there cannot be a valid renunciation of a part of the estate which can give rise to a right of succession to the reversioners to that part."

It was held by Tek Chand, J., of the Lahore High Court in 'CHIRAGH v. GUL MOHAMMAD', AIR (20) 1933 Lah 279, that under Hindu Law as well as under Customary Law a life tenant holding property can no doubt surrender the estate and accelerate the succession of the next heir, but she can do so only if she completely effaces herself and relinquishes the entire estate to him.

(9) There are numerous other authorities on this point but it is unnecessary to refer to them. A careful survey of them makes me think that before an alienation by a female owner holding a limited estate can be regarded as an acceleration of succession it should satisfy the following conditions: (1) that it should be a bona fide transaction and not a transaction adopted merely as a device to divide the property with the reversioners; & (2) that it must amount to complete effacement of the female owner. The question whether a transaction in a particular case satisfies these conditions, that is, whether it is a bona fide transaction and amounts to complete effacement on the part of the alienor must be decided on the facts of each particular case. There is no doubt that when the alienation does not cover the whole of the property owned by the female owner and she either reserves a substantial part of it for herself or gives it to someone else it will not amount to complete effacement on her part but if the property not included in the alienation is a very small part of the whole it will not prevent the transaction from taking effect as complete effacement. It has been held that in case of this kind what must be looked to is the substance of the transaction and the intention with which the alienation is made. Reference in this connection is invited to 'RAM KRISHNA v. Sm. KOUSALYA MANI DASI', AIR (22) 1935 Cal 689. In that case the widows of the last male owner executed a deed of surrender in favour of his daughters. It was found that in addition to the property to which the deed of surrender related the widows owned another plot which had not been included in the surrender. The questions before the High Court were whether the widows had any right, title or interest in the plot and whether the fact that the plot had not been included in the surrender affected its validity. The learned Judges of the High Court, after holding that the plot had passed out of the family and the widows had no interest therein made the following observations:

"But even if it be supposed that the widows had a subsisting interest in the same at the date of the surrender it was such an insignificant part of the inheritance that it might be disregarded as substantially on the terms of the deed of surrender everything which belonged to Bhagabat was intended to pass."

In 'HARIBHAI NANAJI v. NARAYAN HARI', AIR (25) 1938 Bom 438, a widow surrendered her interest in the bulk of the property that she owned to her next reversioner, but kept a small part of it for herself. It was held that this did not affect the validity of the surrender as a whole.

(10) If we apply these principles to the facts of the present case there can be no gainsaying the fact that even though Mt. Biro did not include in the gift the house that she owned, her intention was to efface herself completely. As has already been mentioned she gave away every inch of the land that she had. In addition she also gave the rights that she possessed in the Shamilat land. The reason why she did not include the house in the gift may be that the donees, i.e., her sons, were living in it and she might have honestly believed that they were already owners of the house for all practical purposes. It is true that she also lived in the house along with her sons but since she has given away every bit of her other property and kept nothing with her, even for her maintenance, it cannot be said that she intended to keep the house for herself. Assuming, however, that she knowingly and deliberately kept back the house in order that she might have a place wherein to pass her remaining life, this does not mean that she did not efface herself completely. In 'HARIBHAI NANAJI'S CASE', AIR (25) 1938 Bom 438, mentioned above, it was pointed out by Rangnekar, J., that the doctrine as originally laid down in the earlier Privy Council rulings that the surrender must be the widow's whole interest in the whole estate had not always been strictly adhered to. He referred to the observations of Wallis, J., in 'SITANNA v. VIRANNA', 61 Ind App 200, and then remarked as follows:

"The principles, therefore, which I gather from these decisions and others referred to in the course of the argument are these: (1) that there must be a complete self-effacement of the surrendering widow with the intention of accelerating the succession of the next apparent heir; (2) that the surrender must be bona fide and must not be a mere cloak the real object of which was to divide the estate between the reversionary heir and the widow; and (3) that it is the substance of the transaction that has to be considered in determining the question whether a conveyance operates as a good surrender or not. It may incidentally be noticed that in the last mentioned case it has been clearly conceded that even if provision for the maintenance of a widow is made by reserving a small portion of the property for that purpose, that provision will not affect the validity of the surrender as a whole."

Accordingly, I am of opinion that the gift by Mt. Biro in favour of her sons who were her immediate reversioners amounted to complete effacement of her interest and therefore took effect as an acceleration of succession, with the result that the plaintiffs had no locus standi to challenge it.

(11) It was also argued before us that the plaintiffs' suit was speculative and should have been thrown out for this reason alone. I have already made it clear that Mt. Biro's sons are her immediate heirs, both with regard to the land that she got from her father by means of the gift and the land that devolved on her when her father died. These sons are four in number and it is conceded that some of them are quite young. It is admitted by the Counsel for the plaintiffs that so long as the sons are alive or any of their descendants, whether male or female, are , in existence the plaintiffs can have no right to the land. It was urged that should the lines of descent of all the sons become extinct at any time the land would revert to the plaintiffs or their descendants. I doubt whether this proposition is absolutely correct, but even if it were there is no knowing when that contingency will happen and one can legitimately say that the chances of the plaintiffs' succession to the suit land are very remote indeed. In the circumstances I cannot but hold that the suit is purely speculative and this in itself is a sufficient reason for dismissing it.

(12) The result is that the appeal is allowed and the suit is dismissed with costs throughout.

(13) CHOPRA, J.: I entirely agree.

Appeal allowed.

D.R.R.

A. I. R. (39) 1952 Pepsu 61 *[C. N. 36.]*

TEJA SINGH, C. J.

Inder Singh, Petitioner v. The State.

Criminal Miscellaneous No. 8 of 1950, D/- 21-7-1950.

(a) Public Safety — Preventive Detention Act (1950), S. 7 — 'As soon as may be' meaning of — Grounds not communicated within reasonable time — Validity of detention — Criminal P. C. (1898), S. 491.

The words 'as soon as may be' in S. 7 of the Act mean that the grounds of detention should be communicated to the detenu within a reasonable time and if this is not done the detention must be regarded as illegal. The reason is that the law gives a detenu a valuable right to make a representation to the Central Government or the State Government, as the case may be, against his detention and unless the grounds of detention are communicated to him within a reasonable time his right to make the representation is really affected thereby. AIR (35) 1948 All 225, Rel. on. (Para 2a)

(Delay of one month and eleven days held was not reasonable and therefore detention held illegal.) (Para 5)

Anno: Criminal P.C. S. 491, N. 7.

..(b) Public Safety — Preventive Detention Act (1950), S. 7 — Grounds for detention — Burden of proof.

The burden to prove that the reasons for detention supplied to the detenu were of such a nature that it was possible for the detenu to base thereon his representation to the Government lies upon the State.

Where the Government verbally communicates the reasons for detention and there is no evidence to show what those reasons were the order of detention and there is no evidence to show what those reasons were the order of detention must be held to be illegal. (Para 6)

Jagan Nath, for Petitioner; Chetan Das, Asst. to Advocate-General, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('48) AIR (35) 1948 All 225: (49 Cri L J 257) (Pr 2a)

Cri Misc. No. 209 of 2006 (Pepsu) (Pr 2a)

ORDER.: Inder Singh who describes himself as Mohant Dera Jeondsar was arrested under the Orders of the Deputy Commissioner of Patiala on 5-4-1950 and was produced before him on the 7th when the Deputy Commissioner ordered him to be detained for a period of one month under Section 3 of the Preventive Detention Act. On the 4th May the Deputy Commissioner extended Inder Singh's period of detention for an indefinite period. The present petition under Section 491, Criminal P.C., was made by Inder Singh on the 10th May.

(2) The order of detention of the petitioner is challenged on various grounds. It is alleged by him that no grounds of detention were communicated to him till more than a month after he had been originally ordered to be detained, that the Deputy Commissioner who was the detaining authority was not satisfied of the necessity of detention in the words of Section 3, that the police on whose reports merely the Deputy Commissioner made the order of detention were actuated by malice and extraneous consideration and that the persons working behind the scene, who were responsible for persuading the police to take action against the petitioner were the prominent members of the Akali Party, whom the petitioner had serious differences and to counteraction whose activities in the Ilaqa the petitioner had always been busy. In support of his allegations the petitioner examined the Deputy Commissioner and also put himself in the witness-box. The evidence of the Deputy Commissioner revealed that only day after the petitioner had been ordered to be detained in the Central Jail, Patiala a Police Officer approached the Deputy Commissioner with request that he be handed over to him because he was required for interrogation in connection with his subversive activities, the Deputy Commissioner accepted the request of the Police Officer and made over the petitioner to him. It was also proved that the petitioner remained in the Custody of the Police till 3rd May, when the Deputy Commissioner considered it necessary to issue orders for his being brought back to the Jail. On these allegations, it was strenuously argued before me by Shri Jagan Nath, Counsel for the petitioner, that the object of the police in this case was not to prevent the petitioner from taking any part in subversive activities or activities that were prejudicial to public safety or order but they merely wanted him for interrogation in connection with the offence which they thought the petitioner had committed or in which he had taken part. It may, however, be pointed out that the detaining authority in this case being the Deputy Commissioner, the motives which actuated the police to make reports against the petitioner are not strictly speaking relevant unless it can be shown that the Deputy Commissioner was acting in collaboration with the police and he shared their object and motive. But this is not established. It is true that at the time the Deputy Commissioner made the order of detention the only material on the strength of which he claims to have been satisfied regarding the necessity of the petitioner's detention consisted of the two reports by the Police but there is nothing before me to show that he had any indication that the police were not acting bona fide or that their object in reporting against the petitioner was other than to have a preventive action against him.

(2a) The real point, however, which calls for determination in order to find out whether the detention order made by the Deputy Commissioner was legal is whether the requirements of Section 7 of the Act were complied with. The section lays down that:

> "when a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, communicate to him the grounds on which the order has been made, and shall afford him the earliest opportunity of making representation against the order, in a case where such order has been made by the Central Government to that Government, and in a case where it has been made by a State Government or an officer subordinate thereto, to the State Government."

It has been held in a large number of cases and this fact is not denied by the learned Assistant to the Advocate-General who appeared for the State that the meaning of the words "as soon as may be", is that the grounds of detention should be communicated to the detenu within a reasonable time and if this is not done the detention must be regarded as illegal. The reason in my opinion is clear and it is that the law gives a detenu a valuable right to make a representation to the Central Government or the State Government, as the case may be, against his detention and unless the grounds of detention are communicated to him within a reasonable time his right to make the representation is really affected thereby. In 'JAMIL AHMED v. EMPEROR', AIR (35) 1948 All 225,

which was a case under U. P. Maintenance of Public Order (Temporary) Act it was held that under Section 5 of the Act that was analogous to Section 7 of the Preventive Detention Act it was the duty of the officer concerned to inform the person detained of his right to make representation against the order and to afford him the earliest practicable opportunity of doing so, and that failure to do this amounted to violation of the mandatory provision of the law and the person detained was prejudiced thereby. In that case there was a delay of 32 days and the order of detention was set aside for this reason. This aspect of the matter was also discussed by me in the case 'INDER SINGH v. THE STATE', Cri Misc. No. 209 of 2006) and I held that the provisions of law are mandatory and if they are not complied with the detention must necessarily be declared as illegal. In that case the grounds of detention were not communicated to the detenu for one month and 22 days and I held that the delay was inordinate and set aside the detention on this ground.

(3) The detenu made a statement on oath that when he was produced before the Deputy Commissioner and was ordered to be detained no grounds of detention were communicated to him. According to him the grounds of detention were first communicated to him through the Jail authorities on 6th of May after his second order of detention had been made. These grounds as is clear from the statement of the Deputy Commissioner related only to the order of 4th May whereby the detenu's period of detention was extended and had nothing to do whatsoever with his original order of detention. The Deputy Commissioner stated that he told the detenu verbally at the very time he ordered him to be detained why action was being taken against him. A few days later, i.e., on 23rd April 1950 he thought that it was necessary to afford the detenu another opportunity of making representation to the Government and accordingly he recorded a written order giving the grounds of detention and sent it to the jail for purposes of communication to the detenu. Since the detenu at that time was not in jail and had been taken away by the police that order could not be served upon him till the 18th of May. The opening words of this order are as follows:

> "On 7-4-1950 when you were arrested and produced before me I verbally intimated to you the reasons for your arrest and detention under Section 3 of the Preventive Detention Act, 1950. Once again to afford you an opportunity to give you a right to make a representation to the Government if you feel aggrieved against my order of arrest and detention for one month in the Central Jail, Patiala. Then follow reasons."

(4) There can be no doubt that on the day the Deputy Commissioner recorded this order he was of the impression that the reasons of detention had been verbally communicated to the detenu on 7-4-1950 but in order to be sure whether this impression of the Deputy Commissioner was correct we must turn to the order of that date, i.e., 7-4-1950 which is fairly detailed. In the first paragraph of the order it is mentioned that the Deputy Commissioner examined the material placed before him by the police regarding Inder Singh's activities. The second paragraph is to the effect that the detenu was interrogated by the Deputy Commissioner and his past history was gone into. The third paragraph records the conviction of the Deputy Commissioner that Inder Singh cannot be allowed to remain at large and his activities must be checked at once otherwise the public peace and maintenance of law and order shall be seriously jeopardised. The penultimate paragraph relates to the order of detention. The following are the words of the last paragraph:

> "I have further intimated to him the result of his activities which obviously lead towards the disturbances of public peace and security of the Government and further that he has a right under law to make a representation to the Government, if he feels aggrieved against my order of arrest and detention."

(5) Shri Chetan Dass argues that if the last paragraph be read with the other paragraphs of the order it will be clear that the Deputy Commissioner intimated to the detenu the reasons for his detention and this is what he meant by the words "the result of his activities: Shri Jagan Nath on the other hand urges, that the "result of his activities" was that the petitioner was detained and this is all that the Deputy Commissioner said to the petitioner at that time. On giving careful consideration to the matter I am of the opinion that Shri Jagan Nath's contention must prevail because if the Deputy Commissioner had in fact communicated the reasons of arrest to the petitioner there was nothing to prevent him from mentioning this fact in so many words. After all the Deputy Commissioner is an experienced officer and if he had communicated these reasons to the petitioner he should have made a prominent mention of this fact in his order. He did not do this and I can not understand why he should have felt shy of using the exact words of Section 7. But my impression is that probably the Deputy Commissioner did not have the Detention Act before him and he did not realise that it was his duty to communicate the reasons of detention to the detenu and for this reason he merely told him that since his activities were dangerous he was being detained. The order dated 23rd April 1950 recorded by the Deputy Commissioner, no doubt, mentions the reasons of detention, but this, as I have already pointed out, was not communicated to the detenu till one month and 11 days later. I hold that this did not comply with the mandatory requirements of law and for his reason the detention must be held illegal.

(6) I may also mention another fact in this connection. Even if I were to hold that the Deputy Commissioner did communicate the reasons of arrest to the detenu verbally on the very day he was arrested. the question is what those reasons were. Unfortunately the Deputy Commissioner's evidence on this point is not helpful, because he does not tell us what exactly he told the detenu and there is no other material on the record from which it can be held that the verbal communication made by the Deputy Commissioner to the detenu or at that occasion gave the reasons that would be sufficient for purposes of law. It has been held in several cases that if the reasons are vague and indefinite they do not serve the purpose and position is the same as if no reasons are communicated at all. The burden to prove that the reasons were of such a nature that it was possible for the detenu to base thereon his representation to the Government lies upon the State. In the present case as we do not know anyhing about the reasons at all. I am of the opinion that this is an additional reason why detention order cannot be upheld. The result is that the application is accepted and it is ordered that the petitioner be released forthwith.

K.S. *Detenu released.*

A. I. R. (39) 1952 Pepsu 63 [C. N. 37.]

TEJA SINGH, C. J.

Sawan Ram, Appellant v. Nachittar Singh, Respondent.

Civil Appeal No. 372 of 2005, D/- 1-11-1950.

(a) *Civil P. C. (1908), O. 32, R. 5 — Appointment of next friend how long continues.*

Where the next friend of the minor plaintiff has once been appointed such appointment continues for the whole of the 'lis' or until it is revoked by the Court or until the next friend has been removed under Order 32, Rule 9, and the next friend is the only person who can prefer an appeal on behalf of the minor.

Hence where the next friend of the minor on record has not been removed an appeal by another person as the next friend of the minor would not be properly presented. (*Para 3*)

Anno: C. P. C., O. 32, R. 5, N. 3.

(b) *Civil P. C. (1908), O. 32, Rr. 3 and 4—Appointment of guardian-ad-litem or next friend can take effect only from the date on which it is made — Appeal presented by unauthorised person as next friend of minor — Such person appointed next friend of minor after removal of previous next friend when period of limitation for appeal had expired — Appeal must be taken to have been presented on date of his appointment and as such barred by time — Court has power in such a case under S. 5, Limitation Act, to extend time — Limitation Act (1908), S. 5.* (*Paras 4 and 5*)

Anno: C. P. C., O. 32, R. 3, N. 2; Lim. Act, S. 5, N. 3.

(c) *Civil P. C. (1908), O. 41, R. 27 — Application to adduce additional evidence — Power of appellate Court.*

Under O. 41, R. 27, C.P.C., additional evidence can be allowed by an appellate Court only when the Court requires it in order to be able to decide the case and not because a party requires it. But there is nothing in the rule to debar a party from approaching the appellate Court to exercise the power of admitting additional evidence. Hence a Court is perfectly justified in admitting a document in evidence at the instance of the appellant when the evidence on record has created a confusion in the mind of the Court and the admission of such document has become necessary to resolve the confusion and decide the appeal. AIR (18) 1931 PC 143; AIR (33) 1946 Lah 444 and AIR (5) 1918 Pat 253, Rel. on. (*Para 5*)

Anno: C. P. C., O. 41, R. 27, N. 4, 5 and 11.

Ram Dess, for Appellant; R. B Anant Ram, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('07) 31 Bom 381: (34 Ind App 115 PC) (Pr 5)

('31) 58 Ind App 254: (AIR (18) 1931 PC 143) (Pr 5)

('31) AIR (18) 1931 Lah 635: (133 Ind Cas 445) (Pr 3)

('46) AIR (33) 1946 Lah 444: (228 Ind Cas 44) (Pr 5)

('18) AIR (5) 1918 Pat 253: (44 Ind Cas 670) (Pr 5)

JUDGMENT.: This is a second appeal from the appellate decree of the District Judge, Nabha. In order to be able to understand the point raised by Counsel it is necessary to refer briefly to facts.

(2) Jaimal Singh and Ralla Singh were two brothers. Jaimal Singh owned certain land which was under mortgage. The equity of redemption was attached and sold in execution of a money decree against Jaimal Singh. On this Ralla Singh brought a suit for declaration that the Court sale could not affect his reversionary interests. His allegations, inter alia, were that the land was ancestral and the sale was without necessity. Ralla died during the pendency of the case and his minor son Nachittar Singh was brought on record as his legal representative. Kahan Singh became the next friend of Nachittar Singh. Kahan Singh also died while the suit was still pending and his place was taken by Gurdev Singh. The trial Sub-Judge held that the land had not been proved to be ancestral qua the plaintiff & so dismissed the suit. An appeal was preferred against the decree of the trial Sub-Judge by the minor's mother on behalf of the minor & as his next friend. The District Judge set aside the judgment and the decree of the trial Sub-Judge and being of the opinion that the land was ancestral remanded the case for decision on the remaining issues. Sawan Ram defendant in whose favour the Court sale had been made is the appellant before me.

(3) The first point urged by the appellant's learned Counsel is that the appeal was not properly presented. Counsel's position is that Gurdev Singh who had been appointed next friend of the minor could only prefer the appeal and the mother of the minor could not take place unless Gurdev Singh had been removed as he had retired. He refers in this connection to the provisions of Order 32, Rules 9 and 10, C. P. Code and 'MT. DAULAT BAI v. SHAUKAT RAI', AIR (18) 1931 Lah 635, in which it was held that where the next friend of the minor plaintiff has once been appointed such appointment continues for the whole of the lis or until it is revoked by the Court or until the next friend has been removed under Order 32, Rule 9, and the next friend is the only person who can prefer an appeal on behalf of the minor. This view, with all respect, is correct and Gurdev Singh alone had the right to prefer the appeal on behalf of the minor. It appears that Gurdev Singh did not move into the matter and the mother of the minor considered it necessary to lodge the appeal herself as the minor's next friend, because she believed that Gurdev Singh had neglected his duty. But if this was the case the proper course for her was to make an application to the appellate Court stating all the facts and seeking the permission of the Court preferring the appeal. It is no doubt correct that the position of the guardian-ad-litem of a minor is quite different from that of a next friend and in the case of the guardian express order by the Court for his appointment as such is necessary, while a next friend can himself come into Court on behalf of the minor. This means that while the guardian-ad-litem is appointed by the Court the next friend appoints himself and unless it is shown that he has any interest adverse to the minor his appointment cannot be objected to. The fact, however, remained that when the next friend is once appointed, even though by himself, he continues to be the next friend throughout the lis and no one else can intervene on behalf of the minor until he applies to the Court to have the next friend removed. Accordingly I hold that the appeal when it was instituted by Nachittar Singh's mother was without authority and was not properly presented.

(4) The record shows that on the day the arguments were heard an objection was taken to the competency of the mother to prefer the appeal as Nachittar Singh's next friend. There and then the Counsel for the next friend applied to the Court for removal of Gurdev Singh and the appointment in his place of the mother of the minor as his next friend. This application was accepted by the District Judge. In his order appointing the

minor's mother as his guardian in place of Gurdev Singh the District Judge also observed that the appointment would relate back to the date on which the appeal was originally instituted and also added that apart from his above observation he condoned the delay in the presentation of the appeal. It appears that his intention was that even if the appointment of the mother as the minor's guardian could not have any retrospective effect and it be held that the appeal should be taken to have been instituted on the day the order appointing the mother as the next friend was made, he thought that it was a good case for extension of time under Section 5 of the Limitation Act and he did extend the time. As at present advised I am not prepared to hold that the District Judge had any power to make an order which could have a retrospective effect, because no provision exists on this point in the Civil Procedure Code. There are certain matters such as the extension of time given for doing a particular purpose and permission to put in deficient Court-fees, in which when the Court accepts the prayer, that is to say, grants the extension of time and allows deficiency of Court-fees to be made up its order can take effect from the original date but these are matters which are expressly provided by the Civil Procedure Code. I have not been referred to any such provision regarding the appointment of a guardian-ad-litem or next friend of the minor and I am inclined to think that the appointment can take effect only on the date on which it is made. Consequently, the appeal in the District Judge's Court could be taken to have been instituted only on the day the minor's mother was appointed his next friend.

The next point urged by the appellant's Counsel is that time for preferring the appeal had expired long before the minor's mother was appointed guardian and as is held by me, the appeal could be regarded to have been instituted only on that day, it was barred by time. This would no doubt be correct position but for the order of the District Judge, extending the time under Section 5 of the Indian Limitation Act, mention of which I have made above. It cannot be denied that the District Judge had ample power to extend the time and I do not think that this was a case in which the exercise of discretion in the appellant's favour can be regarded as improper.

(5) As regards the merits, the decision of the appeal depends upon the question whether the land in suit was proved to be ancestral. The copy of the Jamabandi of 1984-85 produced by the plaintiff goes to show that the land in suit stood in the names of Jaimal and Ralla Singh sons of Kalu who were described as joint owners in equal shares. This land when traced to the settlement of 1964-65 was found to be the property and in the possession of Mangal, son of Sukhu. No documentary evidence had been adduced on behalf of the plaintiff to prove how Kalu was related to Mangal. One of his witnesses, viz., Partap Singh deposed that Mangal was Kalu's son and that he died a year after Kalu, whose death took place 25 or 26 years ago. The trial Sub-Judge paid no attention to Partap Singh's statement & he thought that relationship between Mangal and Kalu had not been proved and it could not be held that the land of which Jaimal was the owner was ancestral qua Ralla. The matter went up in appeal to the District Judge, an application was made by the appellant's Counsel for admission of a copy of the pedigree-table of the settlement of 1984-85 under Order 41, Rule 27, C. P. Code. The learned District Judge accepted the application and allowed the copy to be brought on record. It is argued before me by the appellant's Counsel that the scope of Order 41, Rule 27 is limited and the District Judge had no power to admit additional evidence at the instance of one of the parties and for his benefit. I agree that there is consensus of opinion on the point that additional evidence can be allowed by an appellate Court only when the Court requires it in order to be able to decide the case and not because a party requires it. Reference in this connection may be made, inter alia, to KALIKA DATT MANDAR v. TULSI MANDAR', AIR (5) 1918 Pat 253 and the decision of a Division Bench of the Lahore High Court of which I was a member in 'SADHU SINGH v. MT. HARNAMON', AIR (33) 1946 Lah 444. The leading Privy Council case on the point is 'PARSOTIM THAKUR v. LAL MOHAR', 58 Ind App 254, wherein their Lordships explained the rule laid down in a previous case, 'KESSOWJI v. G.I.P., RLY.', 31 Bom 381, and observed that the rule for the admission of additional evidence in appeal is not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak points in his case and to fill up omissions in the Court of appeal but it is only when the appellate Court requires additional evidence (that is to say, finds it needful) that it can be admitted. Clause (a) of Sub-rule (1) of Rule 27 comes into operation when the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted and if a party who wishes to adduce additional evidence satisfies the Court that the same was tendered in the trial Court but it was refused and further that the evidence is relevant and should have been admitted, the appellate Court will exercise its power of admitting that evidence. In all other cases additional evidence could be admitted only under Clause (b) which definitely lays down that this can be done if the appellate Court requires the evidence to enable it to pronounce judgment. The concluding words of the clause ("for any other substantial cause") might cover a case of the kind in which the evidence was not in existence during the time the cause remained pending in the trial Court. It may, however, be pointed out that there is nothing to debar a party from approaching the appellate Court to exercise the power of admitting additional evidence. In the present case though it was the Counsel for the plaintiff-appellant who moved the District Judge for admission of additional evidence taking into consideration the circumstances of the case I am of opinion that the admission of the copy of the pedigree-table became necessary because Partap Singh's statement regarding the relationship between Kalu and Mangal had created a confusion in as much as it contradicted the settlement record of 1964-65 and it became necessary for the District Judge to admit the copy of the pedigree-table in order to resolve that confusion and to decide the appeal. Then according to the record of rights of 1984-85 Jaimal and Ralla were the sons of Kalu but Partap Singh's statement was that Mangal was Kalu's son. It was alleged before the District Judge that Partap's statement had not been correctly recorded and what he had said in fact was that Kalu was Mangal's son and there was a mistake in recording the statement. Unfortunately no one paid any attention to it at the time Partap Singh was in the witness-box and even the defendant's Counsel did not cross-examine him on the question of relationship between Kalu and Mangal. As I have mentioned above, the whole land in possession of Jaimal and Ralla in 1984-85 was in possession of Mangal in 1964-65. This further emphasised the desirability of admitting the copy of the pedigree-table. Consequently I hold that the copy in question was properly admitted and since the copy when read together with the revenue records shows

that the suit land was occupied by Mangal, the grandfather of Jaimal and Ralla, it was ancestral qua Ralla in the hands of Jaimal. The explanation why Kalu's name did not appear in the Settlement papers is to be found in Partap Singh's statement from which it is proved that Kalu pre-deceased Mangal.

(6) These being the only points urged before me, the appeal fails and is dismissed, but the parties are left to bear their own costs in this Court and the Court of the District Judge. Other costs will abide the event. The record shall be sent back to the trial Court forthwith and the parties shall appear there on 29th November 1950.

Appeal dismissed.

K.S.

A. I. R. 1952 Pepsu 65

TEJA SINGH, C. J.

Kapur Singh, Petitioner v. Isher Singh, Respondent.

Civil Revision No. 238 of 1951, D/- 14-11-1951.

Civil P. C. (1908), S. 24 and O. 7, R. 10 — Court having no jurisdiction to entertain suit — Transfer of suit to proper Court.

A legal order for the transfer of a case from one Court to another can be made only if the first Court has jurisdiction to hear it. Consequently where a Sub-Judge cannot entertain a suit for want of jurisdiction to hear it he cannot apply to the District Judge to transfer it to some other Court and the only order that he can make is to return the plaint for presentation to a proper Court. (*Para 3*)

However, if the reason why the Sub-Judge wanted the case to be transferred was that he would not be competent to pass a decree on payment of an amount which is beyond his pecuniary jurisdiction, it cannot be said that he acted illegally or that the District Judge could not transfer the case, though he should have waited till the case arrived at the stage of passing the decree. (*Pr 3*)

Anno: C. P. C., S. 24, N. 12; O. 7, R. 10, N. 1.

Sukhdev Singh, for Petitioner.

ORDER.: This petition arises out of a suit for pre-emption relating to agricultural land. The question involved is very simple but as there appears to be some confusion regarding the law bearing on the point, it is desirable that I should deal with it at some length.

(2) The suit was originally instituted in the Court of Sub-Judge, 2nd Class whose pecuniary jurisdiction extends to Rs. 5,000/-. When the defendant vendee appeared he contended that the price paid by him being Rs. 7,000/- the Sub-Judge, 2nd Class had no jurisdiction to entertain the suit. The Sub-Judge without deciding the objection of the defendant and without holding that he had no jurisdiction to hear the suit sent the record of the case to the District Judge with the recommendation that the same be sent to a competent Court for disposal. The District Judge ordered the record of the case to be transferred to the Court of Sub-Judge 1st Class. The vendee defendant has now come to this Court on the revision side with the prayer that the orders of the Sub-Judge and the District Judge be set aside.

(3) The petitioners' Counsel argues that the Sub-Judge, 2nd Class was not competent to entertain the suit and the proper procedure for him was either to dismiss it or to return the plaint to be presented to a Court of competent jurisdiction. He also argues that the order of the Sub-Judge, 2nd Class being illegal the District Judge had no power to transfer the case to another Court on the strength thereor Now, I agree with the Counsel that if it be conceded for a moment that the Sub-Judge, 2nd Class could not entertain the suit for want of jurisdiction to hear it he could not apply to the District Judge to transfer it to some other Court and the only order that he could make was to return the plaint for presentation to a proper Court. I may also mention that a legal order for the transfer of a case from one Court to another could be made only if the first Court had jurisdiction to hear it, but so far as the present suit is concerned I do not agree with the petitioner's Counsel that the Sub-Judge, 2nd Class had no jurisdiction to hear it. It is admitted that the land which is the subject-matter of the suit is assessed to land revenue of Rs. 31/11/0/- and the jurisdiction value of the suit for possession is twenty-five times the annual land-revenue which comes to Rs. 792/3/0/-. The fact that the defendant vendee alleges to have paid Rs. 7,000/- as price of the land does not affect the jurisdiction of the Court to hear the suit. I agree that if it came to the stage of passing a decree on payment of Rs. 7,000/- it would not be within the power of the Sub-Judge, 2nd Class to pass the decree, but this is quite different from saying that the suit could not be heard by the Sub-Judge, 2nd Class or that he could not go with it until the stage of passing the decree arrived. For example, suppose that the vendee contested the plaintiff's right to pre-empt or it pleaded that the suit was barred by time. Since the value of the suit for purposes of jurisdiction was less than the pecuniary jurisdiction was less than the pecuniary jurisdiction of the Sub-Judge, 2nd Class there was nothing to debar him from deciding the case on the pleas of limitation or the plaintiff's superior right of pre-emption. The order of the Sub-Judge by which he forwarded the record of the case to the District Judge does not make any mention of this fact, but if the reason why he wanted the case to be transferred from his Court was that he would not be competent to pass a decree on payment of Rs. 7,000/-, the amount claimed by the vendee, it cannot be said that he acted illegally or that the District Judge could not transfer the case from his Court to the Court of a Sub-Judge, 1st Class, though I must also add that the Sub-Judge, 2nd Class should have waited till the case arrived at the stage when decree was to be passed on payment of Rs. 7,000/. In the circumstances I do not think that there is any reason for me to interfere on the revision side.

(4) One of the arguments addressed to me by the petitioner's Counsel was that a great injury had been done to his client by the wrong orders made by the Sub-Judge, 2nd Class and the District Judge. He contended that the Sub-Judge, 2nd Class had no jurisdiction to hear the case and he returned the plaint for presentation to the Court of a Sub-Judge First Class by the time the suit would have been reinstituted in the latter Court it would have become barred by time, but by virtue of the order of transfer made by the District Judge he cannot now successfully take the plea of limitation. I wish to say that even assuming for the sake of argument that the Sub-Judge, 2nd Class had no jurisdiction to entertain the suit the order of the District Judge transferring it from that Court to that of the Sub-Judge, 1st Class does not affect the question of limitation because, so far as the Court of Sub-Judge, 1st Class is concerned, the suit can be aken to have been instituted there only on the day the plaint is received in that Court. This means that if the

pleas of jurisdiction and limitation would have been open to the petitioner had the plaint been returned by the Sub-Judge, 2nd Class and reinstituted in the Court of Sub-Judge, Ist Class they are open to him even now notwithstanding the order of the District Judge transferring the case from one Court to the other.

(5) The result is that the petition is dismissed 'in limine.'

V.R.B. *Petition dismissed.*

A. I. R 1952 Pepsu 66

CHOPRA, J.

The State v. Harbans Lal, Accused.

Criminal Reference No. 18 of 1951, D/- 2-11-1951.

(a) *Criminal P. C. (1898), S. 562 (1-A) — Applicability.*

S. 562 (1-A) has no application to a case falling under S. 7 of Ordinance 3 (III) of 'Sambat 1999.

(*Para 2*)

Anno: Criminal P. C., S. 562, N. 10, Pt. 7.

(b) *Criminal P. C. (1898), S. 439 (1) — Interference with illegal order.*

A High Court would not always interfere in an order, which is illegal, unless it is also shown to be unjust. But it, being a Court of justice, would not hesitate to disturb even a legal order in revision if it were unjust. (*Para 3*)

Anno: Criminal P. C., S. 439, N. 1, Pt. 2.

(c) *Criminal P. C. (1898), S. 342 — Object of section — Distinct questions — Desirability.*

The object of enacting S. 342 was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused, so that he may be able to give such explanation as he desires to give. It is always desirable that evey material fact alleged by the prosecution against him should form the subject-matter of a distinct question. (*Para 4*)

Anno: Criminal P. C., S. 342, N. 15.

Moti Ram, Asst. Advocate-General, for the State, P. L. Handa, for Accused.

ORDER.: This is a reference by the Sessions Judge, Kapurthala, for setting aside an order of the Additional District Magistrate, Kapurthala, releasing the respondent on a mere admonition under Section 562 (1-A), Criminal P. C. The respondent was in police service and had been posted as a constable on duty at Phatak Badhla on 31st January 1949. On 10th of February he was found to be in the police lines when he should have been on duty at the Phatak. On being enquired he stated that since his other colleagues had gone on strike, he also did no longer want to remain in the service of the Department. He was challaned under Section 7 of Ordinance 3 of 1999 (An Ordinance to make provisions for the maintenance of certain essential services.) When produced before the Additional District Magistrate, Kapurthala he confessed his guilt and pleaded guilty to the charge The Magistrate released him after due admonition as required by Section 562 (1-A), Criminal P. C. The facts that made him adopt that course were (1) that the accused had confessed his guilt and had felt sorry and tendered an apology for his actions; (2) that he was a young man and had already suffered for the relaxation from duty and (3) that the trial had remained hanging more than a year and a half. On a move by the prosecution the learned Sessions Judge has recommended the case to this Court for passing a proper sentence because Section 562 (1-A) could not be resorted to in the present case.

(2) Shri Moti Ram, Assistant to the Advocate-General, has contended that Section 562 (1-A) applied only to the offences specifically mentioned therein, or to any offence under the Indian Penal Code punishable with not more than two years' imprisonment, and that it had no application to a case falling under Section 7 of the Ordinance referred to above. I have no hesitation to accept this contention. The offence for which the respondent was charged does not fall under the cases for which Section 562 (1-A) is meant. The respondent, therefore, could not have been released on a mere admonition. The Magistrate, if he thought fit, could no doubt, proceed under Sub-clause 1 of that section and could have released the accused on probation of good conduct. In that case he was only to direct the accused to furnish a bond, with or without sureties, to appear and receive sentence when called upon during the period to be fixed by the Court. On the facts relied upon by the trial Magistrate I am inclined to think that it was a fit case in which the Magistrate could have rightly acted under Clause 1 of Section 562.

(3) The question now before me is as to whether I should after almost three years, interfere in the order passed by the Magistrate and call upon the respondent to undergo a sentence of imprisonment or release him on probation of good conduct by furnishing a bail bond as required by Section 562 (1). In spite of the fact that I am of the view that the order of the Magistrate was beyond his powers and must be held to be illegal, I could not like to disturb it in revision. The reason is obvious; on a consideration of all the facts of the case and the time it has taken, I do not think any real injustice has resulted from the order. This Court would not always interfere in an order, which is illegal, unless it is also shown to be unjust. But it, being a Court of justice, would not hesitate to disturb even a legal order in revision if it were unjust. I do not, therefore, feel inclined to pass any other order on this reference except, expressing the view that the order of the Magistrate was illegal.

(4) Before closing I must observe that the sad mistake committed by the A.D.M., could have easily been avoided if he had consulted the law and become sure of its application to the case. Another fact that I cannot fail to take notice of is that while recording the statement of the accused the Magistrate put to him a long all-comprehensive question which should have been divided into several distinct questions. The object of enacting Section 342, Criminal P. C., was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused, so that he may be able to give such explanation as he desires to give. The question or questions must be framed in such a way as to enable the accused to know what he is to explain and what are the circumstances which are against him. It is always desirable that every material fact alleged by the prosecution against him should form the subject-matter of a distinct question. A general or a lengthy question comprised of all the facts relied upon by the prosecution may not be clearly understood by the accused and may result in depriving him of the opportunity of offering his explanation.

(5) In the result the reference is declined.

V.R.B. *Reference declined.*
